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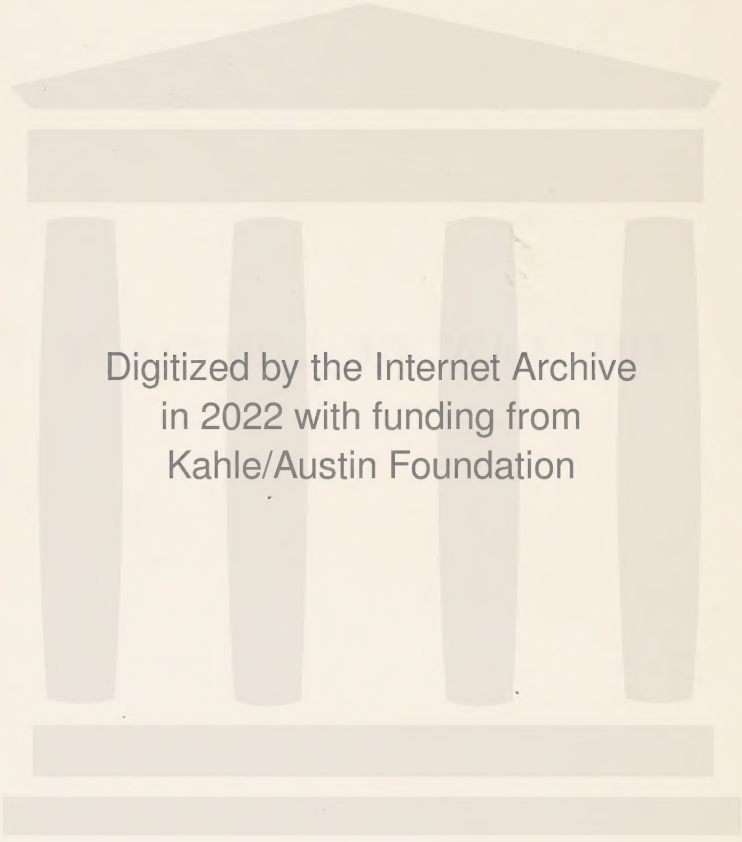
THE LAW OF CONTRACT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THE
LAW OF CONTRACT

A TREATISE ON THE PRINCIPLES OF CONTRACT IN THE LAW OF SCOTLAND

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PREFACE TO THE FIRST EDITION

THIS book is an attempt to state the general principles of the law of contractual obligation in Scotland, in so far as that may be done without including the detailed rules applicable to each particular form of contract. The dividing line is a point on which all would differ; and, while I have tried to bear in mind that sins of commission are more pardonable than sins of omission, I am conscious that I have failed to notice many topics which might reasonably be regarded as falling within my province. Even so restricted, it would seem hopeless to include, in a volume of any reasonable size, a reference to all the cases dealing with the general principles of contract. A writer on Scots law is so far fortunate that he need not cumber his pages with references to early authorities on points on which the leading institutional writers have concurred in holding the law to be definitely settled, and of this privilege I have taken full advantage. With regard to English law, I have attempted a full citation of authority on points where our own reports are relatively meagre, and where no distinction can be drawn between the Scotch and English systems; in other cases I have contented myself with a reference to leading English textbooks. I have made no attempt to deal with American authorities.

W. M. G.

PREFACE TO THIS EDITION

In this edition—re-arranged and in part re-written—I have endeavoured to incorporate the cases which have contributed to the development of the law of contract during the past fifteen years, as well as to remedy the defects and omissions in the former edition which further study has revealed. As I have come to be of opinion that the most serious difficulties in the law of contract, with a possible exception arising from the chaotic state of the law of evidence, relate to the implication of unexpressed terms, a subject which includes the law as to impossibility of performance, it will be found that the most substantial alterations from the former edition depend on the greater attention which has been devoted to this topic.

W. M. G.

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ADDENDA

Page 125, note 6.—Add "*M'Lean* v. *Workers' Union*, 1929, 45 T.L.R. 256."

Page 127, note 1, and page 152, note 2.—"*Reckitt* v. *Barnett, Slater & Co.* is reported [1929], A.C. 176."

Page 299, note 4.—Add "*Aldridge* v. *Wright* [1929], 1 K.B. 381."

Page 350, note 6.—In "*Barrow, Lane & Ballard* v. *Phillips & Co.*, Wright, J., held that where a specific parcel of goods was sold, and a portion of the parcel had, without the knowledge of the seller, perished before the date of the sale, the contract was avoided, and that it was immaterial that the buyer, in ignorance of the facts, had taken delivery of a portion of the parcel."

Page 745, note 10, and page 749, note 9.—"*MacBain's Exr.* v. *MacBain's Exr.* is reported, 1929, S.C. 213."

CHAPTER I

REQUISITES OF CONTRACT

The subject of the following pages may be described in general terms as the legal results of a voluntary obligation. The term "law of contract," though a convenient, is not a sufficiently comprehensive name for the subjects to be discussed in this, as in other treatises so designed. It implies a restriction, which cannot in fact be observed, to those obligations resulting from a concurrent expression of the wills of two or more parties. But the term "voluntary obligations," which might more accurately forecast the contents, is awkward and unfamiliar, and "contract" may be justified as a title on the ground that obligations in which more than one party is concerned form the main part of the subject, obligations by one party only being relatively unimportant.

Meaning of Obligation. The word obligation, as it is used in the leading authorities in the law of Scotland, denotes generally any restriction recognised by law, and enforceable in some way by legal process, on the freedom of the individual to regulate his conduct and dispose of his property as he may please. It is "a legal tie by which we may be necessitated or constrained to pay or perform something"[1]—"a legal tie by which one is bound to pay or perform something to another."[2] Spoken of thus generally, an obligation may arise from the provisions of a statute; from the decree of a Court; from the existence of the rights of others which the individual is bound to respect; from the infringement, wilfully or through negligence, of these rights; or from the fact that the obligation in question has been voluntarily undertaken. It is submitted that this general use of the term obligation is to be deprecated, and that it would be better to confine its use to those obligations where the creditor is a specific person, or definite group of persons, and where the counterpart, from the point of view of the creditor, is a right *in personam*; and to use the word "duty" when speaking of the general rights of others, which a party is bound to respect—their right to liberty, security, etc. where infringement constitutes a legal wrong, and where the corresponding right is a right *in rem*. It is with obligation as thus distinguished from duty that a writer on contract is concerned, and mainly with obligations resulting from voluntary undertaking, though certain cases require notice where, though actual will or intention to incur an obligation is either not proved or directly disproved, the law infers an obligation similar to that which would have resulted from

[1] Stair, i. 3, 1; *Inst.*, iii. xiii. "*Obligatio est juris vinculum quo necessitate adstringimur alicujus solvendae rei secundum nostrae civitatis jura.*"

[2] Ersk. iii. 1, 2. The word obligation is also used in another sense—it may mean an enforceable document of debt. Thus the Act 1579, c. 80, prescribes the forms of authentication for bonds and other "obligations of great importance," meaning a written instrument analogous to a bond. See also Balfour, *Practiques*, p. 149.

a voluntary undertaking. Such obligations are usually spoken of as arising from quasi-contract.

Obligations not Directly Enforceable.—The statement that an obligation is a legal tie seems to infer that some one must have the power to enforce it. But an obligation may involve legal consequences though it is not enforceable, even when the word enforceable is used widely enough to cover the case where an obligant, though not directly compellable in specific implement of his obligation, is liable in damages in the event of failure. Thus, under the special terms of a statute an agreement may not be enforceable, and no damages may be recoverable in respect of failure to perform, and yet it may confer rights on one party against the other which without it he would not possess. The principal example—the law relating to agreements to which a trade union is a party—will be considered in a later chapter.[1] And where the law requires that an agreement of a particular class must be embodied in a particular form in order to bind the parties, it is a general rule that the mere agreement, where the legal requisites as to form are not complied with, infers an obligation to this extent, that if one party allows the other to act upon it he cannot afterwards resile.[2]

Natural Obligations.—The phrase "natural obligation" is used by the earlier writers on the law of Scotland in three senses—(1) moral duties, such as benevolence or charity, or duties to God; (2) obligations derived, or assumed to be derived, as a matter of legal history, from the tie of relationship, such as the reciprocal obligation of aliment between parent and child; (3) obligations actually undertaken but, from some defect of form, or want of contractual capacity, not enforceable against the obligant. With the second of these meanings the law of contract is not directly concerned; the first is irrelevant in legal questions.[3] What is not a legal obligation does not acquire the incidents of one because it is met under a sense of duty. It was once laid down by Lord Medwyn, in considering the right of an arbiter to remuneration, that though he had no such right without express stipulation,[4] yet the parties were under an honourable or moral obligation to pay him, and that "if one of the parties acknowledges his liability therefor, which is a moral though not a legal obligation, and pays what is reasonable, he can recover the half from the other party."[5] But when this argument was relied on in a later case, Lord Medwyn's view was disapproved, as opposed to sound legal principle. "A payment by one man of what another is under moral obligation to pay can never vest that party with a legal right to enforce the obligation. The utmost extent of right which a party so paying can set up is that of an assignee or implied assignee of the party to whom he has made the payment; but if the obligation which a third party has satisfied is only moral, the satisfaction of it by that third party can never convert it into a legal one in his person."[6] And it has been decided that the Scotch Courts have no power to authorise a trustee in bankruptcy, or the liquidator of a company, to carry into effect under-

[1] Chap. VII.

[2] *Infra*, Chap. X.

[3] "We cannot poind for unkindness" (Stair, i. 1, 15). Stair's statement of the obligation to give charity (ii. 1, 6) has been judicially rejected. *Kilmartin Inspector of Poor* v. *Macfarlane*, 1885; 12 R. 713, per Lord Fraser, Ordinary, at p. 716; and see Bankton, i. 9, 2.

[4] This is no longer law. The employment of a professional man as arbiter implies an obligation to pay him (*Macintyre Brothers* v. *Smith*, 1913, S.C. 129).

[5] *Fraser* v. *Wright*, 1838, 16 S. 1049, at p. 1057.

[6] *Henderson* v. *Paul*, 1867, 5 M. 628, per Lord Justice-Clerk Patton, at p. 631.

takings which were not legally binding on the bankrupt or company, on the plea, sanctioned by certain English decisions, that if the undertaking in question was binding in honour or morality the trustee or liquidator, as an officer of the Court, should not take any course which an individual could not honestly take. Where therefore a marine insurance company was in course of voluntary liquidation, following on a resolution that it was unable to meet its liabilities, the Court refused to authorise the liquidator to issue policies in pursuance of slips which were admittedly productive of no legal obligation, but were invariably honoured in professional usage.[1]

An actual undertaking, though one from which the party may free himself at pleasure, may amount to a natural obligation which may be productive of legal results. Thus it is laid down that money paid by mistake cannot be recovered if it was paid in fulfilment of a natural obligation,[2] and founding on this principle, it was decided that a bill, granted for the balance of a debt on which a composition had been paid, could not be regarded as gratuitous, because it was granted in fulfilment of a moral obligation to pay the debt in full.[3] Where a cautioner, who was not aware that his obligation had been extinguished by the septennial limitation, paid the debt, it was held that the natural obligation involved in his agreement to pay did not preclude a demand for repayment,[4] and the same principle would probably apply to the case of a debt which was extinguished by the negative prescription.[5] There is some very doubtful authority to the effect that a natural obligation on the part of a principal debtor, consisting in the fact that he has actually agreed to be bound, though defect of form or limitation of contractual capacity preclude any action against him, may support the obligation of his cautioner, which would otherwise fall on the ground that the failure of an obligation involves the failure of any other obligation merely accessory to it.[6] On this ground it was held in one case that where the signature of the principal debtor in a bond was not properly attested[7] the cautioner was nevertheless liable, though the rule was not extended to cases where the principal debtor had never signed the bond,[8] or where his signature was unwitnessed.[9] In *Stevenson* v. *Adair*,[10] a contract of apprenticeship was entered into by a minor without the consent of his

[1] *Clyde Marine Insurance Co.* v. *Renwick*, 1924, S.C. 113. For English law see Williams *Bankruptcy Practice*, 13th ed., p. 236. The case generally referred to is *ex parte James*, 1874, L.R. 9 Ch. 609.

[2] Mackenzie, *Inst.*, iii. 1, 15; Ersk. iii. 3, 54; and see, as to the condition on which money paid by mistake is recoverable, *infra*, p. 60.

[3] *Clark* v. *Clark*, 1869, 7 M. 335.

[4] *Carrick* v. *Carse*, 1778, M. 2931.

[5] In English law payment of a debt barred by the Statute of Limitations cannot be recovered, but on the ground that the statute does not extinguished the debt but only bars the remedy (Pollock, *Contract*, 9th ed., p. 693). But in Scotland the negative prescription extinguishes the debt (Ersk. iii. 7, 15; *Kermack* v. *Kermack*, 1874, 2 R. 156; see opinion of Lord Deas).

[6] Bankton, iii. 1, 5; Ersk. iii. 3, 64. But this would seem to be laid down on a misconception of the term "*naturalis obligatio*" as used in the Roman texts, *e.g.*, *Dig.*, xlvi. 1, 6, cited by Erskine. It is conceived it does not mean an obligation morally binding, but an obligation binding by the *jus gentium*, though not by the *jus civile* (see Savigny, *Obligationenecht*, i. sec. 14; Pothier, *Obligations*, sec. 194).

[7] *Nimmo* v. *Brown*, 1700, M. 2076; see also *Johnstoun* v. *Laird of Romano*, 1680, M. 2076. But in *Graham's Crs.* v. *Grierson*, 1752, M. 16902, it was held that where the signature of the principal debtor was not properly attested the cautioner was not bound, in spite of the fact that he had granted a bond of corroboration.

[8] *Crighton*, 1612, M. 2074.

[9] *Innes* v. *Commissioners of Supply*, 1728, M. 2079. This case seems irreconcilable with *Nimmo* v. *Brown*, *supra*.

[10] 1872, 10 M. 919; cp. *Shaw* v. *Maxwell*, 1623, M. 2074.

curator, and *A.* undertook to be cautioner. The minor deserted his apprenticeship and *A.* was sued for damages. His defence was that an obligation by a minor without the consent of his curator was void. On that assumption it was held that *A.* was nevertheless liable as cautioner. But it is not clear on what ground the decision was rested, whether on the natural obligation on the apprentice, or on the theory, suggested by Lord Ardmillan, that a cautioner who undertakes for a principal debtor who is not legally bound impliedly undertakes to make good any loss resulting from the principal's availing himself of his right to rescind.[1] Apart from these somewhat doubtful authorities, it would appear that when the question is whether a particular term is to be implied in a contract, the fact that it would give effect to what is commonly regarded as a moral obligation is an element in favour of an affirmative answer.[2]

Unilateral Obligation.—To the constitution of a voluntary obligation, it is not necessary that more than one person be concerned. It is true that a man cannot contract with himself; and hence where a proprietor conveyed his estate to himself, subject to a real burden, it was held that no real burden was created.[3] And a mere expression of intention to be bound, or of willingness to be bound should another so elect, infer in themselves no obligation. But a definite undertaking or promise forms an obligation, without the addition of the consent of the party in whose favour the promise is made.[4]

Obligations in Favour of Non-existing Party.—In the ordinary case it may be assumed that the party to whom the promise is made accepts it if he does not decline, and therefore the obligation may be said to result from agreement. But it is pointed out by Lord Stair that a promise may be binding though the promisee be a pupil or lunatic, and therefore unable to accept.[5] In the passage referred to it is added that a promise may be binding though made in favour of a person not yet in existence, and the same rule is laid down by Bankton.[6] But when the point has been brought to the test of actual decision in cases of voluntary trusts for the benefit of parties yet unborn, it has been held that the trusts were revocable, so long as no beneficiary except the truster himself was in existence. Thus while an antenuptial marriage contract, being a contract with an existing person, may confer rights on the issue of the marriage which the parties to the contract cannot defeat,[7] a unilateral deed or conveyance to trustees has no such effect, and may be revoked by the granter at pleasure.[8]

Obligations to General Public.—It is a point on which there is no very definite authority whether it is legally possible to confer the right to enforce an obligation on anyone who may choose to exercise it. The owner of land, over which the public have exercised a right-of-way, is subject to obligations,

[1] 10 M., at p. 922; see *Yorkshire Railway Wagon Co.* v. *Maclure*, 1881, 19 Ch. D. 478, per Kay, J. (obligation by directors for money borrowed *ultra vires*). In the C.A. (1882, 21 Ch. D. 309) it was held the borrowing was within the powers of the company.

[2] See opinion of Bankes, L.J., in *Tournier* v. *National Provincial Bank* [1924], 1 K.B. 461, at p. 475, "the law is never better employed than in enforcing the observance of moral duties."

[3] *Church of Scotland Endowment Committee* v. *Provident Association*, 1914, S. C. 165. See also *Gray* v. *Ellison*, 1856, 1 Gill. 458.

[4] As to the distinction between a promise and an offer, see *infra*, p. 24.

[5] Stair, i. 10, 4.

[6] Stair, *ut supra*; Bankton, i. 4, 5.

[7] See *Mackie* v. *Gloag's Trs.*, 1884, 11 R. (H.L.) 10; *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88.

[8] *Murison* v. *Dick*, 1854, 16 D. 529; *Mackenzie* v. *Mackenzie's Trs.*, 1878, 5 R. 1027; *Watt* v. *Watson*, 1897, 24 R. 330; *Nelson* v. *Nelson's Tr.*, 1921, 1 S.L.T. 82.

restrictive of the use which he may make of his property, which are enforceable by any member of the public. The foundation of the law with regard to rights-of-way, it has been explained, "is substantially presumed grant —not the presumption of a formal grant, but that presumption of gift which long-continued acquiescence in possession, the origin of which cannot be explained, which fairly imports the intention to make to the public a gift of the footpath in question."[1] But even if this theory be correct, it is probably an exceptional case. The general drift of the law is against the admission of an *actio popularis*, and it is conceived that an express gift to the public of a right-of-way or other similar right could not be vindicated if conceived as a mere obligation, and would require to be constituted by a contract between the granter and some individual or body in whom the title to protect it would be vested. It is, however, competent to frame an obligation in favour of anyone who does a particular act. Thus the English Courts decided that an offer to pay £100 to anyone who used the advertiser's preventive against influenza and yet caught the disease could be sued upon by anyone who fulfilled the prescribed conditions.[2] Where a guarantee of *A.*'s financial standing, not addressed to any particular person, is placed in *A.*'s hands, the guarantor will be liable to anyone who has given credit to *A.* in reliance on the guarantee.[3]

Obligation to Bearer: Blank Writs.—In certain cases an obligation may be incurred in favour of the bearer or holder of a particular document. Its validity, in the case of bills of exchange,[4] promissory notes,[5] cheques,[6] share certificates and debentures issued by a company,[7] is recognised by statute. Apart from these statutory cases, a bond issued blank in the name of the payee was recognised as valid in certain early cases.[8] Lord Stair regretted the state of the law, and it has been altered by statute.[9] The decisions exclude from the Act any document (at least if for payment of money) *in re mercatoria*.[10] It would seem doubtful whether the Act is limited to deeds where there is an actual blank,[11] or a merely general obligation to pay, or whether it includes documents expressed as payable to bearer.[12] A cautionary obligation was held effectual when taken in favour

[1] *Napier's Trs.* v. *Morrison*, 1851, 13 D. 1404, per Lord Justice-Clerk Hope, at p. 1405; see *Winans* v. *Lord Tweedmouth*, 1888, 15 R. 540.

[2] *Carlill* v. *Carbolic Smoke-Ball Co.* [1893], 1 Q.B. 256, and see *infra*, p. 22.

[3] *Ewing* v. *Wright*, June 2, 1808, F.C.; *Fortune* v. *Young*, 1918, S.C. 1.

[4] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), secs. 3, 20.

[5] *Ibid.*, sec. 83.

[6] *Ibid.*, sec. 73.

[7] Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), secs. 37, 106.

[8] *Henderson* v. *Birnie*, 1668, M. 1653; Stair, iii. 1, 5.

[9] Act 1696, c. 25 (Trusts (Scotland) Act, 1696). The Act, in so far as relating to the present question, enacts: "Considering, that the subscribing of bonds, assignations, and dispositions, and other deeds blank in the name of the person in whose favours they are granted . . . are occasions of fraud, as also of many pleas and contentions, doth . . . statute and ordain, that, for hereafter no bonds, assignations, dispositions, or other deeds, be subscribed blank in the person or persons name, in whose favours they are conceived, and that the foresaid person or persons do either insert before, or at the subscribing, or at least in presence of the same witnesses, who are witnesses to the subscribing before the delivery. Certifying that all writs otherwise subscribed and delivered blank as said is, shall be declared null. . . . Declaring, that the Act shall not extend to the indorsation of bills of exchange, or the notes of any trading company."

[10] *Dimmack* v. *Dixon*, 1856, 18 D. 428.

[11] As in *Pentland* v. *Hare*, 1829, secs. 7, 640.

[12] Most of the judges in *Dimmack* v. *Dixon*, *supra*, were of opinion that the Act does not strike at a document payable to bearer. As debentures to bearer are expressly authorised by sec. 106 of the Companies (Consolidation) Act, 1908, the point seems of little importance.

of the creditors of a particular party.[1] In *Duncan's Trs.* v. *Shand*,[2] the instrument in question was expressed "I promise to pay on demand £100, value received," and was sued on by the executors of the party in whose repositories it was found. It was held not to be a promissory note, and opinions were given that it was struck at by the Act, 1696, c. 25; but proof of the debt by writ or oath was allowed.

Warrants for goods without the name of the party to whom they were to be delivered were considered in the case of iron warrants expressed as obligations to deliver to the party presenting the document. In two cases their validity was upheld in the Court of Session.[3] But on the former case being appealed, although the judgment was affirmed on the special facts, the Lord Chancellor (Cranworth), who was the only law peer present, expressed the opinion that, apart from proof of custom of trade, such a document, expressed as giving "a floating right of action to any person who may become possessed of it" was invalid by the law both of Scotland and England.[4] It has never been definitely settled whether the law is as stated by Lord Cranworth, or how far the question would be affected by proof of a custom of trade.[5]

Agreement.—A contractual obligation must have as its basis the agreement of the parties, expressed in words, writing or conduct, or inferred from the fact that the offer or promise of one party has not been rejected by the other. Agreement is the consent of two or more parties to form some engagement or to rescind or modify an engagement already made.[6] Another definition of the word is proposed by Sir Frederick Pollock:[7] "An agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them." The phrase "act in the law," unfamiliar to a Scottish lawyer, is explained to mean an act which on the face of the matter is capable of having legal effects. As thus explained, the definition has been judicially adopted in Scotland.[8]

Contracts where Party already Obliged.—There may be agreement, and consequently a contractual obligation, though one of the parties may have no choice in the matter, and may be bound to accept the other's proposal, if made. So when a statutory body having power to take land compulsorily sends a notice to treat, which the landowner has no power to disregard, it has been held that a contractual relationship is constituted, with the result that the notice cannot be withdrawn without the landowner's consent.[9] It has indeed been suggested in the Court of Appeal that when a passenger enters a tramway no contractual relationship is involved; the passenger demands performance of a statutory obligation, and the company complies.

[1] *Clapperton, Paton, & Co.* v. *Anderson*, 1881, 8 R. 1004.
[2] 1872, 10 M. 984.
[3] *Bovill* v. *Dixon*, 1854, 16 D. 619; *Dimmack* v. *Dixon*, 1856, 18 D. 428.
[4] 1856, 3 Macq. 1. The Act 1696, c. 25, though referred to in argument, was not mentioned by Lord Cranworth. The validity of a bill of lading in favour of the bearer was recognised.
[5] See *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 1877, 5 Ch. D. 205.
[6] Pothier, *Obligations*, sec. 3; see also Stair, i. 10, 1; Ersk. iii. 2, 3; Bell, *Prin.*, sec 7.
[7] *Contract*, 9th ed., 2.
[8] Per Lord Kinnear, *Millen & Somerville, Ltd. (Liquidators of)* v. *Millen*, 1910, S.C. 868.
[9] *Edinburgh, Perth, and Dundee Railway* v. *Leven*, 1852, 1 Macq. 284; *North British Railway* v. *Lindsay*, 1875, 3 R. 168; *Lockaby* v. *City of Glasgow, etc., Trs.*, 1872, 10 M. 971; *Corporation of Edinburgh* v. *Lorimer*, 1914, 2 S.L.T. 225.

But this theory finds no countenance in the opinions in the House of Lords.[1] And Lord Stair has observed that "contracts may intervene where there intercedes a natural and obediential obligation, where it hath this use, to declare and express the natural obligation to avoid debate thereupon."[2]

Meaning of Agreement. When agreement is spoken of, it is not meant that the minds of the parties must have been at one, as a matter of psychological fact. When all the external *indicia* of agreement are present the fact of agreement will, as a general rule, be assumed. If indeed the proof establishes a case of pure misunderstanding, not attributable to one party more than to the other, the conclusion must be that there was no agreement, and therefore no obligation.[3] If, however, the words or acts of one party are calculated to convey to a reasonable and neutral person the impression that he agreed to a proposal, and did convey that impression to the other party, agreement, for all legal purposes, is established, irrespective of the possibility that the apparent was not the real intention. An intention to bind oneself by agreement must as a general rule be assumed from words or acts indicating it. In disputed cases there is seldom any true and complete agreement. Parties resort to the Courts because they differ as to the nature, the incidents, or the resulting obligations of their contracts. The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other. This principle is well illustrated in *Muirhead & Turnbull* v. *Dickson*.[4] There a piano merchant had delivered a piano to a customer, on a verbal bargain under which certain monthly payments were to be made. The customer having failed in the monthly payments, the piano merchant brought an action for the re-delivery of the piano. His right to decree depended upon whether the contract was a sale, with payment by instalments, when the property in the piano would have passed to the customer, or a contract of hire purchase, under which the property would not pass until all the instalments were paid. The evidence of the pursuer was for the latter form of contract, the evidence of the defender for the former. On that evidence the pursuer argued that, assuming his version of the contract was not accepted, then the result was that there had been no agreement, and therefore that the property in the piano had not passed to the customer. The argument was rejected, and it was held—on proof that the words used by the pursuer were calculated to convey to a reasonable man, and had conveyed to the defender, an offer to sell the piano and accept payment by instalments—that the result of the contract was therefore to effect a sale, under which the seller's only claim was for the price. The Lord President (Dunedin) dealing with the argument that there was no agreement, put the case as follows:[5] "Now, of course, if the question really was as to what in their inmost hearts people thought, I think that, taking these people as honest people on both one side and the other, what they thought would lead me to the conclusion at which the Sheriff has arrived, namely, that Grant

[1] *Bradford Corporation* v. *Myers* [1915], 1 K.B. 417; [1916], A.C. 242.
[2] Stair, i. 10, 13.
[3] *Infra*, Chap. XXVI.
[4] 1905, 7 F. 686.
[5] 7 F., at p. 694. Adopted and expanded by Lord President Clyde in *Crerar* v. *Bank of Scotland*, 1921, S.C. 736 (1922, S.C. (H.L.) 137). See also opinion of Lord Blackburn in *Buchanan* v. *Duke of Hamilton*, 1878, 5 R. (H.L.) 69, at p. 82. Telegraphic correspondence by a private code has been treated as a special case. The party maintaining that a agreement has been reached must shew that the other could not reasonably have mistaken his meaning. *Falck* v. *Williams* [1900], A.C. 176.

thought he was selling on the hire-purchase system, and the other person thought he was buying upon some instalment plan. But commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say." To this it is an obvious corollary that where an obligation is undertaken not by words but by acts, these must be construed on similar principles.

Definition of Contract.- Lord Stair speaks of agreement and contract as synonymous terms;[1] and the institutional writers in Scotland generally draw the distinction between unilateral engagement and mutual contract,[2] but do not confine the term contract to any particular class of agreements. But some authorities in England propose to confine the use of the word contract to agreements which may be followed by direct legal action. Thus the Indian Contract Act of 1872[3] gives the definition: "An agreement enforceable by law is a contract," and this definition is accepted by Sir Frederick Pollock,[4] and Sir William Anson.[5] Its simplicity makes it attractive. But it is either a definition entirely out of accord with the ordinary use of the word defined, or else it requires qualifications which rob it of its apparent simplicity. To refuse to apply the term "contract" to an agreement which turns out to be unenforceable because it is connected with an illegal act, though both parties may have intended to bind themselves, and may be unaware of the illegality, would seem both arbitrary and inconvenient. And if the phrase "agreement enforceable by law" is not to exclude agreements which are voidable on the ground of fraud or other incapacitating cause, or because, as in the case of a contract by a minor, one party may have the right to resile, the definition requires a somewhat lengthy explanation.[6] A better definition of contract, it is submitted, is offered by the authors of the *Digest of English Civil Law*: "A contract is an agreement which creates, or is intended to create, a legal obligation between the parties to it."[7]

Agreement Must be Concerned with Legal Relations.- In order to bring an agreement within the province of contract it must be concerned with matters of which the Court will take cognisance. Thus a bet or wager is not a contract, because the relations involved are held, in the law of Scotland, not to be among those subjects for which Courts of Justice were instituted. And an agreement for merely social purposes cannot be enforced by any

[1] Stair, i. 10, 10, "Pactions, contracts, covenants, and agreements are synonymous terms, both in themselves and according to the recent customs of this and other nations."

[2] See Stair, i. 10, 3; Bankton, i. 11, 6; Mackenzie, *Inst.*, iii. 1, 5; Ersk. iii. 1, 16; iii. 2, 1; Bell, *Prin.*, 8, 70.

[3] Act No. IX. of 1872, sec. 2. This definition was anticipated, in 1722, by Professor Forbes (*Inst.*, bk. i., Ch. 1, tit. iii.): "A contract is an engagement between two or more persons, effectual to force performance by an action." Many obligations are undertaken conditionally. Is there merely an agreement, and not a contract, until the condition is purified?

[4] *Contract*, 9th ed., p. 9.

[5] *Contract*, 16th ed., 10. For a proposal still further to limit the scope of the word contract see Salmond and Winfield, *Contract*, p. 8.

[6] It is qualified in the Indian Contract Act by sec. 10: "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

[7] Jenks, *Digest of English Civil Law*, bk. ii., tit. i. A statutory definition, though only for the purposes of the particular Act, is contained in sec. 25 of the Truck Act, 1831 (1 & 2 Will. IV. c. 37): "Any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation upon the other of them, shall be and shall be deemed a contract."

legal process. This may be rested on the ground that the Courts have no jurisdiction in such questions, or on the ground that the apparent agreements are nothing more than indications of intention. The words of a party who agrees to play a game, or who gives or accepts an invitation to dinner, fall to be construed in the meaning they would convey to a reasonable and neutral party. So construed, they do not amount to an expression of willingness to undertake an obligation, only to an expression of a present intention, which may at any time be altered.[1]

More difficult and doubtful questions are presented when a party who has entered into a society or club, and has been expelled, alleges that the method of his expulsion has not been in accordance with the rules of the particular body in question, and sues for the reduction of the resolution by which he has been expelled. Such an action involves the recognition and enforcement by the Court of the agreement under which the party became a member of the society or club. That agreement may have been intended by both parties to be enforceable, but it does not follow that the Court has any jurisdiction to enforce it. To give jurisdiction, some patrimonial interest must be involved, and, in the absence of any such interest, the action is excluded on the ground that it is an attempt to induce the Court to pronounce an order which is not within its power. "There is no authority in the Courts either of England or Scotland to take cognisance of the rules of a voluntary society, entered into merely for the regulation of its own affairs, save only in so far as it may be necessary that they should do so for the disposal or administration of property."[2] So where a member of a trade union sued for the reduction of a resolution by which he had been subjected to a fine the Court refused to entertain the action, on the ground that as the fine was admittedly unenforceable, and there was no averment of any other loss, no patrimonial interest was involved.[3]

Patrimonial Interest. A patrimonial interest may consist in a right to property, or a right to the use of property. Thus when the member of a club obtains by his admission a right to the use of the property held by the club, he has a patrimonial interest which will entitle him to sue on the contract by which he was admitted, provided that he can shew that by the particular breach in question he is deprived of that patrimonial right.[4] When a clergyman of a voluntary church complained of the loss of his benefice, it was found that a patrimonial interest was involved which the Courts would protect;[5] where he merely complained of an alteration in the doctrinal standards of the Church, and did not aver that he had been deprived of his benefice, or of his status as a minister, it was held that his

[1] See opinion of Lord Kinnear in *Murdison* v. *Scottish Football Union*, 1896, 23 R. 449, at p. 466. *Balfour* v. *Balfour* [1919], 2 K.B. 571. In *Rose & Frank Co.* v. *Crompton* [1923], 2 K.B. 261, narrated, *infra*, p. 11, Scrutton, L.J., referred to an unreported case in which he had decided that no contractual rights were involved in a competition held by a golf club. The case must have been a special one; the rules in other sports have been enforced as contractual. *Clarke* v. *Dunraven* [1897], A.C. 59; *Graham* v. *Pollok*, 1848, 10 D. 646, 11 D. 343.

[2] Per Lord Cranworth, *Forbes* v. *Eden*, 1867, 5 M. (H.L.) 36, at p. 50. So an Irish judge held that the Court would not consider whether a rule of a golf club permitting Sunday play had been duly passed, because the objectors did not allege that any interest of theirs in the club had been affected. *Watt* v. *M'Laughlin* [1923], 1 Ir. R. 112.

[3] *Drennan* v. *Associated Ironmoulders*, 1921, S.C. 151.

[4] *Murray* v. *Johnstone*, 1896, 23 R. 981; *Renton Football Club* v. *M'Dowall*, 1891, 18 R. 670; *Gardner* v. *M'Lintock*, 1904, 11 S.L.T. 654; *Labouchere* v. *Lord Wharncliffe*, 1879, 13 Ch. D. 346; *Harington* v. *Sendall* [1903], 1 Ch. 921; *Yonge* v. *Ladies' Imperial Club* [1920], 2 K.B. 523.

[5] *M'Millan* v. *Free Church of Scotland*, 1861, 23 D. 1314.

action was irrelevant.[1] If a society is merely an association for some particular purpose, and holds no property, its members have no patrimonial interest which can justify the interference of the Court. The mere privilege of associating with others, even if incidentally that privilege might lead to other advantages, is not within the contractual rights of which the Court will take cognisance.[2] The law was summed up by Lord President Robertson as follows[3]: "Courts of law, as I understand, take no concern with the resolutions of voluntary associations, except in so far as they affect civil rights. If a man says merely 'such and such a resolution of an ecclesiastical body is a violation of its constitution, on the faith of which I became a member or a minister,' and stops there, the Court will have nothing to do with the case, and will not declare the illegality or reduce the resolution. But if the same man says, 'I have been ejected from a house, or have been deprived of a lucrative office, under colour of this illegal resolution, and I ask possession of the house, or I ask £500 of damages,' then the Court will consider the legality of the resolution, on its way to the disposal of the demand for practical remedy."

But there may be a patrimonial interest which does not involve any actual right of property, if it is a right to a position which affords an opportunity of patrimonial gain, or involves eligibility to a lucrative office. "The possession of a particular status, meaning by that term the capacity to perform certain functions or to hold certain offices, is a thing which the law recognises as a patrimonial interest, and no one can be deprived of its possession by the unauthorised or illegal act of a third party without having a legal remedy."[4] So the positions of a clergyman, though without a benefice; of a member of the Bar, though without practice; of a seaman with a master's certificate, though without a ship, involve patrimonial interest, which will support an action for damages for the breach of contract or for the wrong by which they are interfered with.[5] But it would appear that the Courts will not regard as sufficient a mere chance of gain, dependent on the uncontrolled pleasure or caprice of others. In *Anderson* v. *Manson*,[6] a society established for the purpose of keeping a stud-book for Shetland ponies had in its rules a provision that all entries were received subject to the decision of the council, who had full power to publish, or not to publish, any entry which was sent in. *A.*, a member of the society, was suspended from membership, and the secretary was instructed not to receive any entry from him. In an action for the reduction of the resolution by which he was suspended, the Lord President (Dunedin) expressed the opinion that

[1] *Forbes* v. *Eden*, 1865, 4 M. 143; affd. 1867, 5 M. (H.L.) 36.

[2] *Aitken* v. *Associated Carpenters and Joiners*, 1885, 12 R. 1206; *Forbes* v. *Eden*, *supra*; *Anderson* v. *Manson*, 1909, S.C. 838.

[3] *Skerret* v. *Oliver*, 1896, 23 R. 468, at p. 490.

[4] Per Lord Justice-Clerk Inglis in *Forbes* v. *Eden*, 1867, 4 M. 143, at p. 157; approved by Lord Chancellor Chelmsford, 5 M. (H.L.) 47.

[5] See opinion of Lord Kincairney (Ordinary) in *Skerret* v. *Oliver*, 1896, 23 R. 468. See *M'Millan* v. *Free Church of Scotland*, 1861, 23 D. 1314 (Lord President (Colonsay), at p. 1329; Lord Deas, at p. 1346).

[6] 1909, S.C. 838. The actual point decided was that the suspension of the pursuer was regular. In *Aitken* v. *Associated Carpenters* (1885, 12 R. 1206), Lord President Inglis held that a member of a trade union had no patrimonial interest in his membership, in respect that his claim to the benefits provided by the rules is, by statute, unenforceable. This opinion overlooks the consideration that in the event of the trade union being dissolved a member would be entitled to share in the assets; also, that a member has a right to vote in the disposal of the union funds, a right sufficient to constitute a patrimonial interest. See *Osborne* v. *Amalgamated Railway Servants* [1911], 1 Ch. 540. On the general question involved in *Aitken's* case, see *infra*, p. 124.

no contractual right of the pursuer's had been violated. He had no absolute right to have entries made in the stud-book, seeing that the council were entitled to refuse entries at their pleasure. All he had lost was a chance of such entries being received, and that, it would appear, did not amount to a patrimonial interest. In *Cocker* v. *Crombie*,[1] a market gardener brought an action against the members of a horticultural society who had refused to receive his exhibits. He asked for declarator that the defenders should be ordained to receive his exhibits, and the only patrimonial interest he averred was the chance of gaining a prize. It was held that the action fell to be dismissed as incompetent, but it does not appear whether the incompetency consisted in an action founded on an interest which was merely a chance of gain, or whether it consisted in the form of remedy which was asked. And in England it has been decided that when *A.* offered a prize to certain selected competitors, and the adjudication was to be left to himself, his failure to give one of the competitors reasonable notice of the time of competition was a ground for an action of damages for breach of contract, and that the chance of being selected was a contingency not too remote to be estimated.[2]

Honourable Understanding.—An express provision that an agreement, though it may be concerned with matters of patrimonial interest, is not to have any legal result, but to be regarded as an honourable understanding, is one to which the Court must give effect. So when an arrangement between a British and an American firm, under which the American firm were constituted agents for the sale of the British products, contained the following clause: "This arrangement is not entered into . . . as a formal or legal agreement, and it shall not be subject to legal jurisdiction . . . but it is only a definite expression and record of the purpose and intention of the parties to which each honourably pledge themselves," it was decided that no enforceable contract was created, and that the American firm was not bound to order any goods, nor the British firm to accept orders, though any orders actually given and fulfilled must, independently of the agreement, have their ordinary legal effect.[3]

Indefinite Agreements. In order to create a contractual obligation an agreement must be reasonably definite. Vague general understandings cannot be enforced. In extreme cases this is clear law. The dictum of Ulpian[4]—*si quis insulam fieri stipuletur et locum non adiciat, non valet stipulatio*—commands instant assent. And it is not a valid argument, in such a case, that as the defender has clearly agreed to do or give something, and has done or given nothing, he should be liable in damages. It must be determinable what he has agreed to do or give. The test, according to Lord President Inglis, is that it must be possible to frame a decree of specific implement which would give the pursuer exactly what he bargained for.[5] If no such decree can be framed, the agreement is void from uncertainty, and no damages can be claimed. But it is not to be inferred that it must be possible to frame a decree for specific implement without going beyond the words of the contract; their uncertainty may be overcome by legal

[1] 1893, 20 R. 954.

[2] *Chaplin* v. *Hicks* [1911], 2 K.B. 786.

[3] *Rose & Frank Co.* v. *Crompton* [1925], A.C. 445. On the last point the judgment of the C.A. ([1923], 2 K.B. 261) was reversed.

[4] *Dig.*, xiii. iv. 2, 5.

[5] *Macarthur* v. *Lawson*, 1877, 4 R. 1134, followed in *Traill* v. *Dewar*, 1881, 8 R. 583. English authorities are reviewed by M'Cardie, J., *County Hotel & Wine Co.* v. *L. & N.W. Rly.* [1918], 2 K.B. 251, at p. 262. The point was not considered on appeal [1921], 1 A.C. 85,

implication. It is one of the main functions of a Court of Justice to give a concrete meaning, in particular circumstances, to the word "reasonable," or other expressions equally indeterminate: to decide whether reasonable care has been taken, whether work has been done within a reasonable time; to fix, under statutory provisions, a reasonable price,[1] a "fair" and an "equitable" rent.[2] It is a question of degree whether a particular obligation, taking the words used and the legal implication, is too vague for enforcement.

As illustrative of the circumstances in which it has been found that there were no *termini habiles* for the enforcement of an agreement, there may be cited a promise, by an employer, to give his clerk a "substantial" interest by way of partnership;[3] a provision, in a medical partnership, that on its expiry neither should enter into a new agreement in relation to the practice without the consent of the other, and, in the absence of other agreement, should have an equal interest therein;[4] a promise to give a number of persons "patches of arable ground at a suitable rent";[5] undertakings "not to interfere with the company, agents, assurants, or business in any way whatever,"[6] to "favourably consider" an application for the renewal of a lease,[7] to take a house "if put into thorough repair" and "handsomely decorated according to the present style."[8] It would appear that a "due allowance" from the rate of interest on a loan is too vague for enforcement,[9] though it is an established rule that in the event of partial destruction of premises let the tenant is entitled to a deduction from the rent, and the Court will fix the amount.[10]

On the other hand, a contract under which two railway companies agreed, in general terms, that each should have the right to run traffic over the other's lines was sustained.[11] It was no objection to the enforcement of a contract for the sale of a patent that the price was to be paid "in such manner as shall be mutually agreed upon";[12] or, in a contract for the supply of a number of bags, that the time of delivery should be "as required" by the purchaser.[13] Legal implication will supply the want of a period of duration in a contract of service;[14] of a term of entry,[15] or an ish,[16] in a lease. When something is to be done, and no time is specified, the Court will decide what is a reasonable time.[17]

Building Restrictions. In the case of building restrictions, it has been laid down that the Court will not decide questions of architectural taste.[18]

[1] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sec. 8.
[2] Small Landholders (Scotland) Act, 1911 (1 & 2 Geo. V. c. 49), secs. 7, 32.
[3] *Macarthur* v. *Lawson*, 1877, 4 R. 1134.
[4] *Traill* v. *Dewar*, 1881, 8 R. 583.
[5] *Lord Clinton* v. *Brown*, 1874, 1 R. 1137.
[6] *British Workmen's Insurance Co.* v. *Wilkinson*, 1900, 8 S.L.T. 67.
[7] *Montreal Gas Co.* v. *Vasey* [1900], A.C. 595.
[8] *Taylor* v. *Partington*, 1855, 1 D.M. & G. 328.
[9] *In re Vince* [1892], 2 Q.B. 478. See opinion of Lord Parker in *Love & Stewart* v. *Instone*, 1917, 33 T.L.R. 475 (H.L.).
[10] *Muir* v. *M'Intyre*, 1887, 14 R. 470.
[11] *Great Northern Rly.* v. *Manchester, etc., Rly.*, 1851, 5 De G. and Sm. 138.
[12] *Hall* v. *Conder*, 1857, 2 C.B.N.S. 22.
[13] *Henry* v. *Seggie*, 1922, S.L.T. 5; *Pearl Mill Co.* v. *Ivy Tannery Co.* [1919], 1 K.B. 78.
[14] *Lawrie* v. *Brown & Co.*, 1908, S.C. 705.
[15] *Christie* v. *Fife Coal Co.*, 1899, 2 F. 192.
[16] *Wilson* v. *Mann*, 1876, 3 R. 527; *Dunlop* v. *Steel Co. of Scotland*, 1879, 7 R. 283.
[17] *Hick* v. *Raymond & Reid* [1893], A.C. 22. Would the common phrase "no reasonable offer will be refused" infer any obligation?
[18] *M'Neill* v. *Mackenzie*, 1870, 8 M. 520, per Lord Cowan; *Duke of Buccleuch* v. *Magistrates of Edinburgh*, 1865, 3 M. 528.

So it is conceived that such words as "unsightly" or "inartistic" are inappropriate in feuing contracts, and, if used, are inoperative. The House of Lords could find no enforceable or definite meaning in a contract not to erect buildings "of an unseemly character."[1] In view of this decision, it seems doubtful whether the judges of the Second Division were justified in the opinion that an obligation not to alter the roof of the house so as to "distigure the appearance of the street" was one to which effect could be given.[2] The general principle that the bias of the law is in favour of freedom in the use of property lays the onus of proof on the party who alleges that a restriction has been contravened, and the vaguer the restriction the more difficult proof of its contravention will be.[3] But a restriction is not necessarily inoperative because, to some extent, it involves questions of degree or of opinion. Thus a restriction to buildings of a class not inferior to others already erected has been sustained, and is one which the Court will construe fairly with the aid of expert evidence.[4] An obligation not to alter premises so as to be in any respect offensive to the proprietors of other houses is not too vague for enforcement, but means that a contravention is committed only when some definite interest of the proprietors of the other houses is interfered with, not merely when they in fact object on artistic or sentimental grounds.[5]

Agreements Void, Voidable, Unenforceable.—An agreement which involves a patrimonial interest, and which is expressed in definite terms, may from various causes not be legally enforceable. The parties may not have the capacity to bind themselves by agreement, or by the particular agreement in question; the agreement may be one prohibited by law, or it may be arrived at by improper means, such as misrepresentation, fraud, force, or undue influence. These various invalidating causes can here only be mentioned; their explanation forms the subject of succeeding chapters.

An agreement which is open to any of these objections may be void or null, may be voidable or reducible, or may be unenforceable.

These terms cannot be fully explained until the grounds of avoidance or voidability have been considered.[6] It may here be sufficient to indicate that the term void or null is used either where the conclusion is that there has been no agreement, though there may have been the appearance of one, or that the agreement is denied effect by law, or that the party had no power to bind himself, or that the agreement was dependent on the existence of a state of facts mistakenly assumed by one or both parties.[7] The common characteristic of these cases is that no obligation is created on either party. An agreement which is voidable or reducible is one where the consent of parties has been given in such a way as to create an obligation, but the circumstances are such that one or other has the right to free himself from it. A right in the one party to control the actions of the other is then created, but a right which the party controlled, under certain conditions, and by adopting the appropriate procedure, may determine. Such is the

[1] *Murray's Trs.* v. *St Margaret's Convent*, 1907, S.C. (H.L.) 8.

[2] *M'Neill* v. *Mackenzie*, 1870, 8 M. 520.

[3] *Frame* v. *Cameron*, 1864, 3 M. 290; *Anderson* v. *Dickie*, 1915, S.C. (H.L.) 79, opinions by Lords Kinnear and Dunedin.

[4] *Morrison* v. *M'Lay*, 1874, 1 R. 1117; *Middleton* v. *Leslie*, 1894, 21 R. 781.

[5] *M'Neill* v. *Mackenzie*, 1870, 8 M. 520. See also *Frame* v. *Cameron*, 1864, 3 M. 290.

[6] *Infra*, Chap. XXXII.

[7] Sale of Goods Act, 1893, sec. 6: "Where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void." Question, whether the proper word is not "discharged."

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case of an obligation induced by fraud, or an obligation undertaken by a minor, who has the right, under certain conditions, to resile from his contract. The term unenforceable, as applied to an agreement, has no special or technical meaning, but is most commonly applied to cases where, by the terms of a statute, such as the Trade Union Act, a particular agreement cannot be directly enforced, but may be productive of rights to the one party against the other.

Formalities of Contract. In point of form, the common law of Scotland and various statutes insist on writing as a condition of the creation of an enforceable obligation in certain contracts. In certain cases the revenue laws have added the necessity of a stamp. Apart from these contracts, no special form has ever been held to be necessary to the constitution of an obligation or contract. Thus Lord Stair, after mentioning the methods of contracting recognised in Roman law, and enumerating the contracts which by that law could be completed by consent alone, proceeds: "But not only these, but all other promises and pactions, are now valid contracts by sole consent, except where writ is requisite, as is before explained, and this consent may either be expressed by word, or writ, or by doing deeds importing consent." And there is nothing in our law analogous to the *stipulatio* of the Roman law.[1]

Real Contracts.—The institutional writers in Scotland adopt the civil law division between real and other contracts.[2] But it is conceived that the term "real contract,"[3] as it is used in Roman law, has no meaning in the law of Scotland. It belongs to a stage in legal development when consent was not recognised as a source of obligation, unless it were given in some established form. To this real contracts were developed as an exception, as were also certain contracts of common occurrence, which were completed by consent alone. In real contracts, as in loan (*mutuum*), the obligation of the borrower to repay did not arise *ex contractu*, by consent inferred from his words or acts, but arose *re*, was inferred by law from the receipt of the subjects lent. The obligation to repay was, it might be put, an obligation to recompense the lender, inferred by law, not an obligation imposed by the contract. But in the law of Scotland, where the rule that consent must be adhibited in a particular form is not recognised, the exception ceases to be of importance. There seems no reason for holding that the obligations of a borrower, a depositary, or a pledgee do not arise from consent, in the same way as the obligations of the parties to a contract of sale, mandate, or other contract recognised by the Roman law as consensual. An agreement to lend or pledge is, as is recognised by Erskine[4] an enforceable contract.

It is true that the contract of pledge, conferring on the pledgee a real right in the thing pledged, is not constituted by mere consent, but by consent followed by delivery of the thing. But that is a question of property

[1] Bankton, I. xi. 22.

[2] Stair, i. 10, 11; Ersk. iii. 1, 18; Bell, *Com.*, i. 335.

[3] In Roman law the real contracts were *mutuum, commodatum, depositum, pignus* (*Inst.*, iii. 14). No others are mentioned in the *Institutes*, but in the *Digest* there are mentioned, as instances of obligations arising "*re*," the contracts *do ut des, do ut facias, facio ut des, facio ut facias* (*Dig.*, xix. 5, 5 (Paulus)). See Muirhead, *Roman Law*, 2nd ed., 268.

[4] Ersk. iii. 1, 17. The general principle is well expressed by Lord Bankton (*Inst.*, I., xi.). "It is not a loan, unless the money be really lent, nor commodation, if a thing is not truly delivered, and so for the rest. But nothing hinders one to become obliged, by naked paction, to perfect such contracts with us, compacts being now of themselves obligatory, which was otherwise by the civil law."

or real right, not a question of obligation. The obligations of the parties depend on their consent, but the law of Scotland does not admit of the transfer of the real right in property by consent alone. This rule, moreover, applies at common law as much to sale—a consensual contract—as to pledge, which is a real contract. In both the obligation is derived from the consent of the party who undertakes it—arises, that is to say, *consensu*—though the right of property arises *re*, by the delivery of the subject of the contract.[1]

Sealing. The law of Scotland does not recognise the distinction taken in English law between simple contracts and contracts under seal. The distinction belongs to a system in which consideration is a necessary element in a contractual obligation, and, as will be shewn in a later chapter, the general theory of the law of Scotland is that a voluntary obligation is binding whether there is consideration for it or not.[2]

In the earlier history of the law as to authentication of writs, the imposition of the seal of the granter was the normal and proper method by which a deed was completed.[3] The signature of the party was first rendered necessary by the Act 1540, c. 117. The subsequent Acts 1555, c. 29, and 1579, c. 80, require the use of the party's seal, in addition to his signature before witnesses, in all writs importing heritable title and other bonds and obligations of importance. The Act 1584, c. 4, expressed as an explanatory Act, declares that the Act anent sealing of writs of importance is not to be understood to apply to writs, contracts, or obligations where the parties agree to register the same in the Books of Council or other "ordinar Judges," as that is a more solemn act than the sealing thereof. The non-sealing of the writ, provided it is subscribed by the parties, shall be no exception to its validity. The subsequent statutes contain no reference to sealing in deeds by private parties. By Stair,[4] sealing is referred to as "much out of use, except where seals are solemnities as in evidents granted by the King." By Erskine[5] it is said to have fallen into disuse soon after the Act of 1584. Sir George Mackenzie[6] observes that "not sealing is warranted by uncontroverted custom."

[1] Scots law recognises obligations arising *re*, *e.g.*, the obligation to pay for goods sold and delivered to a party unable to contract. But this obligation is not contractual, it is an obligation to pay a reasonable price, not the contract price.

[2] *Infra*, Chap. III.

[3] Craig, *Jus Feudale*, ii. 4; Menzies, *Conveyancing*, 2nd ed., 80.

[4] Stair, iv. 42, 5.

[5] Ersk. iii. 2, 7.

[6] Mackenzie, *Observations*, 146; see also Ross, *Lectures*, i. 130; Galloway, *Conveyancing*, 42; Mont. Bell, *Conveyancing*, 3rd ed., i. 30. And see, as to contracts under seal in England and Scotland, the second Report of the Royal Commission on Mercantile Law (1853), at p. 28.

CHAPTER II

FORMATION OF CONTRACT

Engagement and Intention.—The constitution of a conventional obligation requires the expression, by at least one party, of willingness to be bound. If the obligation is based on a promise, the expression of willingness may be by one party only; if it is based on offer and acceptance, it must be by both. The will to be bound may be expressed in words or acts; however expressed, and apart from a few exceptional cases,[1] it is a necessary element in the constitution of an obligation.[2]

It is not necessarily the measure of the obligation undertaken. The party who enters into a contract having well-known incidents will be held bound to fulfil the obligations which the law implies as resulting from an agreement to enter into that contract, irrespective of the question whether he knew of those obligations, or intended to subject himself to them. By entering into a contract he agrees to be bound to fulfil the obligations which the Court, in the event of dispute, may decide he has incurred.[3] Thus the seller of goods, in certain circumstances, is held to warrant that they are fit for a particular purpose, and will be held bound to fulfil the warranty though its possibility may never have crossed his mind. Partnership, as is pointed out by Lord Lindley,[4] does not mean a contract, but the relations which result from a contract, and a party may be subjected to the liabilities of a partner though he never intended to be one. So in other usual and nominate contracts, such as lease or agency, the rights and liabilities of the parties, in so far as not defined by express stipulation, are determined by the general law, and not by the intentions or knowledge of the parties. But though the range and extent of an obligation may thus go far beyond what the party was willing to undertake, yet the will to be bound to some obligation, actual, or implied by law, is necessary before contractual obligation can exist. Mere intention is not enough, and the first task in considering the constitution of a contract is to determine in what cases an expression of intention may amount to an obligation.

Unintimated Intention.—Clearly, unexpressed intention can have no obligatory force. And it is probably equally clear law that the mere expression of an intention to make a promise or an offer, if it is not communicated to the other party concerned, cannot be binding, even although that party

[1] *E.g.*, contracts by an agent under the mistaken impression that he has authority, *infra*, p. 155.

[2] See Stair, i. 10, 2.

[3] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25, opinion of Lord Watson. So Lord Sumner, dealing with a case of marine insurance, said: "I daresay few insured have any distinct view of their own on the point, and might not even see it if it was explained to them; but what they intend contractually does not depend on what they understand individually. If it is implied in the nature of the bargain, then they intend it in law just as much as if they said it in words." *Becker Gray & Co.* v. *London Assurance Corporation* [1918], A.C. 101, at p. 111.

[4] Lindley, *Partnership*, 9th ed., 10.

may have incidentally become aware of it. In *Shaw* v. *Muir's Exrx.*[1] — an action against an executrix for a sum which the deceased was alleged to have undertaken to give to the pursuer — the averments, as originally framed, amounted to a statement that the deceased had marked in his own business books a certain share of his profits as given to the pursuer. These averments were held irrelevant; they set forth nothing more than an intention on the part of the deceased, which he was perfectly free to alter. In *Burr* v. *Commissioners of Bo'ness*,[2] the Police Commissioners passed a resolution to increase the salary of the sanitary inspector (Burr) from £10 to £20. This resolution was not formally intimated to Burr, though he became aware of it. At a later meeting the Commissioners resolved to rescind their prior resolution. Burr brought an action for declarator that he was entitled to the increased salary. The defenders were assoilzied, on the ground that as their resolution had not been intimated to Burr, he had acquired no right under it.

Construction of Ambiguous Expressions. More difficult questions may be raised if the intention to contract is intimated to the party with whom the proposed contract is to be made. Even in that case a man is not bound by stating that he intends to be bound in the future. But a question of construction is raised, whether what is expressed as an intention does not amount to an engagement. The words "I intend" may, from the context or from the circumstances, be construed as meaning "I undertake."[3] The construction may depend on the relationship between the parties. So it was observed that a letter, which would have been construed as an acceptance if written in a mercantile transaction, might be a mere statement of intention in a question as to a compromise of a claim in succession.[4] A verbal arrangement between husband and wife, by which the husband undertook to pay the wife £30 a month if she would maintain herself, was construed, in view of the relationship of the parties, as a statement of intention which had no contractual effect.[5] If a public body not only passes a resolution, but intimates it to the party interested, a binding contract will result.[6] Where a miller received hay to be chopped, and sent invoices with the heading "all goods held in trust covered by insurance against fire," he had contracted to insure for the benefit of his customers.[7] Where a railway company, in a written contract with the keeper of a refreshment-room, expressed their intention to stop all trains at the particular station, opinions were given that they had bound themselves to do so.[8] The expression of intention to make a will in favour of a particular party is revocable, and no claim can be founded on it.[9] In *Villiers* v. *Connell*,[10] *A.*, writing to his daughter's father-in-law, expressed himself as "willing to settle" £2,000 on his daughter.

[1] 1892, 19 R. 997.

[2] 1896, 24 R. 148. See a similar case in England—*Powell* v. *Lee*, 1908, 24 T.L.R. 606.

[3] Cases in following notes, and *Reoch* v. *Young*, 1712, M. 9439; *Ker* v. *Ker*, 1751, M. 9442; *Gibson-Craig* v. *Aitken*, 1848, 10 D. 576; *Fair* v. *Hunter*, 1861, 24 D. 1; *Henderson* v. *Dawson*, 1895, 22 R. 895. Contrast *Gordon* v. *Cunningham*, 1740, M. 9425.

[4] *Richardson* v. *Richardson*, 1848, 10 D. 872. See opinion of Lord Moncrieff.

[5] *Balfour* v. *Balfour* [1919], 2 K.B. 571. See a similar case given as an illustration by Lord Sands, *Wick Harbour Trustees* v. *The Admiralty*, 1921, 2 S.L.T. 109.

[6] *Smeaton* v. *St Andrews Police Commissioners*, 1871, 9 M. (H.L.) 24; *Campbell* v. *Glasgow Police Commissioners*, 1895, 22 R. 621. Contrast *Burr* v. *Commissioners of Bo'ness*, *supra*.

[7] *Cochran* v. *Leckie's Trs.*, 1906, 8 F. 975.

[8] *Rigby* v. *Great Western Rly. Co.*, 1845, 14 M. & W. 811.

[9] *Maddison* v. *Alderson*, 1883, 8 App. Cas. 467; *Gray* v. *Johnston*, 1928, S.C. 659. See opinion of Lord Hunter.

[10] 1833, 12 S. 19.

No actual deed of settlement was executed, and, in a question raised after *A.'s* death, it was held that his letter was merely an expression of an intention. But in *Shaw* v. *Muir's Exrx.*,[1] already referred to, it was held, on an amendment of the pursuer's averments, to the effect that the party deceased had not only marked in his own books that he had given a share of his profits to the pursuers, but also intimated the fact to their guardian, that there was a relevant averment of a contract to give which could be enforced against his executry.

The following cases supply illustrations of ambiguous expressions read as mere indications of existing intention, without obligatory force. Thus, a promise to give *A.* "the first and last offer" of the lease of a farm was construed as a mere promise to consider any offer *A.* might make, not as an undertaking to let the farm to him at the rent offered by the highest offerers.[2] A letter referring to an overdue promissory note stated that "failing a settlement within two days, proceedings are to be adopted for the recovery of the amount due." The debtor unsuccessfully attempted to read this letter as an undertaking to refrain from diligence for two days. "A mere expression of intention," said Lord Kinnear, "will not make a contract or infer an obligation."[3] Where the vendors of a business to a company, in a prospectus asking for application for preference shares, stated that they "had agreed to subscribe" for a certain number of ordinary shares, it was held that the statement did not amount to an agreement to become members of the company, so as to make the vendors liable as contributories in the liquidation.[4] Where the shareholder of a company, in answer to a circular stating that in a certain event it was proposed to issue new shares, returned a schedule expressing his "willingness" to take fifty new shares, but did not reply to a letter of application which was sent to him when the shares were actually issued, it was held that his expression of willingness did not amount to an offer to take shares, and that therefore he was not bound when shares were allotted to him.[5] But it was observed that a letter in similar terms, had it referred to shares which were being actually issued, would have amounted to an application.[6] A statement by a company, on a share certificate, that a transfer will not be registered without the production of the share certificate, is merely a statement of intention—not an obligation upon which anyone interested may found.[7] And the advertisement of a proposed examination for a bursary is, it would appear, a mere expression of intention to hold the examination and appoint the person whom the examiners deem to be qualified; it does not amount to a contract with any candidate which will entitle him to declarator that,

[1] 1892, 19 R. 997, *ante*, p. 17. See also *M'Queen* v. *M'Tavish*, 3rd March 1812, F.C., a similar case.

[2] *Cooper* v. *Leslie*, 1825, 4 S. 33. But in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1901], 2 Ch. 37, an undertaking to give *A.* the "first refusal" of a particular subject was held to infer an obligation to offer it to *A.* at the price offered by some one else, which could not be evaded by offering it to *A.* at an impossible price; and see *Pickett* v. *Lindsay's Trs.*, 1905, 13 S.L.T. 440.

[3] *Mackersy* v. *Davis*, 1895, 22 R. 368.

[4] *Millen & Sommerville* (*Liquidator of*) v. *Millen*, 1910, S.C. 868, following *In re Moore*, [1899], 1 Ch. 627. The authority apparently adverse—*Carrie's Trs.* v. *Caledonian Heritable Security Co.*, 1880, 7 R. 479—was not cited. See also circumstantial cases as to proof of agreement to take shares—*Molleson & Grigor* v. *Fraser's Trs.*, 1881, 8 R. 630; *Goldie* v. *Torrance*, 1882, 10 R. 174.

[5] *Mason* v. *Benhar Coal Co.*, 1882, 9 R. 883.

[6] *Ibid.*, per Lord Shand, at p. 889.

[7] *Rainford* v. *Keith* [1905], 1 Ch. 296; 2 Ch. 147; *Guy* v. *Waterlow*, 1909, 25 T.L.R. 515.

under the prescribed conditions, he was entitled to the bursary.[1] An appeal for subscriptions for the erection of a building, on plans which are open to the inspection of intending subscribers, is not an agreement between the projectors and subscribers that the plans will be adhered to exactly, and hence when the building in question was a town hall, and the plans shewed two rooms appropriated to the town clerk, it was held that he had no title to object to these rooms being appropriated to other purposes, because there was no contract under which he could maintain that a right had accrued to him.[2] The mere exhibition of a feuing plan, not referred to in a feu-charter, does not infer any obligation on the superior to lay out the subjects in accordance with the plan,[3] nor does it impose any restriction on the feuar.[4]

Actings on Expressions of Intention.—In certain cases it has been held that although a statement of intention did not amount to an offer or promise, yet if the party to whom it was made acted upon it, and incurred expense, the party who made it was bound to reimburse him.[5] Most of the cases referred to have turned on averments of some actual and completed agreement, which, apart from difficulties resulting from the laws of evidence, would clearly have been obligatory,[6] others admit of the explanation that they were decided on the ground that the defender had been enriched at the pursuer's expense. It is not easy to see any legal principle on which liability can be imposed when nothing is averred beyond an expression of intention, and the cases in question, in so far as not depending on specialities, were disapproved in a more recent decision, where it was held that so long as parties were in the stage of negotiation for a contract, and no offer or promise had been made, either might break off the negotiations without incurring any liability for the expenses which the other might have incurred, unless his conduct in the matter amounted to a wrong.[7] So where *A.* and *B.* were negotiating with respect to a loan which *A.* was to advance on the security of heritable subjects belonging to *B.*, and *B.*, at a late stage in the negotiations but before any actual agreement, withdrew from the bargain, it was held that *A.* could not recover from *B.* either his law agent's account for investigating the title and conducting the negotiations, or loss of interest on money which he kept on deposit-receipt with a view to advancing it to *B.*[8] When *A.* sued *B.*'s executor on the averment that he had been led into expense in the expectation of a will in his favour, his averments,

[1] *Ramsay* v. *United College of St Andrews*, 1860, 22 D. 1328; affd. 1861, 23 D. (H.L.) 8; *Martin* v. *Macdougall's Trs.*, 1883, 13 R. 274; *M'Donald* v. *M'Coll*, 1890, 17 R. 951; *Rooke* v. *Dawson* [1895], 1 Ch. 480. These cases seem to have turned on the consideration that the patrons of the bursary had a discretion to award or withhold it; when the trust deed was construed as giving no such discretion, and a candidate who was not qualified was elected, the candidate next in order of merit was found entitled to reduce the award, and the patrons were ordained to pay the bursary to him. *M'Quaker* v. *Governors of Ballantrae Educational Trust*, 1891, 18 R. 521.

[2] *Downie* v. *Magistrates of Annan*, 1879, 6 R. 457.

[3] *Heriot's Hospital* v. *Gibson*, 1814, 2 Dow 301.

[4] *Gordon* v. *Marjoribanks*, 1818, 6 Dow 87.

[5] *Walker* v. *Milne*, 1823, 2 S. 379; *Bell* v. *Bell*, 1841, 3 D. 1201; *Dobie* v. *Lauder's Trs.*, 1873, 11 M. 749; *Hamilton* v. *Lochrane*, 1899, 1 F. 478. See opinion of Lord Deas in *Allan* v. *Gilchrist*, 1875, 2 R. 587.

[6] See *infra*, p. 176.

[7] *Gilchrist* v. *Whyte*, 1907, S.C. 984. The wrong would consist in falsely inducing the belief that he intended to contract, whereas in fact he had no such intention. See opinion of Lord Ardwall. It is hard to reconcile this with the decision in *Dobie* v. *Lauder's Trs.*, 1873, 11 M. 749; still harder to understand the distinction taken there between an "arrangement" agreed to by both parties and a contract.

[8] *Gilchrist* v. *Whyte*, 1907, S.C. 984.

construed as assertions of *B.'s* expressions of intention, and not of any definite promise, were held to be irrelevant.[1]

Qualified Promises to Pay.– When a man agrees to make a payment when he is able to do so, or when his circumstances improve, or in other similar terms, this may or may not form a binding obligation, according to the nature of the case. Expressions used by a party who has compounded with his creditors with reference to the balance remaining unpaid, when no definite obligatory document, such as a bill or promissory note,[2] is in question, amount to no more than an honourable understanding, to which no legal effect can be given.[3] So where a party, making a composition with his creditors, undertook to "pay up the deficiency as soon as I am able to do so," he had incurred no liability.[4] Expressions of willingness to pay debts due by relatives have been more readily construed as involving an enforceable obligation. So where *A.* was asked to meet a loss which the conduct of his son had caused to *B.*, and, after a long correspondence, acknowledged a letter sending an account, and offering an abatement, by a statement that he would be happy to pay as soon as he had it in his power, it was held that *B.* had a claim which he might enforce against *A.'s* executry.[5] A written acknowledgment of the receipt of money, with a promise to repay when the writer's circumstances improve, is sufficient proof of a loan, and will negative any presumption of donation which the circumstances may raise.[6] So where on a reference to oath of a prescribed debt an answer admitting liability to pay when able to do so is given the debt is established.[7] The same rule applies to an obligation in a marriage contract to provide funds when the applicant is able to do so.[8] Such obligations, however, conditional on the ability of the obligant to pay, though they are binding on the obligant and on his estate, cannot be ranked for in his bankruptcy.[9] They form an intermediate class between full obligations and mere expressions of intention. And probably no action can be taken to enforce them without proof or admission that the debtor's circumstances have in fact improved.[10]

If a party undertaking to pay expressly reserves an absolute discretion as to the time and method of payment, his debt, while it could probably be ranked for in his bankruptcy, cannot be enforced during his solvency without regard to the qualification. When *A.* undertook to pay at such time as he should find it convenient, with an unconditional obligation to pay interest, it was held that payment of the principal sum was absolutely in his discretion, in the absence of any averments that he was *cerjens ad inopiam*,

[1] *Gray* v. *Johnston*, 1928, S.C. 659.

[2] *Clark* v. *Clark*, 1869, 7 M. 335.

[3] *Dig.*, xlv. 1, 16; *Scott* v. *Dawson*, 1862, 24 D. 440; *Ritchie* v. *Cowan & Kinghorn*, 1901, 3 F. 1071; *Ramsden* v. *Dyson*, 1865, L.R. 1 H.L. 129, opinion of Lord Cranworth, at pp. 145-6.

[4] *Ritchie* v. *Cowan & Kinghorn*, *supra*.

[5] *Fair* v. *Hunter*, 1861, 24 D. 1, as explained by Lord President Dunedin in *Mackinnon's Trs.* v. *Dunlop*, 1913, S.C. 232. See also *Edmondstone* v. *Hamilton*, 1842, 5 D. 414 (letter by son as obligation to pay debt of deceased father).

[6] *Dig.*, xix. 2, 4; Voet, xix. 1, 17; *Forbes* v. *Forbes*, 1869, 8 M. 85; *Christie's Trs.* v. *Muirhead*, 1870, 8 M. 461; *Waters* v. *Earl of Thanet*, 1842, 2 Q.B. 757.

[7] *Hamilton's Exrs.* v. *Struthers*, 1858, 21 D. 51; *Broatch* v. *Dodds*, 1892, 19 R. 855. See English cases on the effect of a qualified admission of a statute-barred debt in Leake, *Contracts*, 7th ed., p. 740.

[8] *Mackinnon's Trs.* v. *Dunlop*, 1913, S.C. 232.

[9] *Mackinnon's Trs.*, *supra*, explaining *Fair* v. *Hunter*, 1861, 24 D. 1.

[10] *Hutchison* v. *Hutchison*, 1914, 1 S.L.T. 225; *Balfour-Melville's Factor* v. *Balfour-Melville*, 1901, 8 S.L.T. 454; *Shaw* v. *Kay*, 1904, 12 S.L.T. 262.

fraudulently refusing to pay, or failing to pay the interest.[1] Debentures issued by a club, expressed to be repayable at such times as the committee might determine, were construed exactly according to their terms, and therefore as precluding any action when it was not averred that the committee had decided to repay.[2]

In the converse case, where payment is left to the pleasure or discretion of the other party, the English authorities indicate that while if *A.* undertakes work for anything which *B.* may think fit to pay, he cannot complain if *B.* pays him nothing,[3] yet if *A.* gives up a claim which has already accrued, on a promise that his case will be fairly and honourably met, he may insist on a payment reasonable in the circumstances.[4]

Legal Effect of Business Acts. —Some difficult questions, not altogether met by the decisions, may arise in determining the legal effect of proposals to trade or do business. For instance, does a letter quoting prices amount to an offer to sell, or merely indicate a willingness to receive offers and a general intention to accept them? What is the legal effect of a shopkeeper setting out goods in his window, with or without prices? How far does a carrier, advertising a conveyance at a particular time, offer a contract to anyone who comes forward and complies with the advertised conditions?

These and analogous questions do not admit of any general answer; much must depend on the circumstances of the particular case. But certain cases of common occurrence have come before the Courts, and the decisions arrived at are practically authoritative in all cases where the circumstances are not exceptional.

Quotations of Prices. —A letter from one firm of merchants to another, stating that the writers were sellers of a particular commodity in which both dealt, and quoting prices, was held to amount to an offer to sell, and, when accepted, to a concluded contract.[5] The decision probably rules all similar cases relating to commodities which can be bought in the open market, and of which the supply is practically unlimited. But when a particular estate was concerned, and the owner, in answer to a telegram asking if he was willing to sell and what was his lowest price, replied stating his lowest price, but without expressing his readiness to sell, it was held that he had made no offer.[6] And it is obvious that a price list of articles which are limited in number, *e.g.*, the circular of a second-hand bookseller, cannot amount to a definite offer to sell, made to each party to whom the circular is sent. A price list for articles not so clearly limited in number may admit of more doubt. Lord Herschell expressed the opinion that it is a mere statement of revocable intention.[7] In an Irish case it was held that where a quotation of prices was sent in response to a request it did not amount to an offer.[8] But where a sack merchant issued orders for sacks, blank as to the number, the First Division seemed prepared to hold that he had bound himself to execute all the orders he received.[9]

Carrier's List of Fares.—A party, such as a carrier, who is bound to exercise his vocation on demand, is bound by a list of prices or fares which he has issued or advertised. So where gabbartmen (*i.e.*, owners of small cargo boats plying on the Clyde) issued a list of fares, it was held that they

[1] *Stark's Trs.* v. *Mitchell*, 1923, S.L.T. 326. (O.H. Lord Morison.)
[2] *Wylie* v. *Carlyon* [1922], 1 Ch. 51.
[3] *Roberts* v. *Smith*, 1859, 4 H. & N. 315.
[4] *Broome* v. *Speak* [1903], 1 Ch. 586.
[5] *Philp* v. *Knoblauch*, 1907, S.C. 994.
[6] *Harvey* v. *Facey* [1893], A.C. 552.
[7] *Grainger* v. *Gough* [1896], A.C. 325, 334.
[8] *Boyers* v. *Duke* [1905], 2 Ir. R. 617.
[9] *Chisholm* v. *Robertson*, 1883, 10 R. 760. The decision related to triennial prescription.

were bound to accept goods tendered for carriage at the rates they had fixed.[1] In this case it was stated in argument as too clear for doubt that a shopkeeper, by affixing prices to his goods, only intimated his intention to sell them at that price, and did not make any offer to sell which could be converted into an obligatory contract by acceptance. When a tradesman or carrier intimates that a reduced price or fare will be accepted for a definite period, he at the most makes an offer, valid if accepted before it is withdrawn; he does not make a promise which anyone can insist upon after notice that it is withdrawn.[2]

Offers to the Public.—A person offering a reward for the recovery of lost property or for the discovery of the perpetrator of a crime makes an offer, which is impliedly accepted by anyone who, in the knowledge of the offer, restores the property or reveals the perpetrator.[3] And offers of general advantage to the public, or to such of them as choose to comply with prescribed conditions, are more than mere statements of intention. They are offers, and the party who makes them is liable to anyone who fulfils the conditions.[4] "When a general offer addressed to the public is appropriated to himself by a distinct acceptance by one person, then it is to be read in exactly the same way as if it had been addressed to that individual originally."[5] Thus in *Carlill* v. *Carbolic Smoke-Ball Co.*,[1] the proprietors of a remedy known as a carbolic smoke-ball advertised that they would give £100 to anyone who used the smoke-ball according to the directions and yet caught the influenza. They stated that they had deposited £1,000 in bank as a guarantee of the good faith of their offer. It was held that a person who was able to prove that he had used the smoke-ball according to the directions, and had caught the influenza, was entitled to recover the hundred pounds offered. The advertisement was not a mere puff, or statement of intention, but an offer, and the person who did the act called for accepted the offer and completed the contract. In two cases relating to accident insurance coupons inserted in newspapers or diaries, Lord Young expressed the opinion that these did not constitute any obligation.[6] It was not necessary to decide the point, and the other judges expressed no opinion on it. In a later case, where an offer of insurance on advantageous terms was inserted in a diary, the Court had no difficulty in holding that a party who complied with the specified conditions had accepted an offer, and completed a contract.[7]

Advertisements of Sale by Auction.—The advertisement of a sale by auction merely amounts to an indication of intention to sell. A person

[1] *Campbell* v. *Ker*, 24th February 1810, F.C. As to the obligations of an innkeeper see *Rothfield* v. *North British Rly.*, 1920, S.C. 805.

[2] *Paterson* v. *Highland Rly.*, 1927, S.C. (H.L.) 32.

[3] *Petrie* v. *Earl of Airlie*, 1834, 13 S. 68; *Williams* v. *Carwardine*, 1833, 4 B. & Ad. 621; *England* v. *Davidson*, 1840, 11 A. & E. 856; *Turner* v. *Walker*, 1867, L.R. 2 Q.B. 301; *Bent* v. *Wakefield Bank*, 1878, 4 C.P.D. 1.

[4] *Carlill* v. *Carbolic Smoke-Ball Co.* [1893], 1 Q.B. 256. This case was considered in *Paterson* v. *Highland Rly.* (1927, S.C. (H.L.) 32), and held not to apply to an offer by railway companies of reduced rates for the carriage of timber. In Carlill the advertisement asked for something to be done which would complete the contract; in Paterson the railway companies did not impliedly ask timber merchants to increase their commitments in reliance on the reduced rates. They made an offer which was not accepted until timber was actually tendered for carriage, and until then were entitled to withdraw their offer, in spite of a statement that it would hold good for a definite period. Lord Shaw dissented on this point.

[5] Per Lord Kinnear in *Hunter* v. *General Accident Insurance Corporation, infra*, 1909, S.C. 344, at p. 353.

[6] *Law* v. *Newnes*, 1894, 21 R. 1027; *Hunter* v. *Hunter*, 1904, 7 F. 136.

[7] *Hunter* v. *General Accident, etc., Corporation*, 1909, S.C 344; affd. 1909, S.C. (H.L.) 30.

attending the sale comes to make an offer by bidding, not to accept one, and has no remedy if the sale does not take place, or if a particular article is withdrawn after the bidding has commenced.[1] On English authority an article which has been put up for sale cannot be withdrawn if the conditions state that the sale is without reserve.[2]

Request for Tenders.—A request for tenders for work has been described as a proclamation that the person who makes it is ready to chaffer, and not as an offer. The person sending in the lowest or the only tender has no right to insist on his tender being accepted, unless there is a special provision to that effect[3].

When tenders for the supply of goods are asked for, and one is accepted, a contract is completed. The party who accepted the tender is not impliedly bound to order any goods,[4] but has so far bound himself that if he wants goods of the particular description he must take them from the tenderer.[5] In a system of law where consideration is not necessary to a contractual obligation there can be no doubt that the tenderer, when his tender is accepted, is bound to supply the goods.[6]

Statements in Time-tables.—The legal effect of advertisements by a carrier was considered in *Denton* v. *Great Northern Rly. Co.*[7] The railway company, in their published time-tables, advertised a particular train from Peterborough to Hull. The train was, in fact, withdrawn, but no notice of its withdrawal was given. Denton applied for a ticket, which was refused. In consequence he missed an appointment, and sustained loss, for which the company were held liable. The members of the Court (Queen's Bench) were unanimous in holding that the railway company, by continuing to issue the time-table in the knowledge that the train had ceased to run, had made a false representation, and were therefore liable to Denton, who had acted upon it. In other words, they held that the company were liable in damages for a wrong. Campbell, C. J., and Wightman, J., also held that the time-table was an offer of a contract to anyone who chose to ask for the ticket and tender the fare, and therefore that the liability of the company might also be rested on breach of contract. Crompton, J., expressed doubts as to the soundness of this ground of judgment, but his doubts related to the question whether there was any consideration for the contract—a question irrelevant in Scots law. It was remarked that the same rule would apply to the case of a shipping company advertising particular sailings.

Letters of Credit.—A letter of credit is not merely a contract between the bank and the party to whom it is issued, but an offer by the bank to anyone who may take a cheque or bill under it, and therefore the bank cannot refuse acceptance of a bill drawn under the letter of credit, on the plea

[1] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sec. 58; *Fenwick* v. *Macdonald, Fraser & Co.*, 1904, 6 F. 850.

[2] *Warlow* v. *Harrison*, 1859; 1 EE. 295, as explained in *Harris* v. *Nickerson*, 1873, L.R. 8 Q.B. 286.

[3] *Spencer* v. *Harding*, 1870, L.R. 5 C.P. 561.

[4] *Regina* v. *Demers* [1909], A.C. 103; *Burton* v. *Great Northern Rly. Co.*, 1851, 9 Ex. 507.

[5] *Ford* v. *Newth* [1901], 1 Q.B. 683.

[6] *Great Northern Rly. Co.* v. *Witham*, 1873, L.R. 9 C.P. 16. The difficulty there considered was whether there was any consideration for the promise to supply goods, if the other party was not bound to order them unless he liked.

[7] 1856, 5 E. & B. 860. The decision and *dicta* are questioned by Sir F. Pollock, *Contract*, 9th ed., p. 17, but, in so far as the case turned on contract, it is submitted that the offer made by the railway company is on all-fours with the offer made by the insurance company in *Hunter* v. *General Accident, etc., Corporation*, 1909, S.C. (H.L.) 30, *supra*, p. 22.

that the party to whom the letter was issued is otherwise indebted to them.[1]

Slip in Marine Insurance. In insurance law an "open cover"—*i.e.*, a contract between the insurance company and the owner of a ship undertaking to issue a policy on cargo when shipped—gives the party who may ship the cargo a right to have a policy issued.[2] A slip—*i.e.*, a memorandum of terms prepared by an insurance broker and initialled by the underwriter—is, apart from statute, a completed contract of insurance, and therefore, in fire assurance, will entitle the insured to recover for a loss though no policy has been issued.[3] But by sec. 22 of the Marine Insurance Act, 1906[4] (repeating earlier legislation), a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with the Act, and therefore no direct claim can be founded on the slip, nor can it be read as a contract to issue a policy, for breach of which damages might be claimed.[5]

Proposals for Insurance.—Proposals for insurance are usually accepted subject to the condition that no insurance is effected till the first premium is paid. It has been held in England, in a case of life insurance, that acceptance of the proposal on this condition entitled the company to refuse the premium and decline to issue a policy in a case where the health of the insured had materially altered in the interval between the acceptance of the proposal and the tender of the premium.[6] The judges were inclined to hold, though it was not necessary to decide, that there was no contract, but only an intention to contract, until the premium was paid, and therefore that the insurance company might have broken off the transaction even although there had been no change of circumstances. In Scotland the same rule has been applied to a case of accident insurance.[7] A company agreed to issue a policy from the 24th November inclusive, with the condition that there was no assurance until the premium was paid. On 24th November an accident occurred. The premium had not been paid. The Lord Ordinary held that the company was bound to issue a policy on the tender of the premium, but that their liability attached only to accidents occurring after the premium was paid. The Inner House arrived at the same result, but went further. Relying on *Canning* v. *Farquhar*,[8] they held that after an accident had occurred the company was entitled to refuse to issue the policy as from the 24th November inclusive. As there was no agreement for a policy commencing from any other date, it would seem to follow that the company was not bound to issue a policy at all.

Promise and Offer. Where a party's words or acts are construed as amounting to something more than a mere statement of his intention, and as involving an indication on his part of willingness to be bound, they may amount either to a promise or to an offer. Both, in order to amount to a

[1] *Ex parte Asiatic Banking Corporation*, 1867, L.R. 2 Ch. 391.

[2] *Bhugwandass* v. *Netherlands, etc., Insurance Co.*, 1888, 14 A.C. 83.

[3] *Thompson* v. *Adams*, 1889, 23 Q.B.D. 361.

[4] 6 Edw. VII. c. 41. But a slip may be given in evidence to shew that the contract has been concluded, where the question is whether a misrepresentation has been made by the insured before or after the contract was concluded, or whether facts which he has not revealed were known to him before the contract was concluded (sec. 21).

[5] *Fisher* v. *Liverpool Marine Insurance Co.*, 1874, L.R. 9 Q.B. 418; *Clyde Marine Insurance Co.* v. *Renwick*, 1924, S.C. 113.

[6] *Canning* v. *Farquhar*, 1886, 16 Q.B.D. 727.

[7] *Sickness and Accident Assurance Association* v. *General Accident Assurance Corporation*, 1892, 19 R. 977.

[8] *Canning* v. *Farquhar*, 1886, 16 Q.B.D. 727.

contract, require acceptance by the party to whom they are directed. No one can be forced to accept a gift. But where a promise is made its acceptance is sufficiently indicated by a demand for fulfilment; in the case of an offer the contract must be clinched by words or acts indicating acceptance. Again, a promise is irrevocable, unless refused, subject probably to the condition that fulfilment is demanded within a reasonable time; an offer may be revoked at any time before acceptance. A promise, it may be said, creates an obligation subject to a resolutive condition; it is binding until it is refused: an offer, an obligation subject to a suspensive condition; it is not binding until it is accepted.[1]

It must always be a question of construction whether an offer or a promise has been made. There are no technical words conclusively indicative of one or the other.[2] A promise need not be gratuitous; a man may bind himself to accept a contract if offered, and does so if he makes an offer to contract and undertakes to keep the offer open for a definite time—an offer combined with a promise.[3] On the other hand, an indication of willingness to give may be so expressed as to amount to a mere offer, requiring acceptance to make it binding.[4] But while every case must present an independent question of construction, it is conceived that a proposal to give will usually be read as a promise, a proposal to enter into business relations merely as an offer.[5]

Irrevocable Offer.—If what is in terms an offer is stated to be irrevocable it amounts to a promise, which does not require express acceptance, and which the offerer is not entitled to withdraw. Thus while an application for shares in a company is a mere offer, which may be withdrawn at any time before a notice of allotment is dispatched,[6] where a sub-underwriter signed and sent to the underwriter a letter agreeing to subscribe for a certain number of shares in a proposed company, with a clause in the letter "this contract shall be irrevocable on my part," it was held, when shares were allotted to him, that he could not refuse to pay calls either on the ground that his letter was an offer requiring express acceptance, or on the ground that he had intimated his withdrawal.[7]

Is Promise Accepted if Not Refused?—There would seem to be no direct authority on the question whether a party to whom a promise has been made can be held to have accepted merely because he fails to intimate his refusal within a reasonable time.[8] The subject of a gift may be dangerous or burdensome; for example, shares in a company involving liability. Does a donee incur liability to take over the shares if he does not refuse them? A certain analogy, which would suggest an answer in the affirmative, is presented by cases where goods have been sent by mistake. It has been held that the recipient is liable to pay for them if he fails to intimate rejection,[9] or even, in a very special case, where he intimated rejection but failed to take any steps to return the goods.[10]

[1] Stair, i. 10, 3; Ersk. iii. 3, 88; Bell's *Prin.*, 9; *Ferguson* v. *Paterson*, 1748, M. 8440.
[2] See *Macfarlane* v. *Johnston*, 1864, 2 M. 1210.
[3] See *infra*, p. 35.
[4] *E.g.*, *Morton's Trs.* v. *Aged Christian Friend Society*, 1899, 2 F. 82.
[5] *J. M. Smith Ltd.* v. *Colquhoun's Tr.*, 1901, 3 F. 981; *Malcolm* v. *Campbell*, 1891, 19 R. 278.
[6] Buckley, *Companies Acts*, 10th ed., p. 56; *Chapman* v. *Sulphite Pulp Co.*, 1892, 19 R. 837.
[7] *Premier Briquette Co.* v. *Gray*, 1922, S.C. 329; *In re Hannan's Empress Gold Mining Co., Carmichael's Case* [1896], 2 Ch. 643; *Olympic Re Insurance Co., Pope's Case* [1920], 2 Ch. 341.
[8] See *In re Empress Assurance Corporation, Somerville's Case*, 1870, L.R. 6 Ch. 266.
[9] *Sharrat* v. *Turnbull*, 1827, 5 S. 361.
[10] *Webster* v. *Thomson*, 1830, 8 S. 528.

Promise or Offer Made to Third Party.—As a general rule a promise or offer, in order to result in a contract, must be made to the other contracting party, or to an agent for him. The case of offers to the general public has been already considered.[1] An expression of willingness to be bound to *B.*, made not to him, or to his agent, but to a third party, would not amount to a promise or offer to *B.* Even if it amounted to a contract with the third party it would not be a contract with *B.*, though in certain circumstances, discussed in a later chapter, *B.* might have a *jus quæsitum* under it, which would entitle him to enforce performance.[2] So where the articles of roup at a sale by auction provided that, in a certain event, the right of the highest bidder should lapse and the second bidder should be preferred, it was held that the articles of roup formed a contract between the exposer and each bidder, not between the bidders themselves, and therefore that the second had no right to enforce the irritancy.[3] But in England it has been held that where the competitors in a yacht race each agreed with the race committee to be bound by the rules, and one of the rules was that the owner of a yacht which fouled another should pay all damage, the competitors had entered into contractual relations with each other, and therefore that the owner of the injured yacht might claim the whole damage, and was not affected by the limits of liability imposed by the Merchant Shipping Acts in cases of collision due to negligent navigation.[4]

Acceptance : by Word or Act.—An offer requires acceptance, communicated in some way to the offerer. What amounts to acceptance depends on the nature of the offer. It may be an offer to pay for work if done, or for goods if supplied, or for some particular benefit if conferred. Or it may be an offer to do work, supply goods, or perform services. In the former case the offer calls for an act, in the latter for a promise. Where the offer calls for an act, express acceptance is not required. Thus, if goods ordered are supplied, the act of supplying them amounts to acceptance of the offer to pay for them implied in the order.[5] In *Wilson* v. *Walker*[6] *A.* offered to take from *B.* a certain number of shares in a company. *B.* tendered the shares, which were refused. It was held that the offer, followed by the tender of the shares, completed the contract without the necessity of any express acceptance, and that *B.* was entitled to the ordinary remedies open to a seller when delivery has been tendered and refused. In *Kinninmont* v. *Paxton*[7] the pursuer made a written offer to purchase certain fittings and to take over the remainder of a lease. This could not be done without the consent of the landlord; and the defender wrote to him a letter, which he gave to the pursuer to deliver, asking him to arrange a new lease in the pursuer's favour. The defender afterwards refused to carry out

[1] *Ante*, p. 22. [2] *Infra*, Chap. XIII.

[3] *Walker* v. *Gavin*, 1787, M. 14193. The second bidder had no *jus quæsitum*, because the conditions of the articles were intended for the benefit of the exposers, not of the other bidders.

[4] *Clarke* v. *Dunraven* [1895], P. 248; [1897], A.C. 59. The principle was that each competitor had impliedly constituted the committee his agent to contract with other competitors. In Scotland the same result might be arrived at on the principle of *jus quæsitum tertio* (*infra*, Chap. XIII.), as the rule in question was obviously imposed for the benefit of the other competitors, not of the committee. In *Mitchell* v. *Scott's Trs.* (1874, 2 R. 162) doubts were expressed as to whether it was competent for *A.* and *B.* to delegate to *C.* the power to make a contract for them, but it is submitted that there is no reason why they should not.

[5] Bell, *Com.*, i. 343: "If a man writes, 'Send me such and such goods and I will pay for them,' is not the sending of the goods, without more, an acceptance of the offer?" (per Cresswell, J., in *Harvey* v. *Johnston*, 1848, 6 C.B. 295, at p. 304).

[6] 1856, 18 D. 673. [7] 1892, 20 R. 128.

the transaction, and maintained that no contract had been completed because he had not given any express acceptance to the pursuer's offer. It was held that no express acceptance was required, that the defender's assent was sufficiently indicated by his letter to the landlord asking him to further the contract.

Order in Trade.—An order in trade constitutes an offer,[1] though when by the general law the trader is bound to exercise his vocation, as in the case of a carrier, it may be considered as an acceptance.[2] In other cases the person to whom the order is sent is free to accept it or not, as he pleases. The statement in Bell's *Commentaries* (i. 344) that a trader is bound to refuse an order if he does not mean to comply with it is not in any way borne out by the case cited for it by the editor,[3] but, if it stands in need of any authority, is sufficiently vouched by other cases.[4] When goods are ordered at market prices they are to be paid for at the price ruling when the order was received, not at that ruling when the goods are sent off.[5]

Cases where Express Acceptance Necessary.—When the offer consists of a proposal to supply goods, perform services, or undertake a cautionary obligation, it generally calls for express acceptance. Thus a tender for work is an offer which requires acceptance, and falls if it is not accepted within a reasonable time.[6] But the question is really one of the intention of the party making the offer. Did he ask for an express acceptance of his offer?[7] Many of the cases have related to cautionary obligations. An obligation to guarantee a particular debt may be a promise, and in that case does not require express acceptance. Such will, as a rule, be the construction when the document founded on is given to the debtor. So a letter of credit renders the bank liable on any bills that may be drawn under it.[8] And when *A.* places in *B.'s* hands a written undertaking to be liable for goods that may be furnished to *B.*, he is liable although the person furnishing the goods does not expressly intimate his acceptance of the guarantee.[9] When a letter, not addressed to anyone, and construed as a guarantee of *A.'s* financial standing, was placed in *A.'s* hands, the writer was found liable to a party who, in reliance on it, had given credit to *A.*[10] When the proposal to undertake cautionary liability is addressed to the creditor, or to one who is contemplating making advances or supplying goods, it would appear to be a question of construction, in each case, whether a guarantee is undertaken or whether the creditor must indicate his acceptance before acting in reliance on it.[11] So an undertaking to underwrite

[1] In Bell's *Prin.* (sec. 80) it is stated that an order in trade is a mandate, and to be distinguished from an offer. But the distinction seems merely verbal. See *Barry, Ostlere & Shepherd* v. *Edinburgh Cork Importing Co.*, 1909, S.C. 1113.

[2] *Ante*, p. 21.

[3] *Van Oppen* v. *Arbuckle*, 1855, 18 D. 113.

[4] *Serruys & Co.* v. *Watt*, 12th February 1817, F.C.; *Hunter* v. *Levy & Co.*, 1825, 3 S. 605; *Sutton* v. *Ciceri*, 1890, 17 R. (H.L.) 40.

[5] Bell's *Prin.*, 92; *Champion* v. *Milne*, 14th June 1811, F.C.

[6] *Wylie & Lochhead* v. *M'Elroy*, 1873, 1 R. 41.

[7] See opinion of Bowen, L.J., *Carlill* v. *Carbolic Smoke-Ball Co.* [1893], 1 Q.B. 256, 269.

[8] *Ex parte Asiatic Banking Corporation*, 1867, L.R. 2 Ch. 391.

[9] *Ewing* v. *Wright*, 2nd June 1808, F.C.; *Grant* v. *Campbell*, 1818, 6 Dow, 239; *Watt* v. *National Bank*, 1839, 1 D. 827. So a bill signed in blank may be filled up to any amount which the stamp will cover without notice to the party who signed it (Bills of Exchange Act, 1882, sec. 20; *Anderson* v. *Somerville*, 1898, 1 F. 90).

[10] *Fortune* v. *Young*, 1918, S.C. 1.

[11] In *Tweedie* v. *Macintyre*, 1823, 2 Sh. 361; *Thomson* v. *Dadgeon*, 1851, 13 D. 1029; 1 Macq. 714; *Veitch* v. *Murray*, 1864, 2 M. 1098; *Wallace* v. *Gibson*, 1895, 22 R. (H.L.) 56, it was held that the contract was complete without acceptance. In *Allan* v. *Colzier*, 1664,

shares may or may not require express acceptance, according to its terms.[1]

Where the directors of a company discovered that the prospectus on which shares had been applied for and allotted contained material misrepresentations, and sent a circular to the allottees stating that they proposed to obtain the authority of the Court to cancel the allotments, it was held that this was an offer requiring express acceptance, since the allottees had the right, if they chose, to retain their shares, and therefore that those who had expressly accepted it were entitled to have their names removed from the register, in the liquidation of the company, whereas those who had taken no notice of the circular were liable as contributories.[2]

Mental Assent.—Where an offer requires acceptance, mere mental assent is not sufficient; there must be a communication to the other party.[3] So the mere allotment of shares applied for, not brought to the knowledge of the applicant, does not bar revocation of the application[4]; though, as there is no rule that a written offer requires a written acceptance, it is not necessary, in order to complete a contract to take shares, that an allotment letter should be sent; it is sufficient that the application has been accepted verbally, or that the fact of acceptance has in some way been brought to the notice of the applicant.[5] But there may be circumstances in which it will be held, from the relations of the parties, that failure to refuse an offer amounts to acceptance. This, as already stated, is the rule in orders in trade.[6] Where there has been no previous course of dealing, a man is generally safe in ignoring an offer which he has not invited. In *Wylie & Lochhead* v. *M'Elroy*,[7] *A.* tendered for the execution of ironwork on *B.'s* premises. *B.*, five weeks afterwards, wrote accepting the tender, but proposing a new condition. *A.* took no notice of the letter. He was called upon to supply the ironwork, and refused. It was held that *B.'s* letter of acceptance was in effect a new offer by him (in respect that it was not an acceptance within a reasonable time, and that it proposed a new condition), and that *A.* incurred no liability by failure to take any notice of it. A man cannot generally force a contract on another by stating that he will hold his offer as accepted if it is not refused within a specified time. So if goods are sent without an order, and without a previous course of dealing, no such statement can compel the party to whom they are sent to accept them.[8] When there was a dispute as to the quality of two casks of oil which had been sold, and the buyer wrote proposing to accept one and return the other, adding that he would consider that his proposal was accepted if he did not hear to the contrary by the following Monday, it was decided that the seller was not bound by the proposed compromise merely because he had failed to answer the letter.[9] But if a

M. 9428 (where the offer asked for a reply); *Thomson* v. *Marquis of Breadalbane*, 1854, 16 D. 943, it was held that express acceptance was required.

[1] *Ex parte Stark* [1897], 1 Ch. 575; *Premier Briquette Co.* v. *Gray*, 1922, S.C. 329, narrated *supra*, p. 25.

[2] *Edinburgh Employers', etc., Assurance Co.* (*Liquidators of*) v. *Griffiths*, 1892, 19 R. 550.

[3] *Brogden* v. *Metropolitan Rly.*, 1877, 2 App. Cas. 666, per Lord Blackburn.

[4] *Hebb's case*, 1867, L.R. 4 Eq. 9; Buckley, *Companies Acts*, 10th ed., 57.

[5] *Chapman* v. *Sulphite Pulp Co.*, 1892, 19 R. 837; *Nelson* v. *Fraser*, 1906, 14 S.L.T. 513.

[6] *Ante*, p. 25.

[7] 1873, 1 R. 41.

[8] *Jaffrey* v. *Boag*, 1824, 3 S. 375. See *Thew* v. *Sinclair*, 1881, 8 R. 467. Where a party to whom goods were sent by mistake took them for the convenience of the sender, but afterwards interposed obstacles to their recovery, he was held liable for the price (*Webster* v. *Thomson*, 1830, 8 S. 528. See also *Pride* v. *Saint Anne's Bleaching Co.*, 1838, 16 S. 1376).

[9] *Jaffrey* v. *Boag*, *supra*.

man states that he will hold his offer accepted if it is not refused, he has clearly waived any right to an express acceptance, and therefore mental assent without any actual communication will complete the contract.[1]

Where there have been prolonged negotiations between the parties, or a previous course of dealing, it will readily be inferred that silence in the face of a definite offer, or an evasive answer,[2] amounts to acceptance. So where in a sale of land a difficulty had arisen regarding the title, and the seller wrote that the buyer must take the title as it stood or declare off, and the buyer did not reply for three years, when he brought an action for implement, the Court, without deciding whether the original bargain was binding or not, held that the buyer must be taken to have assented to its rescission.[3] Where, as the result of negotiations for the sale of goods which have not reached a binding agreement, the intending buyer intimates definitely the terms on which he is prepared to buy, or, conversely, the seller dispatches the goods and indicates that he has done so on certain terms, the seller in the former case if he sends the goods, the buyer in the latter if he does not reject them, will be held to have acquiesced in the terms proposed by the other party.[4] Where parties are already in contractual relations, such as those of master and servant or landlord and tenant, and one party proposes a renewal of the contract on altered terms, the other will be held to have assented to these terms if, in fact, he continues the relationship.[5] If there is a custom of trade for manufacturers of a particular article to send their goods to retail dealers, such goods, if not rejected within a reasonable time, will be held as accepted.[6] In *Ballantine* v. *Stevenson*,[7] a somewhat special case, a tenant, already in possession under a sub-lease from the existing tenant, signed a new lease in his own favour. The landlord kept it for a year, and then intimated a refusal. It was held that the lease was binding. The decision went chiefly on the ground of *rei interventus* involved in continued possession and payment of an increased rent, but the Lord Justice-Clerk (Moncrieff) and Lord Young were of opinion that in such circumstances the mere delay in intimating refusal was equivalent to acceptance.

Acts Implying Acceptance. If a party acts in a way which he could not lawfully do unless he had accepted an offer, he may be held to have accepted even if in words he has refused. Thus when underwriters expressly refused a notice of abandonment of a ship as a constructive total loss, proceeded to arrange for salvage (which, under an express term in the policy, did not infer acceptance of abandonment), and suspended their salvage

[1] Bell's *Prin.*, sec. 76. The case of *Felthouse* v. *Bindley* (1862, 11 C.B.N.S. 869) seems to turn on the want of the written memorandum necessary (in English law) to complete a sale of moveables exceeding £10 in value, and seems hardly an authority for the proposition, for which it is cited in Anson on *Contract*, 13th ed., 28, that mental assent is not sufficient to complete a contract in the circumstances mentioned in the text.

[2] See *Fair* v. *Hunter*, 1861, 24 D. 1.

[3] *M'Neill* v. *Cameron*, 1830, 8 S. 362.

[4] *Pierson* v. *Balfour*, 1st December 1812, F.C.; *Harford Brothers* v. *Robertson*, 1831, 9 S. 352; revd. 1832, 6 W. & S. 1.

[5] *Morrison* v. *Campbell*, 1842, 4 D. 1426; *Macfarlane* v. *Mitchell*, 1900, 2 F. 901 (lease); *Caledonian Rly.* v. *Stein*, 1919, S.C. 324 (alteration in railway rates); *M'Intosh* v. *Arden Coal Co.*, 1923, S.C. 830.

[6] *Sharrat* v. *Turnbull*, 1827, 5 S. 361, per Lord President Hope; *Lombe* v. *Scott*, 1779, M. 5627; *Serrays & Co.* v. *Watt*, 12th February 1817, F.C. The same rule holds if there was a previous course of dealing between the parties (*Gilbert* v. *Dickson*, 1803, Hume, 334).

[7] 1881, 8 R. 959; see also *Forbes* v. *Wilson*, 1873, 11 M. 454. Erskine (*Inst.*, III. iv. 45) refers to an unreported case where a creditor, present at a meeting, was held to have acceded to a trust deed on the ground that he did not expressly object.

operations for a period long enough to cause further injury, it was decided that in respect of this latter act they had either accepted the notice or were barred from maintaining that they had not accepted it.[1]

Notice of Conditions of Offer.—The law as to implied terms in contract may be reserved for a later chapter; it may be appropriate here to consider how far a contract is governed by conditions attached to the offer. Where a contract is constituted by the performance of an act called for by the offerer, or by an acceptance in general terms, the question whether the contract is governed by special terms or conditions contained in the offer depends upon whether the party who accepts knew, or had reasonable means of knowing, that these conditions were attached. The question has been illustrated mainly, though not exclusively, by cases relating to the effect to be given to conditions expressed or referred to on tickets issued by carriers or storekeepers, limiting the liability which their contracts infer at common law. In such questions it has been laid down that the law of Scotland and England is the same,[2] though it is not always easy to determine what is meant, when applied to Scots procedure, by the statement that a particular point is a question of fact for the jury.[3]

Ticket Cases.—There is no doubt that when a party accepts an offer, by word or act, in the knowledge of the conditions which are attached to it, these conditions are imported into the contract.[4] And where a contract is made by an agent, it is sufficient that he is aware of the conditions attached to the offer, though the principal may not have known of them.[5] In *Wood* v. *Burns* [6] goods were forwarded by sea through the agency of a railway company. The shipowners had issued bills, containing the conditions on which they were prepared to carry, and disclaiming liability for loss arising from certain specified causes. With these bills the officials of the railway were familiar. The goods were sent with a delivery sheet, on which the shipowners wrote a receipt for them, adding the words "owner's risk." The goods were damaged in transit. It was held that the owner could sue only as in right of his agent, and that, in so suing, he was suing on a contract into which the conditions in the bills, and the special terms that the goods were carried at owner's risk, were duly imported.

In cases where actual knowledge of the terms of the conditions is not proved, the question may depend partly on the degree of knowledge as to the existence of some conditions possessed by the party who has taken

[1] *Robertson* v. *Royal Exchange Corporation*, 1925, S.C. 1 (O.H. Lord Murray). An analogy may be found in cases where a buyer, after intimating rejection of the article, has continued to use it, and has been held to have passed from his notice of rejection. *Croom & Arthur* v. *Stewart & Co.*, 1905, 7 F. 563.

[2] *Lyons* v. *Caledonian Rly. Co.*, 1909, S.C. 1185, per Lord Kinnear, at p. 1196; *Harris* v. *Great Western Rly. Co.*, 1876, 1 Q.B.D. 515, per Blackburn, J., at p. 528.

[3] It is laid down throughout the English cases that the question whether the party founding on the conditions has taken reasonable means to bring them to the notice of the other—when that question is material—is a question of fact for the jury. In a recent case the Court of Appeal held that it was a question on which the verdict of the jury should not be disturbed (*Skrine* v. *Gould*, 1912, 29 T.L.R. 19). In Scotland, where such questions are not submitted to a jury, it is a question for the Court whether reasonable means were taken—reasonable, considering the character of the contract and the class of persons to whom the offer is addressed. That, it is submitted, is a question of law. See opinion of Lord Haldane, *Hood* v. *Anchor Line*, 1918, S.C. (H.L.) 143, 146.

[4] *Stewart* v. *Johnston*, 17th January 1810, F.C.; *Lightbody's Trs.* v. *Hutchison*, 1886, 14 R. 4.

[5] *Wood* v. *Burns*, 1893, 20 R. 602; *Harris* v. *Great Western Rly. Co.*, 1876, 1 Q.B.D. 515; *Hood* v. *Anchor Line*, 1918, S.C. 27; affd. 1918, S.C. (H.L.) 143; *Grand Trunk Rly.* v. *Robinson* [1915], A.C. 740.

[6] *Wood* v. *Burns*, *supra*.

the ticket, partly on the adequacy of the means adopted by the party who issued it to bring its conditions under notice.

An extreme view of the position of the party issuing the ticket was taken by Lord Chelmsford in *Henderson* v. *Stevenson*.[1] He said, after stating the liability of a steamship company in the carriage of passengers' luggage: "I think that such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger, and of his having expressly assented to it." In this statement of the law Lord Hatherley concurred, but it has since been pointed out that these remarks were *obiter*, and they have not been followed in subsequent cases.[2]

A party who has taken a ticket and is not proved to be actually aware of the conditions expressed or referred to on it, may either be completely ignorant that there is anything on the ticket except what appears on the face of it, or he may know that there is something printed on the ticket, but not that this imports conditions, or he may know that conditions are referred to, though he may not have made himself acquainted with them.

Conditions on Back of Tickets. —In the first case, if there is no reference on the face of the ticket to any condition, and if the evidence of the party to the effect that he did not know of any is believed, it is probably settled by the decision of the House of Lords in *Henderson* v. *Stevenson*,[3] that any conditions which may have been printed on the back of the ticket are not imported into the contract. There a party took a ticket which on the face of it only bore the words "Dublin to Whitehaven." Having lost his luggage, he brought an action of damages against the shipping company which had issued the ticket. The defence was based on conditions printed on the back of the ticket, by which, it was contended, liability was excluded. The pursuer's evidence, on which he was not cross-examined, was read as meaning that he did not know of any conditions. In the Court of Session the case was decided on the ground that the conditions did not cover the negligent acts which led to the loss of the luggage, and the judges were divided on the question whether they were imported into the contract. On appeal, the former point was not considered, and it was held that when a ticket on the face of it contained no reference to any conditions, and the passenger did not know of any conditions printed on the back of the ticket formed no part of the contract.

The same rule, it has been remarked, could apply to a case where a man might reasonably suppose that the ticket was a mere receipt for a payment he had made, and did not even look at it, the instance suggested being a ticket given for payment of a toll.[4]

At the other end of the scale is the case where a man knows there are conditions, but does not read them. Then he is bound by them. In

[1] 1875, 2 R. (H.L.) 71, at p. 76.

[2] See opinion of Mellor, J., and Blackburn, J., in *Harris* v. *Great Western Rly. Co.*, 1876, 1 Q.B.D. 515; cp. *Lyons* v. *Caledonian Rly. Co.*, 1909, S.C. 1185; *White & Co. Ltd.* v. *Dougherty*, 1891, 18 R. 972; *Watkins* v. *Rymill*, 1883, 10 Q.B.D. 178.

[3] 1873, 1 R. 215; affd. 1875, 2 R. (H.L.) 71. The decision overrules dicta in the prior English cases to the effect that every one must satisfy himself that there are no special conditions on a ticket (*Van Toll* v. *South-Eastern Rly. Co.*, 1862, 12 C.B. (N.S.) 75; *Steward* v. *London and North-Western Rly. Co.*, 1864, 3 H. & C. 135; *Zunz* v. *South-Eastern Rly. Co.*, 1869, L.R. 4 Q.B. 539).

[4] See opinion of Mellish, L.J., in *Watkins* v. *Rymill*, 1883, 10 Q.B.D. 178.

Lyons v. *Caledonian Rly. Co.*,[1] a commercial traveller deposited luggage at the left luggage office of a station. He received a ticket, on the back of which was printed a statement that the company would not be liable for articles exceeding £5 unless the value was declared and an extra charge paid. The luggage was lost through the negligence of the servants of the railway company. In an action of damages the commercial traveller deponed that he did not read the conditions on the back of the ticket, did not know what they were, but did know that there were some conditions printed there. It was held that the railway company were protected, on the ground that a party who enters into a contract to which he knows conditions are attached, and does not ascertain what they are, is barred from maintaining that they are not part of the contract. "By accepting the ticket without objection, and thereupon depositing his goods, he represented to the company that he agreed to their conditions, and so induced them to enter into the contract. I am of opinion that he is thus precluded from disputing the condition upon which the railway company relied. They put a printed offer into his hands, and he accepted it, and must be held either to have been satisfied with its terms, or, if he did not choose to make himself acquainted with them, to have accepted them whatever they might be." [2]

These principles apply not only to the case where a ticket is given containing conditions on the back, but to other cases where a party knows there are conditions attached to his contract, and has the means of ascertaining what these are. He cannot maintain that he is not bound by them merely because he did not read them.[3]

In *Lyons* v. *Caledonian Rly. Co.* it was not maintained that the conditions imposed were unreasonable. If a man attached conditions to his offer which were unreasonable, and such as no one could expect to find in that particular kind of contract, probably the actual knowledge of the other party would be necessary to make them enforceable.[4]

The intermediate case is when a party admits that he knew there was something printed or written on the ticket, but did not know that print or writing to be conditions of his contract. In that case the English Courts have held that it is a question of fact for the jury whether fair notice of the existence of the condition has been given, and have declined to hold that a reference on the front of the ticket to conditions printed on the back is, as matter of law, sufficient notice.[5] Something may depend on the class

[1] 1909, S.C. 1185. A previous case (*Handon* v. *Caledonian Rly. Co.*, 1880, 7 R. 966) was decided on the ground that the conditions on the ticket did not apply to the particular facts. See also *Gibaud* v. *Great Eastern Rly.* [1920], 3 K.B. 689.

[2] Per Lord Kinnear (*Lyons* v. *Caledonian Rly. Co.*, 1909, S.C. 1885, at p. 1193. See also *Watkins* v. *Rymill*, 1883, 10 Q.B.D. 178 (opinion of Stephen, J.); *Harris* v. *Great Western Rly. Co.*, 1876, 1 Q.B.D. 515 (opinion of Lord Blackburn, then Blackburn, J.).

[3] *White & Co. Ltd.* v. *Dougherty*, 1891, 18 R. 972; *Macdonald & Fraser* v. *Henderson*, 1882, 10 R. 95 (conditions of auction sale, posted, but not read by auctioneer); *Wright* v. *Howard, Baker & Co.*, 1893, 21 R. 25 (notice as to conditions of work posted on pay-box); *Watkins* v. *Rymill*, 1883, 10 Q.B.D. 178 (notice posted as to terms on which carriages were received for safe custody).

[4] See opinion of Byles, J., in *Van Toll* v. *South-Eastern Rly. Co.*, 1862, 12 C.B. (N.S.) 75, 88; Bramwell, L.J., *Parker* v. *South-Eastern Rly. Co.*, 1877, 2 C.P.D. 416, 428. Both judges suggest a condition, in a cloak-room ticket, that the article is to be forfeited if not called for within two days.

[5] See *Richardson, Spence & Co.* v. *Rowntree* [1894], A.C. 217 (steamer ticket); *Harris* v. *Great Western Rly. Co.*, 1876, 1 Q.B.D. 515 (left luggage); *Burke* v. *South-Eastern Rly. Co.*, 1879, 5 C.P.D. 1 (railway book of coupons); *Parker* v. *South-Eastern Rly. Co.*, 1877, 2 C.P.D. 416 (cloak-room); *Watkins* v. *Rymill*, 1883, 10 Q.B.D. 178 (review of cases by Stephen, J.); *Marriott* v. *Yeoward Brothers* [1909], 2 K.B. 987 (steamer ticket); *Skrine* v. *Gould*, 1912,

to whom the ticket is addressed, notice which would be sufficient on a cabin may not be sufficient on a steerage ticket.[1] Any peculiar disability on the part of the person who takes the ticket—who may, for instance, be unable to read—is not a proper subject for consideration.[2] A reference on the ticket to conditions contained in time-tables or way bills has been held to be sufficient.[3] Conditions such as the duration of a return ticket do not require notice on the ticket itself, it is enough if they are set forth in time-tables or bills.[4]

Conditions in Offer by Letter.—Cases dealing with notices on tickets do not necessarily apply where the question is as to the adequacy of notice of conditions in contracts entered into by letter or sale-notes. It would then appear that each party is bound to read everything written or printed on the documents sent him by the other, and cannot be heard to say that he was not aware of anything to be found there. So when a letter was sent with a head-note, printed in red ink, and importing strike and war clauses, it was considered immaterial that the addressee had not observed the head-note.[5] In *M'Connell & Reid* v. *Smith* [6] there was a statement on the margin of a sale-note to the effect that all disputes were to be settled according to the rules of a trade association, of which the buyer was not a member. The rules provided for arbitration. The buyer averred that he was not aware of the statement on the margin, and the Court found that the provision for arbitration was not binding on him. Except on the ground, suggested by Lord Dundas, that a provision for arbitration requires more distinct notice than any other condition, it is difficult to see how this case can be reconciled with *Oakbank Oil Co.* v. *Love & Stewart*, where, apparently, it was not cited.

Contracts by Letter—Date of Completion.—In the ordinary case a contract is completed at the date when the acceptance is dispatched, by the channel of communication, if any, expressly agreed upon: if none, by the ordinary method of communication usual in cases of this particular class. And in the absence of any indication of an intention to the contrary it will be assumed that an offerer contemplates a reply by post; if so, the contract is completed when the acceptance is posted.[7] In *Thomson* v. *James* [8] an estate was advertised for sale, and James made an offer for it. On 1st December Thomson, in Edinburgh, wrote accepting the offer; on the same day, James, in Jedburgh, wrote withdrawing it. Both letters were delivered

29 T.L.R. 19 (ticket for football match); *Williamson* v. *North of Scotland Navigation Co.*, 1916, S.C. 554 (steamer ticket, conditions illegible); *Hood* v. *Anchor Line*, 1918, S.C. 27; affd. 1918, S.C. (H.L.) 173.

[1] *Roberton, Spence & Co.* v. *Rowntree* [1894], A.C. 217.

[2] *Parker* v. *South-Eastern Rly.*, 1877, 2 C.P.D. 416, per Mellish, L.J., at p. 423; *Marriott* v. *Yeoward Brothers* [1909], 2 K.B. 987.

[3] *Morris* v. *Clan Line*, 1925, S.L.T. 321.

[4] *Highland Rly.* v. *Menzies*, 1878, 5 R. 887.

[5] *Oakbank Oil Co.* v. *Love & Stewart*, 1917, S.C. 611; affd. 1918, S.C. (H.L.) 54.

[6] 1911, S.C. 635, distinguishing *Stewart, Brown & Co.* v. *Grime* (1897, 24 R. 414), where a similar reference to the rules of a trade association, contained in the body of the document and not on the margin, formed part of the contract.

[7] Bell, *Com.*, i. 334; *Dunlop* v. *Higgins*, 1847, 9 D. 1407; affd. 1848, 6 Bell's App. 195; *Thomson* v. *James*, 1855, 18 D. 1; *Jacobsen* v. *Underwood*, 1894, 21 R. 654; *Adams* v. *Lindsell*, 1818, 1 B. & Ald. 681; *Henthorn* v. *Fraser* [1892], 2 Ch. 27; *Bruner* v. *Moore* [1904], 1 Ch. 305 (telegram). Giving a letter to a postman, who has no authority to receive letters, is not, in this connection, equivalent to posting (*In re London and Northern Bank* [1900], 1 Ch. 220). In *Burnley* v. *Alford* (1919, 2 S.L.T. 123) a telegram withdrawing the offer would have reached the offeree before he dispatched his acceptance had he not been absent from his place of business. The Lord Ordinary held that the general rule did not apply unless ordinary business methods were observed, and that the withdrawal was in time.

[8] 1855, 18 D. 1.

on the following day. It was held that as an acceptance by post was[8] contemplated by the parties, the contract was complete when the acceptance was posted on the 1st December, and therefore that the withdrawal of the offer, not arriving till the 2nd December, was too late. Lord Curriehill dissented, holding that there was no completed contract until the acceptance reached the offerer. In *Dunlop* v. *Higgins*[1] there was no question of retractation of the offer; the point at issue was the validity of an acceptance which was accidentally delayed in transit. An offer to sell pig-iron by *A.*, in Glasgow, to *B.*, in Liverpool, was accepted by *B.* on the day on which it was received. In the ordinary course it ought to have arrived in Glasgow by a morning post; through a delay in the post office it did not arrive until the afternoon. The seller, maintaining that an offer of this kind was open for reply by return of post only, refused to implement the contract. It was held that the point to be considered was the date when the acceptance was posted, and, as that had been in due course, the contract was complete and binding.

Of the theories propounded to account for this rule (perhaps best justified by its convenience and the necessity of some definite rule) the most coherent is that the offerer must be taken as impliedly contracting to treat a letter posted as an acceptance and notification to him.[2]

From the rule that the contract is completed when the acceptance is dispatched, it has been deduced that if an offer gives a definite time for acceptance, it is sufficient if the acceptance is dispatched, though not received, within that time.[3]

It might seem also to follow that the contract is complete if an acceptance is in fact posted, though it never arrives; and the English Courts have so decided.[4] But in *Mason* v. *Benhar Coal Co.*,[5] Lord Shand, who delivered the judgment of the Court, intimated that he was not prepared to concur in this decision. The point must therefore be considered in Scotland to be open. Notice of the dishonour of a bill is duly given if there is proof that it was posted in time, though it may never have arrived.[6]

An offerer who desires to protect himself from the risk that his offer may have been accepted, and the letter of acceptance delayed or lost, should stipulate that there is to be no completed contract until an acceptance is received. There can be no doubt that an express condition of this kind would be effectual,[7] though the authorities are not clear as to the effect to be given to merely conventional expressions, such as "awaiting your reply."[8]

[1] 1847, 9 D. 1407; affd. 1848, 6 Bell's App. 195.

[2] Lindley, J., in *Byrne* v. *Van Tienhoven*, 1880, 5 C.P.D. 344, 348; *Thomson* v. *James*, 1855, 18 D. 1, per Lord Deas, at p. 25.

[3] *Jacobsen* v. *Underwood*, 1894, 21 R. 654; *Bruner* v. *Moore* [1904], 1 Ch. 305.

[4] *Household Fire Insurance Co.* v. *Grant*, 1879, 4 Ex. D. 216 (application for shares in a company).

[5] 1882, 9 R. 883, at p. 890. See also opinion of Lord Fullerton in *Dunlop* v. *Higgins*, 1847, 9 D. 1407, at p. 1414; affd. 1848, 6 Bell's App. 195.

[6] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), sec. 49, Rule 15.

[7] Bell, *Com.*, i. 344.

[8] In *Adams* v. *Lindsell* (1818, 1 B. & Ald. 681) the words "receiving an answer by return of post" were held not to affect the completion of the contract when the letter of acceptance was duly posted. And see comments on this case by Lord Fullerton in *Dunlop* v. *Higgins*, 1847, 9 D. 1407, at p. 1413. In *Thomson* v. *James* (1855, 18 D. 1) the words of the offer were "on hearing from you that these terms are to be acceded to, the forms necessary in such transactions will be gone through." It was held that these words did not affect the question, because they did not refer to the completion of the contract, but to subsequent formalities. See also *Farries* v. *Stein*, 1799, M. 8482; revd. 1800, 4 Paton, 131; Bell, *Com.*, i. 344; and *Brodie (Arnot's Tr.)* v. *Todd*, 20th May 1814, F.C.

The offerer may also indicate some particular method of dispatching the acceptance. If the party to whom the offer is made disregards it, the risk of delay or loss in transmission will fall upon him.[1]

Proof that Acceptance Posted.—The onus of proof that acceptance has been posted, or otherwise dispatched, lies on the acceptor.[2] But it is sufficient if he can prove that the offerer was made aware of the fact of acceptance. So when shares were applied for and allotted, and there was some doubt as to whether an allotment letter had been sent, it was held that the completion of the contract was established by proof that the applicant had been told by the secretary of the company that his name was on the register.[3]

Offers Open for Specified Time. An offer may limit the time for acceptance, or state that it is open for a certain time. There may be cases where this will be read merely as a warning or intimation that the acceptance will not be received after the time has expired.[4] But in general a definite statement that an offer is open for a certain time amounts to a promise, and binds the offerer to the contract if acceptance is given within the period specified.[5] In *Marshall* v. *Blackwood*,[6] a heritor offered his crop of victual, and added that the offer was open for a fortnight. On acceptance being tendered towards the close of that period he refused it, on the ground that in the meantime he had concluded a bargain with another party. He was held liable in damages, on the ground that his promise to keep the offer open for a fortnight was a binding obligation. In *Littlejohn* v. *Hadwen*,[7] a case which did not reach the Inner House, an offer to sell land concluded with the words "it is understood that *Mr L.* has the offer of the estate of *R.* for ten days from this date." Within the ten days the offer was withdrawn: but, after notice of withdrawal, the pursuer wrote accepting it, and maintained that a contract had been completed. The Lord Ordinary held that the offer was not properly authenticated, but in an elaborate opinion he discussed the question whether, assuming there had been no objection to the form of the offer, it conferred the right to accept within the ten days, whether it was withdrawn or not, and came to the conclusion that it did. He pointed out that the English authorities,[8] to the effect that a promise to keep an offer open is not binding, were based on the absence of any consideration for that promise, and were therefore not applicable to the law of Scotland.

An undertaking to keep an offer open until the occurrence of a certain event is binding. So where *A.* sold a quantity of tobacco to *B.* upon

[1] *Robb* v. *Gow*, 1905, 8 F. 90, per Lord M'Laren, 107.

[2] *In re London and Northern Bank* [1900], 1 Ch. 220. As to sufficient evidence of posting see *Cuming* v. *Marshall*, 1752, M. 10095; *Robertson* v. *Gamack*, 1835, 14 S. 139; *Guthrie* v. *Stewart*, 1926, S.C. 743.

[3] *Chapman* v. *Sulphite Pulp Co.*, 1892, 19 R. 837.

[4] *Heys* v. *Kimball & Morton*, 1890, 17 R. 381, opinion of Lord President Inglis.

[5] Bell, *Prin.*, sec. 72; Bankton, i. tit. xi.; More's *Notes to Stair*, 58; Brodie's *Supplement to Stair*, 906; *Marshall* v. *Blackwood*, 1747; Elchies, *voce* Sale, No. 6, and notes; *Thomson* v. *James*, 1855, 18 D. 1, at pp. 11, 18; *Littlejohn* v. *Hadwen*, 1882, 20 S.L.R. 5.

[6] 1747, Elchies, *voce* Sale, No. 6, and notes. The reporter states that the decision was affirmed in the House of Lords.

[7] 1882, 20 S.L.R. 5. This case was approved by Lord Dunedin in *Paterson* v. *Highland Rly.* (1927, S.C. (H.L.) 32, at p. 38), and distinguished from a general offer of reduced prices to the public, which, though expressed as open for a definite time, might be withdrawn except in a question with a party who, before the withdrawal, had accepted the offer by ordering goods.

[8] *Dickinson* v. *Dodds*, 1876, 2 Ch. D. 463. See Pollock, *Contract*, 9th ed., pp. 27, 30; Leake *Contracts*, 7th ed., p. 25; Chitty, *Contracts*, 17th ed., 12.

condition that *B.* should be allowed to inspect a shipping book (which contained particulars of the tobacco) and then decide whether he would adhere to the bargain, it was held that *A.* had bound himself to sell though *B.* was not bound to buy, and therefore that *A.*, who had re-sold before *B.* made his election, was liable in damages.[1] As already stated, where a fixed time is given for acceptance, it is sufficient if the acceptance is dispatched within that time, although it does not reach the offerer until it has expired.[2]

Time Allowed for Acceptance. Where no time is fixed for acceptance, it is conceived that the law is that the offer is open for a time reasonable in the circumstances. It is true that it is laid down in Bell's *Commentaries* (i. 343) that where an offer is made simply the common law is that it may be accepted at any time until it is withdrawn. But there is authority for holding that this is a mistake.[3]

What is a reasonable time depends on the nature of the offer. In mercantile offers to buy or sell a particular commodity, the rule is that the offer is only open for acceptance by return of post.[4] When the element of fluctuation of price is absent there is no definite rule; it is in each case a question whether the offer was accepted within a reasonable time in the particular circumstances. The cases cited supply illustrations.[5] It is conceived that proof of a custom of trade that an offer is only to be open for a particular time would rule the case. In *Murray* v. *Rennie & Angus*,[6] a builder obtained a tender for mason work, which he accepted eleven days after it was made. The mason refused to consider himself bound, on the plea that by the custom of the building trade of the particular town, embodied in "conditions" printed and adopted by the trade, tenders were open for acceptance for seven days only. This plea was repelled, but on the specialty that the "conditions" in question were limited to the case where there was a definite time fixed for receiving tenders.

A material change of circumstances may be a bar to acceptance within a time which would otherwise be reasonable. In an action for payment of work done the defender lodged a tender. Subsequently the action was referred, by consent of parties, to a judicial referee. He intimated notes of his intended award, which gave the pursuer less than the amount tendered. Two months afterwards the pursuer lodged a minute accepting the tender. It was held, in the altered circumstances, to be too late.[7]

It has been decided in England that if a man to whom an offer has been made has learned, though accidentally, that the offerer has no longer the power to fulfil it (as where he has parted with the subject to which the offer relates), he has no longer the right to accept.[8]

[1] *Graham & Co.* v. *Pollock*, 1763, M. 14198. But such a contract, where only one party is bound, is not a sale, nor an agreement to sell, within the meaning of sec. 25 of the Sale of Goods Act, 1893, or sec. 8 of the Factors Act, 1889 (*Heilby* v. *Matthews* [1895], A.C. 471).

[2] *Ante*, p. 34.

[3] *Hall-Maxwell* v. *Gill*, 1901, 9 S.L.T. 222 (Lord Stormonth Darling).

[4] Bell, *Com.*, i. 343; *Farries* v. *Stein*, 1799, M. 8482; revd. 1800, 4 Paton, 131; *Dunlop* v. *Higgins*, 1847, 9 D. 1407; affd. 1848, 6 Bell's App. 195; *Wylie & Lochhead* v. *M'Elroy*, 1873, 1 R. 41, per Lord President Inglis; *Stevenson* v. *M'Lean*, 1880, 5 Q.B.D. 346.

[5] *Wylie & Lochhead* v. *M'Elroy*, 1873, 1 R. 41, and *Murray* v. *Rennie & Angus*, 1897, 24 R. 965 (tenders for work); *Glasgow Steam Shipping Co.* v. *Watson*, 1873, 1 R. 189 (offer to supply coal for a year); *Hall-Maxwell* v. *Gill*, 1901, 9 S.L.T. 222 (offer to sell land); *Ramsgate Hotel Co.* v. *Montefiore*, 1866, L.R. 1 Ex. 109, and *Ralso's* case, 1877, 4 Ch. D. 774 (application for shares).

[6] 1897, 24 R. 965.

[7] *Macrae* v. *Edinburgh Tramways Co.*, 1885, 13 R. 265; *Heron* v. *Caledonian Rly. Co.*, 1867, 5 M. 935.

[8] *Dickinson* v. *Dodds*, 1876, 2 Ch. D. 463.

If an offer which ought to be accepted within a short time leads to negotiations as to the method in which the contract is to be performed, and is ultimately accepted after what would in ordinary circumstances be an unreasonable delay, it lies on the acceptor to prove that the offerer still kept his offer open.[1] In the case cited it was laid down by Lord President Inglis that an offer cannot be kept open beyond a reasonable time except by "the most express agreement between the parties."

Effect of Acceptance Too Late. An acceptance which is not tendered within a reasonable time, and which therefore the offerer is entitled to reject, is in effect a new offer. The offerer may or may not accept it; he incurs no liability if he simply ignores it. In *Wylie & Lochhead* v. *M'Elroy*[2] *A.* tendered for the execution of ironwork on *B.'s* premises. Five weeks afterwards *B.* wrote accepting the tender, but proposing a new condition. *A.* took no notice of this letter and refused to execute the contract. It was held that *B.'s* acceptance, even if it had been unconditional, was too late; that it was in effect an offer on his part, which *A.* was free to accept or not as he pleased, and that he incurred no liability by failure to intimate his rejection of it.

Implied Revocation of Offer. An offer falls by the death of either party before acceptance.[3] The question whether the death of the offerer, after acceptance has been posted but before it has been received, precludes a contract, is discussed, but not decided, in *Thomson* v. *James*.[4]

The supervening insanity of the offerer amounts to a revocation of the offer, and no contract results even although the other party should accept without notice of the insanity.[5]

It is stated in Bell's *Principles* (sec. 74) that the bankruptcy of the offerer before acceptance revokes the offer.

Refusal.—An offer falls if it is refused. If the refusal is not peremptory, but combined with a request for better terms, the general construction is that the offer is gone, and that the party to whom it was made, on failure to obtain the terms he requests, cannot fall back on an acceptance of the original offer.[6]

Withdrawal of Offer. Except in cases where there is an undertaking to hold the offer open for a definite time,[7] it may be withdrawn at any time before acceptance. So an application for shares in a company, which is an offer calling for acceptance and not merely for the act of allotting the shares, may be withdrawn after the shares have been allotted but before notice of allotment has been sent.[8] But it follows from the principle already explained, that a contract is completed when the acceptance is dispatched, that a revocation of the offer is ineffectual unless it is brought to the notice

[1] *Glasgow Steam Shipping Co.* v. *Watson*, 1873, 1 R. 189.

[2] 1873, 1 R. 41.

[3] Stair, i. 10, 6; Bell, *Prin.*, sec. 79; *Reynolds* v. *Atherton*, 1922, 127 L.T. 189. From certain dicta in this case it appears that it is an unsettled question whether, if an offer is made to more than one person, it falls by the death of one of the offerees. It is submitted that the answer should be in the affirmative. If the offer calls for a joint and several obligation, *e.g.*, an offer of a lease to joint tenants—it is clear that acceptance by a survivor would be out of the question. In any case, acceptance by one offeree of an offer made to two would be an acceptance which did not meet the offer. See *Anderson* v. *Sillars*, 1894, 22 R. 105.

[4] 1855, 18 D. 1, per Lord President M'Neill, at p. 10; per Lord Deas, at p. 26.

[5] *Loudon* v. *Elder's Curator*, 1923, S.L.T. 226 (O.H. Lord Blackburn); *Thomson* v. *James*, 1855, 18 D. 1, at p. 10. See also *Drew* v. *Nunn*, 1879, 4 Q.B.D. 661.

[6] *Hunter* v. *Hunter*, 1745, M. 9169; *Hyde* v. *Wrench*, 1840, 3 Beavan, 334.

[7] *Ante*, p. 35.

[8] *Hebb's* case, 1867, L.R. 4 Eq. 9; Buckley, *Companies Acts*, 10th ed., 57.

of the offerer before he has dispatched his acceptance. So if the order in time is (1) revocation of the offer posted, (2) acceptance posted, (3) revocation received, (4) acceptance received, the revocation is too late and the contract is complete.[1]

Withdrawal of Acceptance.—It is remarkable that there is no definite authority on the question whether an acceptance can be recalled or revoked by adopting some channel of communication (*e.g.*, telegraph or telephone) which brings the fact of the recal to the notice of the offerer before he has actually become aware of the acceptance. Common sense would seem to dictate an affirmative answer to the question, and this is supported by the only authority in point.[2] In *Countess of Dunmore* v. *Alexander* the action was at the instance of a domestic servant (Alexander) for wages and board wages, on the plea that the Countess had engaged her and refused to carry out her contract. The facts established were that the Countess had written to Lady Agnew (in whose service the pursuer then was), asking whether Alexander would enter her service; that she was assured by Lady Agnew, on the pursuer's behalf, that she would; that on 5th November she had written to Lady Agnew engaging the pursuer, and on the 6th a letter stating that she no longer required her; and that as Lady Agnew was away from home at the time, both these letters reached Alexander by the same post. On these facts it was held (Lord Craigie dissenting) that there was no concluded contract. Lady Dunmore's letter of the 5th November might, if it had stood alone, have been read as an acceptance of an offer of service made by Alexander, through Lady Agnew as her agent, but if so it was effectually revoked by the letter of the 6th, seeing that both letters reached Alexander at the same time. The leading opinion (Lord Balgray) may be quoted: "The admission that the two letters were simultaneously received, puts an end to the case. Had the one arrived in the morning, and the other in the evening of the same day, it would have been different. Lady Dunmore conveys a request to Lady Agnew to engage Alexander, which request she recalls by a subsequent letter that arrives in time to be forwarded to Alexander as soon as the first. This, then, is just the same as though a man had put an order into the post office, desiring his agent to buy stock for him. He afterwards changes his mind, but cannot recover his letter from the post office. He therefore writes a second letter countermanding the first. They both arrive together, and the result is that no purchase can be made to bind the principal." [3]

The difficulty in holding that an acceptance can be recalled, which has led to adverse comments by English writers [4] on the decision just narrated, is that it seems impossible to reconcile it with the rule that a contract is completed when the acceptance is posted, and is not in suspense until it is received.[5] If the contract is completed when the acceptor posts his acceptance, how can he resile from it without the consent of the offerer?

[1] *Thomson* v. *James*, 1855, 18 D. 1; *Byrne* v. *Van Tienhoven*, 1880, 5 C.P.D. 344. See *ante*, p. 40.

[2] *Countess of Dunmore* v. *Alexander*, 1830, 9 S. 190. See comments on this case in *Thomson* v. *James*, 1855, 18 D.1. As to a telegram countermanding payment of a cheque, see *Curtice* v. *London City and Midland Bank* [1908], 1 K.B. 293. When the rules of the post office (in France) allowed the withdrawal of letters it was held that a letter of acceptance was recalled when the proper steps were taken for its withdrawal, though by mistake it was forwarded to the offerer. *Ex. p.* Cote, 1873, L.R. 9 Ch. 27.

[3] Lord Balgray's illustration is clearly irrelevant. An order is an offer, not an acceptance.

[4] Benjamin, *Sale*, 6th ed., 98; Pollock, *Contract*, 9th ed., p. 929.

[5] See *ante*, p. 33.

But the logical difficulty may be admitted without holding that the rule is wrong.

Acceptance not Meeting Offer. -An acceptance must meet the offer. To form a contract parties must arrive at an agreement, which they have clearly failed to do if they differ as to the terms of the bargain. Thus an offer which calls for an act is not accepted by the performance of an act different, in any material respect, from that called for. So if a party from whom goods are ordered sends more, or less, than the order, they may be rejected,[1] though it has been held that tender of a slight excess, for which no extra payment was asked, did not justify rejection.[2] Where preference shares were applied for and allotted, and it was afterwards found that the company had no power to issue preference shares, it was held, in a special case, that the allottees were not ordinary shareholders, as contended by the company, but creditors of the company for the amount they had paid, since they had never applied for ordinary shares, and their offer to take preference shares was not met by the allotment of shares which had no preference.[3] But if, in response to an offer, performance which does not exactly meet it is tendered and accepted without demur, and the parties act on the footing of a completed contract, the offerer may be precluded from maintaining that there was no contract because his offer was not exactly accepted. So where, in response to an application for a bond from a benefit society, a certificate obliging the society to grant a bond was issued, and no objection was taken for seven years, it was decided, on the assumption that the application for a bond was not met by the issue of a mere certificate, that the applicant was precluded from taking the objection.[4] And when goods were delivered which were not conform to sample, and the purchaser had refused to return them, and intimated that he proposed to make a deduction from the price (which, as the law then stood, he was not entitled to do), it was held that he was liable for the contract price and could not afterwards insist on returning the goods. It was laid down as a general rule by Lord Balgray that "where goods have been purchased according to sample, and a different sort is sent, it is the duty of the purchaser either immediately to return them or intimate to the seller that he holds them for his behoof." [5]

Construction of Qualified Acceptance. -When the construction of a reply to an offer is in question, the difficulty has been to distinguish between an actual, though perhaps hesitating and reluctant, acceptance, and an offer to accept if the offerer is prepared to alter his terms. In the former case the contract is complete: in the latter the reply is in effect a new offer, and there is no contract unless the original offerer accedes to it. There is another possibility. What is put forward as an acceptance may be read as a mere expression of willingness to contract and of expectation that terms will be arranged.

Extreme cases present little difficulty. A general acceptance of a detailed offer implies assent to the conditions proposed; and, on the authorities, it cannot be seriously argued that there is no completed contract merely

[1] Sale of Goods Act, 1893, sec. 30; *Richardson* v. *Roscoe*, 1837, 15 S. 952; *Aitken, Campbell & Co.* v. *Boullen*, 1908, S.C. 490 (goods sent, mixed with goods of a different description).

[2] *Shipton, Anderson & Co.* v. *Weil*, 1912, 28 T.L.R. 269 (Lush, J.).

[3] *Waverley Hydropathic Co.* v. *Barrowman*, 1895, 23 R. 136.

[4] *National Benefit Trust* v. *Coulter*, 1911, S.C. 544.

[5] *Watt* v. *Glen*, 1829, 7 S. 372. See also *Wilson* v. *Marquis of Breadalbane*, 1859, 21 D. 957 (opinion of Lord Cowan). The law as to the remedies of the purchaser in the circumstances of *Watt* v. *Glen* has been altered by sec. 11 of the Sale of Goods Act, 1893.

because the acceptance does not recapitulate and affirm all the terms of the offer.[1] Nor is an acceptance really conditional because it puts in words terms which the law would imply.[2]

On the other hand, if a general offer is met by an acceptance qualified by such words as "terms to be afterwards arranged," parties have not got beyond the stage of negotiation, and, provided that nothing further has been done, are each free to withdraw.[3] Thus, in an early decision, where a party wrote that he accepted an offer to sell lands but was afraid that he would not have the money to pay at the time proposed, it was held that the seller was still free to resile.[4] And where *A.* offered to sell land to *B.*, and in the course of a correspondence which followed the exact subjects to be sold and the price to be paid were fixed, and drafts of the proposed conveyance had been prepared and revised by the agents for the parties, but they were still at variance as to the servitudes to be imposed on the subjects, it was held that there was no completed contract.[5] Such a case raises a question of degree, of the relative importance of the point left unsettled. Where a contract for the sale of land contained a clause, inserted by the buyer, providing that the seller, if desired, should leave a bond of unspecified amount and duration, it was held that as this provision was not of the essence of the contract, the buyer could not found upon it a plea that there was no completed agreement.[6]

Price, Rent, etc., Unfixed. Where offer and acceptance, taken together, do not fix the amount of the return to be paid—price, rent, wage, etc.—the inference in ordinary contracts of everyday life, such as the purchase of goods on credit, taking a room at a hotel, will be that the parties regard the contract as complete, and that the amount of the return, in the event of dispute, is to be fixed by the Court on a consideration of what is reasonable. If, however, it is stated that the return is to be the subject of future adjustment, the inference will be that the stage of final contract has not been reached, and that either party is still free to resile. For if, as was held in *Heiton* v. *Waverley Hydropathic Co.*,[7] a contract for the sale of land is not binding when the servitudes to be imposed are still the subject of discussion, the same result must follow if the point unsettled is the price. If actings have followed a reasonable return is due. Thus in the sale of goods "when the price is not determined . . . the buyer must pay a reasonable price."[8] If a party has been in possession of land, and fails to prove—the onus being on him—that he possessed on some contract entitling him to do so gratuitously, he is liable for a reasonable rent.[9]

Acceptance Proposing New Terms. It is clear as a general principle, though there may be difficulty in applying it to particular facts, that if in response to an offer an answer is given which amounts to an expression of willingness to enter into the proposed contract on more favourable terms, parties have not yet arrived at agreement, and there is no contract. The

[1] *Erskine* v. *Glendinning*, 1871, 9 M. 656; *Philp* v. *Knoblauch*, 1907, S.C. 994.

[2] *Erskine* v. *Glendinning*, *supra*, per Lord President Inglis.

[3] *Heiton* v. *Waverley Hydropathic Co.*, 1877, 4 R. 830; *Milne* v. *Anderson*, 1836, 14 S. 533. As to actings following upon an acceptance so qualified, see *infra*, p. 52. And see *Honeyman* v. *Marryat*, 1857, 6 H.L.C. 112; *Stanley* v. *Dowdeswell*, 1874, L.R. 10 C.P. 102.

[4] *Montgomery* v. *Brown*, 1663, M. 8411.

[5] *Heiton* v. *Waverley Hydropathic Co.*, *supra*.

[6] *Freeman* v. *Maxwell*, 1928, S.C. 682.

[7] 1877, 4 R. 830. *Wilson* v. *Marquis of Breadalbane*, 1859, 21 D. 957.

[8] Sale of Goods Act, 1893, sec. 8.

[9] *Earl of Fife* v. *Wilson*, 1864, 3 M. 323; *Glen* v. *Roy*, 1802, 10 R. 329; *Cooke's Circus Buildings Co.* v. *Welding*, 1894, 21 R. 339.

cases which follow illustrate this rule.[1] An offer to buy land, "you giving a clear and good title," is not accepted when the acceptor stipulates that no search for incumbrances will be given,[2] nor by a tender of "our interest in the property" in a case where it was held that these words were intended to cover a doubtful title.[3] No contract was completed where a tender for work was accepted by a letter imposing the condition that the tenderer was to be liable for failure to observe the contract time, whereas the employer was to be entitled to discontinue the work at any time without liability for damages.[4] Where, after a draft lease had been adjusted, the tenant secured the insertion in the extended copy of a clause to which the landlord had not assented, the landlord was entitled to resile from the contract, and the tenant was refused decree in an action of implement, though he offered to give up the clause in question.[5] Where a proposal for a policy of fire insurance was met by issuing a policy in terms which made the insured a member of the company, with a contingent liability, it was held that the proposer was not bound to accept it.[6] A narrower case is *Johnston* v. *Clark*.[7] There a written agreement for the sale of land provided that it was not to be binding unless the buyer intimated his adherence to it within ten days. He did so, but added that he adhered on the "understandings" (which were not referred to in the written agreement) that the feu-duty was nominal, that the extent was 200 Scotch acres, and that the minerals were conveyed. On none of these points did it appear that there was any difference between the parties. The seller refused to carry out the bargain, and the Court, applying very strictly the rule that acceptance must be unconditional, held that he was not bound.

A contract may be held to be completed although the acceptance proceeds to state conditions as to the method in which the transaction is to be carried out. Thus a tender for work for a lump sum is fully accepted, although the acceptance goes on to provide that the tenderer is to sign the plans and specification and lodge a schedule of measurements.[8] Where a lease of minerals was executed with a provision that certain engines and machinery were to be taken over by the tenant, conform to inventory to be signed by both parties, it was held that the contract was complete though no inventory had been drawn up, the provision amounting to an obligation on each party to concur in drawing up the inventory, and not to a condition suspensive of the contract.[9] The acceptance of an offer to sell shares, with the words "you will require to sign two transfers," constituted a binding agreement.[10] Where the defender in an action made a tender of £50, and the pursuer accepted it, adding that it must be paid before a certain date, it was held that as the tender impliedly offered immediate payment, the terms of the acceptance did not import a new condition, and the contract to compromise was complete.[11] In *Ingram-Johnston* v. *Century Insurance Co.*,[12] a policy

[1] See, in addition, *Bakers of Edinburgh* v. *Hay*, 1868, 6 S.L.R. 144; *Clason* v. *Steuart*, 1844, 6 D. 1201; *Mitchell* v. *Scott's Trs.*, 1874, 2 R. 162; *Bruce* v. *Cleghorn*, 1785, 3 Paton, 5; *English and Foreign Credit Co.* v. *Arduin*, 1871, L.R. 5 H.L. 64; other English cases in Fry, *Specific Performance*, 6th ed., p. 134 *et seq.*

[2] *Dickson* v. *Blair*, 1871, 10 M. 41.

[3] *Nelson* v. *Assets Co.*, 1889, 16 R. 898.

[4] *Wylie & Lochhead* v. *M'Elroy*, 1873, 1 R. 41.

[5] *Dallas* v. *Fraser*, 1849, 11 D. 1058.

[6] *Star Fire and Burglary Insurance Co.* v. *Davidson*, 1902, 5 F. 83.

[7] 1855, 18 D. 70. See *Freeman* v. *Maxwell*, 1928, S.C. 682, narrated *supra*, p. 40.

[8] *Seaton Brick and Tile Co.* v. *Mitchell*, 1900, 2 F. 550; *Lewis* v. *Brass*, 1877, 3 Q.B.D. 667.

[9] *Steuart* v. *Neilsons*, 1864, 2 M. 817.

[10] *Tait & Crichton* v. *Mitchell*, 1889, 26 S.L.R. 573.

[11] *Gordon* v. *Hill*, 1839, 2 D. 150.

[12] 1909, S.C. 1032.

of insurance (which, *inter alia*, provided for sickness) contained a provision under which its surrender value might be claimed. The insured wrote that he had decided to accept the surrender value. The letter was acknowledged, with a request that the insured should indorse the policy and return it to the company. He did not indorse it, and the surrender value was not paid. With matters at this stage the insured fell ill, and made a claim under the policy, which was refused, on the ground that the policy had been surrendered. It was held that the provision as to the surrender value was a standing offer by the company, that this offer had been accepted, and that the request for indorsement was not a condition of the completion of the contract, but merely a provision for carrying it into effect.

But the line dividing conditions as to the method of carrying out a contract from conditions affecting its substance is a narrow one. So if an offer to buy land is accepted, with a provision that the title must be taken as it stands,[1] or even, it would appear, that the purchaser will be required to make a deposit,[2] the contract is not yet complete. And where the liquidator of a company accepts a proposal for the compromise of an action, subject to the approval of the Court, there is no concluded bargain until the sanction of the Court is obtained. The liquidator is under no obligation to apply for sanction, and may disregard the compromise and proceed with the action.[3] If a party in accepting an offer adds a condition which is purely in his own interest, he is entitled to waive compliance with it and maintain that there is a completed contract. So a shareholder cannot reduce a contract to take shares on the ground of non-compliance with such a provision as that no one should become a shareholder until he had signed a minute in the company's books,[4] or that, before any transfer, the shares should be offered to the company.[5]

If an unqualified offer is met by an acceptance subject to the fulfilment of a particular condition, the offerer, it is conceived, cannot be bound to take it as a complete acceptance. He is entitled to say, "I want your answer, yes or no." But if the offerer takes no objection the acceptor cannot maintain that matters have not got beyond the stage of negotiation; he has bound himself, subject to a right to rescind if the condition in question is not purified. In other words, he has made a counter offer, which is deemed to be accepted if it is not declined. So where *A.* offered to buy iron and *B.* accepted, "subject to your specification being approved," it was held that *B.* had concluded a contract from which he was entitled to resile in the event, but only in the event, of his disapproving *A.'s* specification. He was not entitled subsequently to add a new term as to the method of payment.[6] And the acceptance of an offer to sell land, expressed to be subject to the approval of the buyer's solicitor, is read, on English authority, as a binding contract, unless the solicitor can point to a reasonable objection to the title.[7]

Acceptance "Subject to Contract." An offer is often accepted with an indication that the contract is to be embodied in a formal deed, and the

[1] *Dickson* v. *Blair*, 1871, 10 M. 41; *Crossley* v. *Maycock*, 1874, L.R. 18 Eq. 180; *Jones* v. *Daniel* [1894], 2 Ch. 332.

[2] *Jones* v. *Daniel*, *supra*.

[3] *Reid & Laidlaw* v. *Reid*, 1905, 7 F. 457. This seems irreconcilable with *Lee* v. *Stevenson's Trs.*, 1883, 11 R. 26.

[4] *Burnes* v. *Pennell*, 1849, 6 Bell's App. 541. [5] *Allan* v. *Turnbull*, 1834, 7 W. & S. 281.

[6] *Jack* v. *Roberts & Gibson*, 1865, 3 M. 554.

[7] *Hussey* v. *Horne-Payne*, 1879, 4 App. Cas. 311; *Chipperfield* v. *Carter*, 1895, 72 L.T. 487.

question then is whether the contract is then complete, or whether there is *locus pœnitentiæ* until the formal deed is executed. Lord Kinnear has stated the law in terms which, it is submitted, are too wide. "Now, the general rule of law is beyond all question that when parties agree that their arrangements are to be embodied in a formal written contract to be executed, there is a *locus pœnitentiæ* until the execution of that written document is completed, and either party may resile until the written instrument is duly executed." [1] More guardedly, Lord Moncrieff has stated that it is always a question of circumstances whether the parties to the contract intend that the execution of the formal writing shall be suspensive of the contract.[2] An English judge has stated the law as follows: "If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions, then specified or to be specified by the party making it, or by his solicitor, then until these conditions are accepted there is no fixed agreement such as the Courts will enforce." [3]

Much, it is conceived, depends on the stage at which the negotiations have arrived. If parties have got so far as to adjust and sign a draft of the contract, its binding force is not in any way lessened by the fact that it is arranged that the draft is to be extended.[4] And a contract has been held completed though the stage of a draft contract has not been reached. In *Erskine* v. *Glendinning* [5] a written offer to take a lease was met by a general acceptance, also in writing, with the words "subject to lease drawn out in due form." It was held that a binding contract had been concluded, and that if parties would not concur in drawing out a lease, the Court would remit to a conveyancer to draw one, with the usual clauses. In *Smeaton* v. *St Andrews Police Commissioners*,[6] *S.*, who had a claim for compensation against the Police Commissioners, made proposals for a compromise, by which he undertook to give up his claim if the Commissioners would agree to alter the track of a proposed sewer. One term of the proposed compromise was that a formal deed embodying its provisions should be executed by *S.* and by the Commissioners. The compromise was accepted by the Commissioners at a meeting, and their clerk was instructed to prepare a deed. Difficulties having arisen before the deed was executed, it was held that the existing agreement was completely binding.

Agreements to Settle Action. An agreement to settle an action is binding although it be provided that it is to be recorded in a joint minute.[7] But,

[1] *Van Laun* v. *Neilson, Reid & Co.*, 1904, 6 F. 644, at p. 652. Lord Kinnear's statement of the law is borne out in the civil law (*Inst.*, i. 3, 23; Code IV. 21, 17) by *Campbell* v. *Douglas* 1676, M. 8470; *Coult* v. *Angus*, 1749, M. 17040; and, possibly, by *Wallace, Gardyne & Co.* v *Miller*, 1766, M. 8475, but it seems to be stated too generally, in view of *Erskine* v. *Glendinning* and other cases cited in the next paragraph.

[2] *Rederi Aktiebolaget Nordstjernan* v. *Salvesen*, 1903, 6 F. 64, at p. 75 (revd., on another point, 1905, 7 F. (H.L.) 101).

[3] Jessel, M.R., in *Crossley* v. *Maycock*, 1874, L.R. 18 Eq. 180; approved in *Bonnewell* v. *Jenkins*, 1878, 8 Ch. D. 70. See *Brogden* v. *Metropolitan Rly. Co.*, 1877, 2 App. Cas. 666.

[4] *Lockhart* v. *Baillie*, 1709, M. 8430; *Rutherford* v. *Feuars of Bowden*, 1748, M. 8443; *Bloomfield* v. *Young*, 1753, M. 9446; *Bernards Ltd.* v. *North British Rly. Co.*, 1899, 36 S.L.R. 683; *Steuart* v. *Neilsons*, 1864, 2 M. 817, per Lord Deas, at p. 821; *Petrie* v. *Forsyth*, 1874, 2. R. 214 (see opinion of Lord Gifford, at p. 223).

[5] 1871, 9 M. 656.

[6] 1868, 7 M. 206; revd. 1871, 9 M. (H.L.) 24.

[7] *Dewar* v. *Ainslie*, 1892, 20 R. 203; *Anderson* v. *Dick*, 1901, 4 F. 68; *Gow* v. *Henry*, 1899, 2 F. 48.

where the action was at the instance of a widow on behalf of herself and her pupil children, and separate sums of damages were concluded for, it was decided that an agreement by the widow to accept a tender of a lump sum was not final, in respect that there was no provision for the allocation of the sum tendered among the parties interested in the action. The general rule that the settlement of an action is binding, and a joint minute merely the method of carrying it into effect, was recognised, though regretted by Lord Skerrington.[1]

Sales, Subject to Contract.—These cases—in particular *Erskine* v. *Glendinning*—may render it difficult for a Court in Scotland to hold that when parties enter into an agreement expressed to be "subject to contract," "subject to formal contract," or other equivalent terms, they have not got beyond the stage of negotiation and intention, so that either is free to resile until the formal contract is executed and signed. A series of cases in England,[2] relating to the sale of land, have established this as the general rule, yielding only to clear indications from the other terms of the agreement that the intention was to create an immediate obligation. In a case bearing a remarkable resemblance to *Erskine* v. *Glendinning*, Jessel, M.R., pointed out that agreement is really a question of the mental attitude of the parties, and gave very cogent reasons for holding that when parties to a verbal or informal agreement arrange to have it drawn out as a formal contract, they as a rule regard the matter as still subject to deliberation.[3] In *Coope* v. *Ridout*,[4] where an offer to buy land was expressed to be "subject to title and contract," the Court of Appeal decided that the seller could resile even though he had revised and approved a draft conveyance. In *Chillingworth* v. *Esche*[5] land was sold "subject to a proper contract to be prepared by the vendor's solicitors." The purchaser, in accordance with a provision to that effect, made a deposit. It was held that until he had actually signed the "proper contract" he was free to resile, and that, on doing so, he could recover the deposit. It was immaterial that the contract had been approved by the solicitors on either side, as they had no authority to bind their clients to the contract. Sergant, L.J., was of opinion that the term "subject to contract" (or "subject to formal contract") had acquired by usage a technical meaning, indicating that neither party had incurred any enforceable obligation. It would be unfortunate that expressions in ordinary business use should be read differently on either side of the Border. Unless *Erskine* v. *Glendinning* can be distinguished on the ground that it was a case of lease and not of sale, it should, it is submitted, be reconsidered by a larger Court.

Contracts by Series of Letters, Etc. When the question before the Court is whether evidence of a completed contract can be found in the course of a correspondence between the parties, the rule is that it is not necessarily conclusive to point to an offer and acceptance, apparently unconditional, in two of the earlier letters. The whole correspondence must be considered; and if it appears from the later letters that both parties regarded some of the terms of the contract as still matter for bargaining, it will be held that

[1] *Murphy* v. *Smith*, 1920, S.C. 104.

[2] *Rossiter* v. *Miller*, 1878, 3 App. Cas. 1124; *Winn* v. *Bull*, 1877, 7 Ch. D. 29; *Lloyd* v. *Nowell* [1895], 2 Ch. 744; *Von Hatzfeldt Wildenburg* v. *Alexander* [1912], 1 Ch. 284; *Love & Stewart* v. *Instone* (H.L.), 1917, 33 T.L.R. 475; *Rossdale* v. *Denny* [1921], 1 Ch. 57; *Coope* v. *Ridout* [1921], 1 Ch. 291; *Chillingworth* v. *Esche* [1924], 1 Ch. 97; *Keppel* v. *Wheeler* [1927], 1 K.B. 577.

[3] *Winn* v. *Bull*, 1877, 7 Ch. D. 29. [4] [1921], 1 Ch. 291. [5] [1924], 1 Ch. 97.

neither is bound.[1] Where a contract is entered into by an exchange of telegrams, followed by confirmatory letters, it will be governed by terms expressed in the letters though not in the telegrams.[2]

Actings on Incomplete Agreement. When an offer is met by an acceptance which is merely tentative either because it proposes some new condition, or because it indicates that the exact terms of the bargain have still to be arranged, and actings have followed without any more definite agreement, one of two conclusions may be drawn: (1) That the parties mistook each other's attitude, each believing that his terms had been agreed to; or (2) that they had agreed to regard the contract as binding, the points in dispute being either waived by one or other party, or left to be settled as occasion might arise. If the former inference is drawn it will be held that there is no contract, on the ground that the parties never came to any real agreement; if the latter, the contract will be enforced though it may be difficult to say at what exact time agreement was reached.

***Buchanan* v. *Duke of Hamilton*.** An example of a case of the former class is *Buchanan* v. *Duke of Hamilton*.[3] Buchanan made a written offer to take a farm on the Hamilton estate, on the condition that certain specified alterations on the buildings were carried out. To this offer no definite answer was given. Thereafter Buchanan signed a printed form of conditions of lease which was in use on the Hamilton estate, and which did not contain any reference to the alterations he required. Buchanan then entered into possession of the farm, and, when called upon to concur in a formal lease on the terms contained in the printed conditions which he had signed, objected on the ground that he had entered into possession on the terms of his first offer. The Duke then raised an action for declarator that Buchanan was bound to execute the lease, or alternatively, that there was no contract and therefore that the tenant was bound to remove. As the result of a proof the Court came to the conclusion that Buchanan believed that the terms of his first offer had been accepted, whereas the Duke had allowed possession on the footing of the second offer. It was held that parties had never reached any agreement; that accordingly there was no contract between them, and that Buchanan must remove.

The decision in *Buchanan* v. *Duke of Hamilton*[4] shews that the Court may arrive at the conclusion that there has been no contract, though the parties may have acted on the footing that there was: the peculiarity of the case being that there were two separate offers, and that the actings from which acceptance might be inferred were as applicable to the one offer as to the other. In the ordinary case when there is only one offer, and the difficulty is that that offer is not completely met by the acceptance, or that offer and acceptance, taken together, leave some of the terms of the contract indefinite, the conclusion to be drawn from actings which have followed will generally be that the contract has been thereby rendered complete and

[1] *Hussey* v. *Horne-Payne*, 1879, 4 App. Cas. 311; *British, etc., Aerated Bread Co.* v. *Maggs*, 1890, 44 Ch. D. 616; *Milne* v. *Anderson*, 1836, 14 S. 533; affd. 1827, 2 S. & M'L. 494; *Young* v. *Dougans*, 1887, 14 R. 490; *Fowler* v. *Mackenzie*, 1874, 11 S.L.R. 485; *Bellamy* v. *Debenham* [1891], 1 Ch. 412. *Western* v. *Miller*, 1879, 7 R. 173, seems hardly consistent with the rule laid down by the House of Lords in *Hussey* v. *Horne-Payne*. See an exceptional case of very definite acceptance—*Perry* v. *Suffields* [1916], 2 Ch. 187.

[2] *Harrower, Welsh & Co.* v. *M'William & Sons*, 1928, S.C. 326.

[3] 1877, 4 R. 328, 854; affd. 1878, 5 R. (H.L.) 69; and see, as to the effect of error in contract, *post*, Chap. XXVI.

[4] *Supra*. See also *Heiton* v. *Waverley Hydropathic Co.*, 1877, 4 R. 830.

binding, on the doctrine or principle which in Scotland is known as *rei interventus*.[1]

Locus pœnitentiæ and rei interventus. The position of matters which arises when parties have entered into negotiation for a contract, but have not said or done anything by which they are irrevocably bound, is, in the language of the leading institutional writers, that there is *locus pœnitentiæ*, or a right in either party to refuse to take the further steps necessary to complete the contract.[2] That right, however, is excluded if the negotiations have been followed by actings which cannot reasonably be referred to any other motive than an assumption that a contract had been completed, and to such actings the term *rei interventus* is applied. The definition of *rei interventus* given in Bell's *Principles* (sec. 26) has been so often judicially approved that it would be absurd to attempt any other: "*Rei interventus* raises a personal exception, which excludes the plea of *locus pœnitentiæ*. It is inferred from any proceedings not unimportant on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract as if it were perfect, provided they are unequivocally referable to the agreement, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable."[3] To this it must be added that it is not necessary to prove that the party against whom the plea is urged (the "obligor") had actual knowledge of the actings on which the plea is rested; it is enough if such actings were the normal and natural outcome of the negotiations or inchoate agreement alleged.[4]

Meaning of *rei interventus*.—The normal application of the plea of *rei interventus* is in cases where it is not disputed that an agreement has been made, but where the mere agreement is not binding, because the contract in question is one of the class in which writing is necessary to constitute a binding obligation. These cases will be considered in a later chapter, to which the reader is referred for a discussion of the doctrine in detail. But the term *rei interventus* is also applied, though not so frequently, to the case where parties have been in negotiation for a contract, and one of them has acted, and been known and allowed to act, on the mistaken assumption that the negotiations had reached the point of a completed contract. But though the term *rei interventus* is applied in both cases, and though the result (the completion or clinching of the contract) is the same, the theory on which the result is reached is different. In the case of an agreement which is not binding unless it is entered into in writing (as, for example, a contract relating to heritage), the rule that a merely verbal agreement becomes binding when followed by *rei interventus* is simply an exception to the primary and more general rule that contracts of that class require writing. But when *rei interventus* is relied upon in cases where parties have not arrived at any agreement, verbal or written, the rule that actings may

[1] *Colquhoun* v. *Wilson's Trs.*, 1862, 22 D. 1035; *Ballantine* v. *Stevenson*, 1881, 8 R. 959; *Wight* v. *Newton*, 1911, S.C. 762; *National Benefit Trust* v. *Coulter*, 1911, S.C. 544; *Roberts & Couper* v. *Salvesen*, 1918, S.C. 794; *Brogden* v. *Metropolitan Rly. Co.*, 1877, 2 App. Cas. 666; *Waring & Gillow* v. *Thompson*, 1912, 29 T.L.R. 154. But see *Barr* v. *Turner* (1904, 12 S.L.T. 369), where Lord Stormonth Darling seems to hold that *rei interventus* is not applicable to a case of actings following on mere negotiations (*Fraser* v. *Brebner*, 1857, 19 D. 401).

[2] *Stair*, i. 10, 9; More's *Notes to Stair*, lxv.; Ersk. iii. 2, 3; Bell's *Prin.*, sec. 25.

[3] Bell's *Prin.*, sec. 26; approved in *Wark* v. *Bargaddie Coal Co.*, 1859, 3 Macq. 467; *Kirkpatrick* v. *Allanshaw Coal Co.*, 1880, 8 R. 327.

[4] *Johnston* v. *Grant*, 1844, 6 D. 875; *Church of England Insurance Co.* v. *Wink*, 1857, 19 D. 1079; *National Bank* v. *Campbell*, 1892, 19 R. 885. In *Paterson* v. *Highland Rly.* (1927, S.C. (H.L.) 32), Lord Blanesburgh (p. 44) cited Bell's definition of *rei interventus*, but without adverting to this qualification. See opinion of Lord Shaw in the same case.

bind them to a contract is not an exception to the general rule that contract requires agreement. What is really meant is that the actings in question are evidence that agreement has been actually reached, though it has not been indicated in words or in other way than by the actings. In the former case the actings render an agreement binding; in the latter they prove that an agreement was reached.[1]

As illustrations of the circumstances in which it may be held that proof of actings which involve the assumption of a contract may render other proof that the contract was made unnecessary, two cases may be summarised.

In *Colquhoun* v. *Wilson's Trs.*,[2] *A.* offered to take a feu of certain ground of which he was already in possession as tenant. *B.* replied, accepting the offer, but adjecting to his acceptance certain conditions which were not in the offer, and so far as the overt correspondence between the parties indicated, no definite agreement was arrived at with regard to these conditions, and no feu-contract was executed. *A.*, however, made certain alterations on the subjects, of which *B.* was aware, and which (in the opinion of the Court) could only be explained on the assumption that he regarded himself, and was regarded by *B.*, as a feuar, and not merely as a lessee. The conclusion arrived at was that the alterations made by *A.*, and permitted by *B.*, amounted to *rei interventus*: that thereby the contract, previously incomplete, was made binding: that the inference to be drawn was that *A.* had tacitly assented to the conditions imposed by *B.*, and that he was therefore bound to concur in executing a feu-contract containing these conditions.

In *Wight* v. *Newton*,[3] a tenant had offered for a farm and had entered into possession on a draft lease, after having settled all the terms except the repairs on the fences, which the landlord was to undertake. On this point the tenant held that the landlord had assented to certain obligations which he (the tenant) had inserted on revising the draft lease. He brought an action, concluding that the landlord should be ordained to concur in a lease including these obligations, or on such other terms as the Court might determine. The landlord, in defence, maintained that there was no concluded contract, and that the pursuer was in possession merely as a yearly tenant without a lease. As the result of a proof it was held that the tenant had failed to prove the obligations on the landlord's part for which he contended. The draft lease, it was decided, followed by the *rei interventus* involved in entering into possession, completed a contract, but a contract without any obligation on the part of the landlord to execute the repairs, and therefore the pursuer was entitled to a lease without any express stipulation as to repair of fences or any obligation on his part to leave them in repair at the end of the lease.

[1] *Infra*, Chap. X.

[2] 1860, 22 D. 1035.

[3] 1911, S.C. 762. The Court did not attempt the task of distinguishing *Buchanan* v. *Duke of Hamilton* (1878, 5 R. (H.L.) 69, narrated *supra*), and it is submitted that no distinction is possible, except on the footing that in this branch of the law each case must depend on its own circumstances. For other cases between landlord and tenant, which lead to that conclusion, see *Cairns* v. *Gerrard*, 1833, 11 S. 737; *Fraser* v. *Brebner*, 1857, 19 D. 401; *Kerr* v. *Forrest's Trs.*, 1902, 10 S.L.T. 67.

CHAPTER III

ONEROUS AND GRATUITOUS CONTRACTS

Consideration not Necessary in Scotland.—The doctrine of consideration, as it has been developed in English law, has no place in the law of Scotland. There is nothing in our law corresponding to the English distinction between contracts under seal, in which consideration is presumed, and simple contracts which are not binding unless consideration be proved.[1] With the exception of those contracts which require constitution in writing[2]—a requirement which depends on the nature of the contract in question, and not upon its onerous or gratuitous character—the law of Scotland infers an obligation from consent to undertake it, whether that obligation has or has not a consideration behind it. "It is quite certain that if well proved a gratuitous promise is just as binding as if it were onerous. In this respect our law differs from the law of England."[3] "It is a familiar doctrine in the law of Scotland, differing in that respect from the law of England, that an obligation is binding though it may not proceed on a valuable consideration, or may not be expressed in a solemn form such as a deed under seal. What is necessary is that the promisor should intend to bind himself by an enforceable obligation, and should express that intention in clear words."[4] This general rule is laid down by all the institutional writers,[5] and is referred to in many cases as undisputed law.[6]

Nuda pacta.—Nor has the law of Scotland, in this particular, followed the Roman law, under which certain agreements (*nuda pacta*) did not form a ground of action, though, if fulfilled, they might be pleaded, *per exceptionem*,

[1] For English law of consideration, see Pollock, *Contract*, chap. iv.; Leake, *Contracts*, 7th ed., 445; Anson, *Contract*, chap. ii.; Chitty, *Contracts*, chap. i. As the word "consideration" has a technical meaning in English law it should as far as possible be avoided in dealing with the law of Scotland. Where it is used (and it is difficult to avoid it) in contrasting a unilateral obligation, where one party binds himself without the other being bound, with a mutual or bilateral contract, where obligations are undertaken by both parties, it denotes in Scotland simply a counterpart, or *quid pro quo*, of some kind, by the one party for the obligations undertaken by the other, irrespective of the technical rules by which, in England, certain forms of such counterpart amount to consideration while others do not. The necessity of consideration is a question of the law of the country when the contract was entered into, not of that where it is sought to be enforced. Therefore in a Scots sequestration a ranking was refused on a bond granted in England which, according to the opinion of English counsel, could not there compete with onerous creditors (*Williamson* v. *Taylor*, 1845, 8 D. 156). See a converse case (*In re Bonacina* [1912], 2 Ch. 394), where a gratuitous obligation entered into in Italy, and valid by Italian law, was allowed effect in an English bankruptcy.

[2] *Post*, Chap. X.

[3] Per Lord Kyllachy (Ordinary) in *Hawick Heritable Investment Bank* v. *Hoggan*, 1902, 5 F. 75, 78.

[4] Per Lord Kinnear in *Morton's Trs.* v. *Aged Christian Friend Society*, 1899, 2 F. 82, 85.

[5] Stair, i. 10, 7; More's *Notes*, i., lxii.; Bankton, i., xi.; Ersk. iii. 2, 1, and iii. 3, 38; Bell, *Prin.*, secs. 8, 64.

[6] *E.g.*, *M'Gibbon* v. *M'Gibbon*, 1852, 14 D. 605; *Dixon* v. *Bovill*, 1856, 3 Macq. 1; *Law* v. *Humphrey*, 1876, 3 R. 1192; *Paterson* v. *Paterson*, 1893, 20 R. 484.

in answer to an action for repetition.[1] This doctrine, though its applicability was arguable in the earlier part of the seventeenth century,[2] has never been adopted in the law of Scotland, and is definitely rejected by Lord Stair. "The Romans, that they might have clear proof of pactions and agreements, would second none with their civil authority but such as had a solemnity of words, by way of stipulation, whereby the one party going before, by an interrogation, the other party closed by an answer conform, which was clear both to the parties and witnesses; or otherwise unless there were the intervention of some deed or thing beside the consent, or that it were a contract allowed by the law, or such other paction as is specially confirmed, without all which it was called *nudum pactum, inefficax ad agendum*. We shall not insist on these, because the common custom of nations has resiled therefrom, following rather the canon law, by which every paction produceth action, *et omni verbum de ore fideli cadit in debitum*." [3]

Distinctions from English Law.—The absence of any necessity for consideration in order to make an obligation binding results in some cardinal distinctions between the laws of England and Scotland. Thus an obligation to give, to be binding in England, must be undertaken under seal;[4] in Scotland, it is submitted, it is obligatory by force of mere consent.[5] In

[1] *Dig.*, ii. 14, 7: "*Sed cum nulla subest causa, propter conventionem hic constat non posse constitui obligationem; igitur nuda pactio obligationem non parit sed parit exceptionem.*" A "*nudum pactum*," in Roman law, meant an obligation which was not undertaken by a *stipulatio*, and was not recognised as one of the real or consensual contracts. Hence it did not mean a gratuitous obligation; a mandate, being one of the recognised consensual contracts, would be enforceable though gratuitous (*Inst.*, iii. 26, 13). But from a very early period in the law of Scotland (see *Kintore* v. *Sinclair*, *infra*) the phrase seems to have been used with the meaning of a gratuitous obligation. As to the Roman law of *nuda pacta*, see Savigny, *Obligationenrecht*, vol. i., sec. 9; Sohm, *Institutes* (Ledlie's translation), sec. 84. As to the history of the term see Pollock, *Contract*, App. E.

[2] The doctrine was rejected, though not unanimously, in *Kintore* v. *Sinclair*, 1623, M. 9425. It seems to have been approved in argument in *Sharp* v. *Sharp*, 1631, M. 15562. Forty years later, in *Deuchar* v. *Brown* (1672, M. 12386), when the question at issue was whether a gratuitous cautionary obligation could be proved by parole, the general proposition that "a promise, for whatever cause, is valid and obligatory," was put forward and received as a commonplace.

[3] Stair, i. 10, 7; Bankton, i., xi. 22.

[4] Chitty, *Contracts*, 17th ed., 34.

[5] Lord Young, in more than one case, has indicated an opinion that the Scots Courts will not interfere to enforce an obligation to give (*Milne* v. *Grant's Exrs.*, 1884, 11 R. 887, 891; *Thomson's Exrs.* v. *Thomson*, 1882, 9 R. 911, 914; *Cambuslang West Church Committee* v. *Bryce*, 1897, 25 R. 322). But it is submitted that the validity of such an obligation is fully established, provided that competent proof is available (see *infra*, p. 50). Thus Lord Stair says (i. 10, 11), "he who obliges himself to bestow a horse is thereby bound, but there is no obligation on the other," and see More's *Notes*, lxii.; Mackenzie's *Inst.*, iii. 3. In *Ker* v. *Ker* (1751, M. 9442) a letter undertaking to execute a bond of provision in the recipient's favour was held to be enforceable; in *Dugaid* v. *Caddall's Trs.* (1831, 9 S. 844) a gratuitous obligation payable at the granter's death was sustained; and in *Reoch* v. *Young* (1712, M. 9439) a gratuitous undertaking to pay £20 was held to be a valid obligation, in circumstances very unfavourable to the pursuer. In modern law the same principle was very clearly brought out in *Morton's Trs.* v. *Aged Christian Friend Society*, 1899, 2 F. 82 (contrast a similar English case, *Creed* v. *Henderson*, 1885, 54 L.J. Ch. 811). *M.* had written to a provisional committee who were engaged in establishing a charitable society, offering to subscribe £1,000 in ten annual instalments. The offer was accepted, and the society was formed. After eight instalments had been paid *M.* died. In a special case raised to determine the liability of his representatives for the remaining two instalments it was held that his offer, when accepted, formed an obligation binding on him and his representatives. In *Smith* v. *Oliver* (1911, S.C. 103), where an action for payment of a subscription promised failed for want of proof by the writ of the promisor (see *infra*, p. 61), it was not disputed that the promise to subscribe, if proved, was binding. In *Murray* v. *Macfarlane's Trs.* (1895, 22 R. 927) a written conveyance of furniture was held to be irrevocable and obligatory, though, as the furniture remained in the possession of the granter, no right of property in it was transferred, and the conveyance was gratuitous. In *Costin* v. *Hume* (1914, S.C. 134) it was decided that where *A.* had agreed to give money to *B.*, and had by mistake paid it to *C.*, *B.* had a title to recover it from *C.* The case that seems

Scots law an averment of non-onerosity of a bill is not *per se* a relevant defence to an action by the drawer against the acceptor ; [1] in English law, though onerosity is presumed, proof of absence of consideration is a relevant defence in an action between the original parties to the bill.[2] When *A.* makes an offer to *B.*, and undertakes to keep it open for a certain time, he is not, in English law, debarred from revoking his offer whenever he pleases, on the ground that there is no consideration for the undertaking to keep the offer open.[3] In Scotland such an offer amounts to a promise, and gives the party to whom it is made the right to insist on the contract if he accepts within the stipulated time.[4] Again, there is no trace in the law of Scotland of the rule that an agreement to discharge a debt for less than the amount due is not binding on the creditor ; [5] and the question whether action can be raised on a contract by one who was not a party to it is not embarrassed, in Scotland, by the principle that " consideration must move from the promisee." [6]

Proof of Gratuitous Obligation.—The principle that an obligation for which no return is asked or made is nevertheless binding is limited, in its practical effects, by the rule that a gratuitous obligation cannot be proved except by the writ or oath of the promisor. Parole evidence is incompetent.[7] Thus, though when a gift is completed by a transfer of the thing given, the *animus donandi*, if the title of the donee be called in question, may be proved by parole evidence ; [8] an obligation to give, not followed by any transfer of the thing, can be proved only by the writ or oath of the party who has undertaken it.[9] In *Millar* v. *Tremamondo*, *A.* sued his father-in-law for fulfilment of certain promises alleged to have been made to him before marriage, and it was held that proof was restricted to the writ or oath of

to present some difficulty is *Cambuslang West Church Committee* v. *Bryce* (1897, 25 R. 322). *B.*, in a private letter to his son-in-law, a clergyman who was engaged in collecting money for the endowment of a church, used the expression : " I will give you £100 towards endowment should your subscriptions fall short." Founding on the letter, the committee of management sued *B.* for £100, averring that the subscriptions had fallen short of the amount required. It was held that the pursuers had no title to sue. The Lord Justice-Clerk, Lords Trayner and Moncrieff, decided the case on the ground that the obligation had been undertaken directly in favour of the minister, and that there was no relevant averment that *B.* intended to confer on the committee any title to sue. On this view the case seems to be purely special. Lord Young, however, dissented from this ground of judgment, and held that the letter in question was not obligatory. In so far as this opinion was not based on the specialty that the promise in question was contained in a private letter passing between relations, it is submitted that it cannot be held to be law.

[1] *Law* v. *Humphrey*, 1876, 3 R. 1192.

[2] Chitty, *Contracts*, 17th ed., 22.

[3] *Dickinson* v. *Dodds*, 1876, 2 Ch. D. 463; Leake, *Contracts*, 7th ed., p. 25; Pollock, *Contract*, 9th ed., 28.

[4] *Ante*, p. 35.

[5] *Foakes* v. *Beer*, 1884, 9 App. Cas. 605; Leake, *Contracts*, 7th ed., p. 455; Pollock, *Contract*, 203.

[6] See Leake, *Contracts*, 7th ed., 449. As to the right to sue on a contract to which the pursuer is not a party, on the principle of *jus quæsitum tertio*, see Chap. XIII.

[7] Stair, i. 10, 4 ; Ersk. iv. 2, 20 ; Bankton, i., xi. 2, and iv. 30, 15 ; Dickson, *Evidence*, sec. 598.

[8] *Wright's Exrs.* v. *City of Glasgow Bank*, 1880, 7 R. 527 ; *Sharp* v. *Paton*, 1883, 10 R. 1000 ; *Milne* v. *Grant's Exrs.*, 1884, 11 R. 887 ; *Thomson's Exrs.* v. *Thomson*, 1882, 9 R. 911 ; *Brownlee's Exrs.* v. *Brownlee*, 1908, S.C. 232.

[9] *Millar* v. *Tremamondo*, 1771, M. 12395 ; *Mackenzie* v. *Brodie*, 1859, 21 D. 1048, per Lord Cowan, at p. 1051 ; *Smith* v. *Oliver*, 1911, S.C. 103. So a promise to make a will in favour of a particular party can be proved only by the promisor's writ (*Edmondston* v. *Edmondston*, 1861, 23 D. 995 ; *Johnston* v. *Goodlet*, 1868, 6 M. 1067 ; *Hallet* v. *Ryrie*, 1907, 15 S.L.T. 367 ; *Smith* v. *Oliver*, *cit.* ; *Gray* v. *Johnston*, 1928, S.C. 659). In *Weir* v. *Russell* (1703, M. 12331) an unreported case is referred to, deciding that parole evidence of an obligation to give is incompetent even if the amount is less than £100 Scots (£8. 6s. 8d.).

the defender.[1] Nor does it matter that the person founding on the alleged promise avers that he has altered his position in reliance on it. In *Smith* v. *Oliver* the trustees of a church brought an action against an executor, averring that the deceased had promised to leave £7,000 for additional buildings, which she had desired them to erect, and that in reliance on this undertaking they had erected the buildings in question. It was held that the proof of this obligation was limited to the writ of the deceased. If, however, the party to whom the promise of some gratuitous advantage has been made avers that in reliance on it he incurred some definite expenditure, it would appear that he has a claim for reimbursement in pursuance of which he may establish the fact of the promise by parole evidence. In *Gray* v. *Johnston*[2] the pursuer, in an action directed against an executor, averred that the deceased had promised to make a will in his favour if he would reside with him, that in reliance on this promise he had given up his employment, and had incurred loss which he estimated at £6,000. For this sum he sued. He did not aver that he could produce any writ of the deceased in proof of the alleged promise, and disclaimed contract as a basis for his action. The majority of the Court dismissed the action as irrelevant, on the ground that the pursuer, though he averred general damage, did not aver any definite expenditure in reliance on the alleged promise, but in their opinions seem to admit the relevancy of such a claim if definite expenditure is duly averred. The Lord Justice-Clerk (Alness) was of opinion that the pursuer had stated a relevant case, and that proof *prout de jure* was competent.

In *Stuart* v. *Potter, Choate & Prentice*,[3] the Lord Ordinary (Skerrington) held that a letter by which *A.* acknowledged that he held certain bonds for *B.*, being neither holograph nor tested, and being, in his Lordship's opinion, gratuitous, did not form any obligation on which *B.* could found. This involves the theory that a gratuitous obligation must not only be proved by writing, but is not binding unless originally constituted by a probative writ. No authority is cited for the proposition, and it is believed there is none. The decision was reversed, but on other grounds. It is conceived that in the case of a gratuitous obligation writing is requisite merely as evidence, and that, as in other cases where it is so required, it is not necessary that it should be in probative form.[4]

In the intermediate stage between a completed gift and an obligation to give, where documents of title, such as share certificates or an unendorsed deposit-receipt, which do not carry the right of which they are the vouchers, are transferred, it would appear that proof of donation is limited to the writ or oath of the donor.[5] But if a deposit-receipt is endorsed and transferred, or if it is taken in the name of the donee, or of the donor and donee and the survivor, proof that the donor's intention was to make a gift, either *inter vivos* or *mortis causa*, may be by parole evidence.[6]

The restriction of proof to writ or oath applies to other gratuitous obligations which are not mere promises to give. Thus proof by parole was refused of an averment that the cedent of a bond had warranted the solvency of the debtor,[7] of an undertaking to pass from a right of action,[8] and of a gratuitous

[1] 1771, M. 12395; approved and followed in *Smith* v. *Oliver*, *supra*.
[2] 1928, S.C. 659. [3] 1911, 1 S.L.T. 377; 48 S.L.R. 657. [4] *Infra*, p. 193.
[5] *M'Nicol* v. *M'Dougall*, 1889, 17 R. 25. And see *infra*, p. 68.
[6] *Sharp* v. *Paton*, 1883, 10 R. 1000; *Macfarlane's Trs.* v. *Miller*, 1898, 25 R. 1201; *Scott's Trs.* v. *Macmillan*, 1905, 8 F. 214; *Boucher's Trs.* v. *Boucher's Trs.*, 1907, 15 S.L.T. 157.
[7] *Weir* v. *Russel*, 1703, M. 12331.
[8] *Hislop* v. *Smart*, 1703, M. 12331.

cautionary obligation.[1] But when an obligation, in itself gratuitous, is added to a mutual and onerous contract, of such a character that it may be proved by parole, the rule limiting proof to writ or oath is not applicable. So when a compromise was effected under which *A.* was relieved of a possible claim of damages for failure to implement a lease, and undertook, on his part, to endorse a grocer's licence which had been granted in his name, it was held that parole proof of the obligation to endorse was admissible.[2] "A promise or undertaking is not in the eye of the law gratuitous—that is to say, it is not a mere *nudum pactum*, if it be part of a transaction which includes *hinc inde* onerous elements, such, for example, as a waiver or discharge of claims, or objections to claims—claims or objections which, whether good or bad, it is desired to extinguish. In such a case the whole transaction—unless heritable rights are affected—may, I think it is clear, be the subject of parole proof." [3]

Consideration in Cases of Error. –When it is said that the law of Scotland holds an obligation binding, although gratuitous, it is by no means to be inferred that the gratuitous or onerous character of an obligation is a circumstance irrelevant or immaterial in determining the rights or liabilities it confers or imposes. A party who admits that he has undertaken an obligation, and sets forth no defence other than its gratuitous character, is indeed out of Court; but when the existence of the obligation is in issue, or when its validity is challenged on other grounds, the fact that it is gratuitous is entitled to great weight. "In Scotland a contract does not require consideration as a condition of its validity, but when the question is whether a particular contract has been entered into, it is material that the alleged contract is unusual and gratuitous." [4] Thus a gratuitous obligation which has been entered into in consequence of an error or mistake may be reducible on grounds which would be irrelevant in an attack on an onerous contract.[5] And the absence of any consideration, or gross inadequacy of consideration, though not in itself proof of fraud or undue influence, is a very material part of the evidence on which the Court has to decide whether fraud or undue influence has been made out. The general drift of the law may be given in the words of Lord Ardmillan: "Mere inadequacy of consideration does not of itself furnish sufficient ground for setting aside a transaction. But then gross inadequacy of consideration is a circumstance not to be lost sight of in judging of the transaction when challenged on other grounds. It is an element of importance to be weighed with all the other circumstances, and if, in the relations or the conduct of the parties there are any suspicious circumstances, then gross inadequacy of consideration may reasonably furnish what the English lawyers call "a vehement presumption of fraud." [6]

Besides its general importance in cases of fraud or error there are certain special relationships or circumstances where the onerosity or non-onerosity of a contract becomes the ruling consideration. A full discussion of these

[1] *Deuchar* v. *Brown*, 1672, M. 12386; *Donaldson* v. *Harrower*, 1668, M. 12385.

[2] *Hawick Heritable Investment Bank* v. *Hoggan*, 1902, 5 F. 75 (opinion of Lord Kyllachy, Ordinary). The question of proof was not considered in the Inner House. *Question*—Whether an obligation to keep an offer open could be proved by parole?

[3] Per Lord Kyllachy (Ordinary), in *Hawick Heritable Investment Bank* v. *Hoggan*, *supra*, at p. 79.

[4] Per Lord Skerrington (Ordinary) in *Nairn's Trs.* v. *Stewart*, 1910, 2 S.L.T. 432-435.

[5] *M'Caig* v. *University of Glasgow*, 1904, 6 F. 918; and see further on the effect of error on gratuitous obligations, *infra*, Chap. XXVI.

[6] Per Lord Ardmillan in *Tennent* v. *Tennent's Trs.*, 1868, 6 M. 840, at p. 865; affd. 1870, 8 M. (H.L.) 10.

belongs to a more specialised treatise than the present, but their general character may be briefly indicated.

Donation *inter virum et uxorem*. Contracts between husband and wife, during marriage, were at common law revocable as donations if gratuitous, and the right to revoke might be exercised by the donor or by his creditors.[1] The law has been altered by the Married Women's Property (Scotland) Act, 1920,[2] under which donations *inter virum et uxorem* are no longer revocable. But as there is a proviso that any donation completed within a year and a day before the sequestration of the donor shall be revocable at the instance of his or her creditors a statement of the prior law may still be of interest. In order to bar the right to revoke it must be shown that consideration of some kind was given. Consideration, in such cases, may consist in the natural obligation of a husband to provide for his wife; in some counter gift; in a renunciation of a right already secured; or in the fact that the alleged gift was in reality remuneration for the wife's assistance in the husband's business.[3] It is not enough to shew that the contract in question was not entirely gratuitous. The consideration must be reasonably adequate; but it has been laid down that it will not be weighed in nice scales.[4] So a postnuptial contract in favour of a wife may be revoked by the husband, or by his creditors, in so far as it exceeds a reasonable provision for her, considering the circumstances of the parties.[5] Mutual wills or settlements, made by agreement between husband and wife, are revocable if the benefit is substantially all on one side,[6] and it is probably established that the question is to be determined by considering the circumstances of the parties at the dissolution of the marriage.[7] In *Beattie's Trs.*,[8] the husband, by antenuptial marriage contract, had made a provision for the wife in the event of her survivance which in the opinion of the Court was reasonable. During marriage they executed a mutual settlement, by which, in the event (which happened) of there being no issue, the whole estate was destined to the survivor. The marriage was dissolved by the death of the husband, leaving a will by which he revoked the mutual settlement. At his death his means amounted to £18,000: the wife possessed only £800, subject to certain burdens. It was held that the mutual settlement was practically a gratuitous deed on the part of the husband, and was therefore revocable by him. But when a wife renounces a provision made for her by antenuptial marriage contract in respect of a postnuptial provision, the latter will be revocable only if the disproportion is gross.[9] And a postnuptial contract, though providing for the wife, may be in substance a contract between the husband

[1] Ersk. i. 6, 29; Bell, *Prin.*, sec. 1616 *seq.*; Fraser, *Husband and Wife*, 2nd ed., 916; Walton *Husband and Wife*, 2nd ed., p. 120, cases cited there; and *Lord Advocate* v. *Gunning's Trs.*, 1907, S.C. 800; *Livingstone* v. *Livingstone*, 1908, S.C. 286; *Fann* v. *M'Donald*, 1913, S.C. 937.

[2] 10 & 11 Geo. V. c. 64, sec. 6.

[3] *Countess of Oxenford* v. *The Viscount*, 1664, M. 6136; *Chisholm* v. *Brae*, 1669, M. 6137; *Stewart* v. *Stewart*, 1904, 11 S.L.T. 721; *Dryden* v. *M'Gibbon*, 1907, S.C. 1131.

[4] *Hepburn* v. *Brown*, 1814, 2 Dow, 342, per Lord Eldon; *Mitchell* v. *Mitchell's Trs.*, 1877, 4 R. 800. *Fernie* v. *Colquhoun's Trs.* (1854, 17 D. 232) is an instance of inadequacy.

[5] *Craig* v. *Galloway*, 1860, 22 D. 1211; revd. 1861, 4 Macq. 267; *Gibson's Trs.* v. *Gibson*, 1877, 4 R. 867; *Melville* v. *Melville's Trs.*, 1879, 6 R. 1286; *Corbidge* v. *Somerville's Trs.*, 1911, S.C. 1326; *Scottish Equitable Life Assurance Co.* v. *Hunter*, 1910, 2 S.L.T. 296; *Pirie* v. *Pirie*, 1921, S.C. 781.

[6] *Henderson* v. *Tulloch*, 1833, 12 S. 133; *Beattie's Trs.*, 1884, 11 R. 846; *Corrance's Trs.* v. *Glen*, 1903, 5 F. 777; *Wood's Tr.* v. *Findlay*, 1909, 1 S.L.T. 156.

[7] *Hunter* v. *Dickson*, 1827, 5 S. 266; affd. 1831, 5 W. & S. 455; *Thomson* v. *Thomson*, 1838, 16 S. 641; *Mitchell* v. *Mitchell's Trs.*, 1877, 4 R. 800.

[8] 1884, 11 R. 846.

[9] *Ferguson's Curator Bonis* v. *Ferguson's Trs.*, 1893, 20 R. 835.

and a third party; if so, the law as to the revocability of donations between husband and wife does not apply, and the case must be dealt with on the ordinary principles of contract.[1]

Marriage Contracts.—The law as to antenuptial marriage contracts also illustrates the difference between onerous and gratuitous obligations, although such contracts are construed according to technical rules, which have only a very remote relation to the ordinary principles of contract.[2] Questions may be raised as to the validity of a subsequent revocation by the granter, or as to the effect of a marriage-contract provision in a question with creditors.

Marriage is consideration for a promise made in anticipation of it, and therefore those provisions in an antenuptial marriage contract which fall within the consideration of marriage are onerous, and cannot be revoked by any gratuitous deed.[3] These include all provisions in favour of the spouses themselves, the issue of the marriage, and their descendants.[4] And a provision in favour of third parties, such as the children of a prior marriage, may be obligatory, if an intention to bring them within the consideration of marriage is indicated, as by their being instituted along with the issue of the marriage.[5] Provisions in favour of the relatives of one party are obligatory if they are made in consideration of provisions in favour of the relatives of the other.[6] But if none of these conditions are present, provisions in favour of third parties are regarded as merely testamentary; they confer only a *spes successionis*, not a *jus crediti*, and they may be revoked by a subsequent direction, either *inter vivos* or by will, on the principle, as explained by Lord Watson, that, though contractual in form, they are not intended to be so in substance.[7]

It is an entirely different question whether provisions in an antenuptial marriage contract, which have not been followed by a conveyance of money or property to trustees, but remain merely as obligations by one or other of the spouses, are to be regarded as debts due by him or her in a question with other creditors. For provisions by one spouse to another, marriage is regarded as a counter prestation; they are therefore onerous debts, entitled to a ranking with other creditors.[8] So, in the bankruptcy of the husband, the wife may rank as a contingent creditor for provisions made for her to take effect at his death.[9] But provisions in favour of the issue of the marriage are regarded less favourably. A mere obligation to pay to them, or to trustees for their benefit, if it confers no right to payment of principal

[1] *Corbidge* v. *Somerville's Tr.*, 1911, S.C. 1326, where the husband's father was a party.

[2] See opinion of Lord Watson in *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88.

[3] But a reasonable provision to the issue of a second marriage will be sustained, though it may encroach on the provisions of an antenuptial marriage contract (Ersk. iii. 8, 42; M'Laren, *Wills*, 3rd ed., i. 677; *Haldane* v. *Hutchison*, 1885, 13 R. 179). And a reserved power to revoke is effectual, however inconsistent with the other provisions of the deed (*Fowler's Trs.* v. *Fowler*, 1898, 25 R. 1034; *Simpson's Trs.* v. *Taylor*, 1912, S.C. 280).

[4] *Macdonald* v. *Hall*, 1892, 19 R. 567; revd. 1893, 20 R. (H.L.) 88; *Livingstone* v. *Waddell's Trs.*, 1899, 1 F. 831.

[5] *Mackie* v. *Gloag's Trs.*, 1883, 10 R. 746; revd. 1884, 11 R. (H.L.) 10; *Allan's Trs.* v. *Allan's Trs.*, 1907, 15 S.L.T. 73; *Leslie's Trs.* v. *Leslie*, 1921, S.C. 940.

[6] *Macdonald* v. *Hall*, 1892, 19 R. 567, per Lord Kinnear, at p. 574; contrast *Montgomerie's Trs.* v. *Alexander's Trs.*, 1911, S.C. 856, where provisions by a wife to her husband's children by a former marriage were held to be merely testamentary.

[7] Ersk. iii. 8, 39; M'Laren, *Wills*, 3rd ed., i. 424; *Macleod* v. *Cuninghame*, 1841, 3 D. 1288; *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88, per Lord Watson, at p. 95; *Barclay's Trs* v. *Watson*, 1903, 5 F. 926; *Main's Trs.* v. *Main*, 1917, S.C. 660.

[8] Ersk. iv. 1, 33; Bell, *Com.*, i. 682; M'Laren, *Wills*, 3rd ed., i. 671. As to reduction of an antenuptial marriage contract on the ground that it was granted during insolvency, see *M'Lay* v. *M'Queen*, 1899, 1 F. 804.

[9] *Mackinnon's Trs.* v. *Dunlop*, 1913, S.C. 232.

or interest at any period which may arise during the granter's lifetime, though, as already explained, it is not revocable by any gratuitous act of the granter, cannot stand against his onerous deeds, and therefore cannot obtain a ranking on his bankruptcy.[1] In questions with creditors, the issue of the marriage have a *spes successionis* only, not a *jus crediti*. And the result is not altered if there is an obligation to provide funds to trustees, if, were it carried out, it would give the issue no right to payment of principal or interest during the granter's lifetime.[2] Such obligations form a class half-way between ordinary debts and mere expressions of testamentary intention, in respect that they are binding on the granter but inoperative when his creditors come into the field. It is not, however, impossible to frame obligations in an antenuptial marriage contract which will give the issue of the marriage a *jus crediti*, and entitle them to rank as ordinary or contingent creditors in bankruptcy. This result is effected if the provisions are made payable at a period which may possibly arrive during the granter's lifetime, such as the majority or marriage of the children, or the dissolution of the marriage.[3] The same result follows if there is an obligation to pay interest either immediately or from a period which may arrive during the granter's lifetime.[4] But where a husband undertook to provide £4,000 "at such times and in such sums as he finds it convenient," to be held for the wife in liferent, for himself in liferent after her death, and for the issue in fee after the death of the survivor, with an obligation to pay interest to the trustees or to the wife, it was held that as there was no obligation to pay interest which the children could directly receive in the lifetime of the granter, they had only a *spes successionis*, and therefore that the trustees were not entitled to rank for the £4,000 in the bankruptcy of the husband.[5] If security is given for the sums provided to the children, and duly completed in favour of trustees, the security, so far as it goes, is effectual in the bankruptcy of the granter,[6] but the mere fact that security has been given does not render the provisions which it is intended to secure obligatory.[7]

There are certain confidential relationships, besides that of husband and wife, such as the relationship of a trustee to a beneficiary, a law agent to his client, which fall rather within the domain of trust than that of contract. When the parties to a contract stand in these relations to each other, its gratuitous or quasi-gratuitous character may expose it to reduction. Such cases will be considered in a later chapter.[8]

Gratuitous Obligations in Bankruptcy.—Where a gratuitous obligation has been incurred by a party while solvent, the mere fact that he ultimately becomes bankrupt does not render it unenforceable if still unfulfilled, or expose it to reduction if implemented.[9] Thus, according to Erskine, a prior creditor, though his debt be gratuitous, may reduce a posterior conveyance to a conjunct and confident person, granted after the debtor had become

[1] Ersk. iii. 8, 39; Bell, *Com.*, i. 685; *Gordon* v. *Sutherland*, 1748, M. 12915; *Herries, Farquhar & Co.* v. *Brown*, 1838, 16 S. 948; *Mackinnon's Trs.* v. *Dunlop*, 1913, S.C. 232.

[2] *Goddard* v. *Stewart*, 1844, 6 D. 1018; *Wilson's Trs.* v. *Wilson*, 1856, 18 D. 1096.

[3] *Cruikshank's Trs.* v. *Cruikshank*, 1853, 16 D. 7.

[4] *Mackenzie's Crs.* v. *His Children*, 1792, M. 12924, and Bell's *Octavo Cases*, 404; affd. 1795, 3 Paton, 409.

[5] *Mackinnon's Trs.* v. *Dunlop*, 1913, S.C. 232.

[6] *Herries, Farquhar & Co.* v. *Brown*, 1838, 16 S. 948.

[7] *Wilson's Trs.* v. *Wilson*, *supra*.

[8] Chap. XXXI.

[9] Ersk. iv. 1, 32; *Drummond* v. *Swayne*, 1834, 12 S. 342; *Bolden* v. *Ferguson*, 1863, 1 M. 522; *Pringle's Tr.* v. *Wright*, 1903, 5 F. 522.

insolvent, under the provisions of the Act 1621, c. 18.[1] And in reductions of a disposition under that Act, *a fortiori* in reductions founded on common law, an averment that the granter was insolvent at the date of granting is necessary to the relevancy of the pursuer's case.[2] In *Pringle's Tr.* v. *Wright*,[3] the bankrupt, while solvent, had granted gratuitous obligations to his daughter. These he had ultimately paid, but the payment was within sixty days of his bankruptcy. It was held that the payments could not be recovered by the trustee. As payments in cash of an existing debt they were not struck at by the Act 1696, c. 5, and the objection that the debts were gratuitous was met by the reply that the debtor was solvent when they were incurred. But in certain gratuitous obligations the continued solvency of the obligant may be held to be an implied condition. The construction of marriage contracts, in this connection, has been already considered.[4] If a man binds himself to pay when he is able to do so, that undertaking, unless it be merely corroborative of an obligation already enforceable, may be binding on him, but will not entitle the creditor to rank in his bankruptcy.[5] And when the directors of a bank conferred a pension on a retiring official, to whom they were under no obligation, it was held that the continued solvency of the bank was an implied condition, and that the pensioner had no claim in its liquidation.[6]

But while supervening bankruptcy does not cut down gratuitous obligations, it is a general rule that a party who is actually insolvent cannot bind himself or dispose of his property to the prejudice of his creditors except for onerous causes. "From the moment of his insolvency a debtor is bound to act as the mere trustee, or rather as the *negotiorum gestor*, of his creditors, who, thenceforward, have the exclusive interest in his funds. He may, as long as he is permitted, continue his trade, with the intention of making gain for his creditors and for himself: but his funds are no longer his own, which he can be entitled secretly to set apart for his own use, or to give away as caprice or affection may dictate."[7] Thus while a security for a prior debt is reducible, at common law, only on proof that it was granted at a time when the granter was aware of his insolvency,[8] it is a fundamental principle of common law that all gratuitous alienations by a party at a time when he is in fact insolvent are reducible.[9] For the detailed rules of the common law and of statute as to the reduction of conveyances or preferences as fraudulent in bankruptcy, works devoted to that subject must be consulted.

Gratuitous Obligation by Trustee in Bankruptcy.—Another distinction between gratuitous and onerous contracts occasioned by bankruptcy is that a gratuitous obligation by a trustee in bankruptcy cannot be sustained. Thus when property belonging to a bankrupt estate had been injuriously affected by the operations of a railway company, and the trustee assigned the claim for compensation to the superior without receiving anything in return, it was held that the assignation was voidable, and did not confer on the superior any title to sue the railway company.[10]

[1] Ersk. iv. 1. 28. [2] *Bolden* v. *Ferguson, supra.* [3] 1903, 5 F. 522. [4] *Supra*, p. 54.
[5] See opinion of Lord President Dunedin in *Mackinnon's Trs.* v. *Dunlop*, 1913, S.C. 232, commenting on *Fair* v. *Hunter*, 1861, 24 D. 1. And see *ante*, p. 20.
[6] *Fraser* v. *City of Glasgow Bank*, 1880, 7 R. 961.
[7] Bell, *Com.*, ii. 170.
[8] *M'Dougall's Tr.* v. *Ironside*, 1914, S.C. 186.
[9] Bell, *Com., ut supra*; *Obers* v. *Paton's Trs.*, 1897, 24 R. 719.
[10] *Caledonian Rly. Co.* v. *Watt*, 1875, 2 R. 917.

Cautionary Obligation. It is laid down by the institutional writers that a cautionary obligation may be enforced although it is entirely gratuitous.[1] But this may mean merely that it is not necessary that any advantage should accrue to the cautioner in consideration of his undertaking the obligation. It is not clear that a creditor can enforce a cautionary obligation for which he has given no value, either by advances to the principal debtor, or abstaining from pressing him for payment in circumstances where such pressure would have had a reasonable chance of success. In *Sutherland* v. *Low*,[2] *A.*, who was in debt to *B.*, and was to *B.'s* knowledge hopelessly insolvent, induced *C.* to guarantee his debt. An action of reduction was successful, primarily on the ground of fraud, in which *B.* as well as *A.* was implicated, but Lord Young expressed the opinion that as *B.* had no chance of recovering payment from *A.*, the reduction of the guarantee would have been competent even if no fraud had been proved, because *B.* had not in any way acted in reliance on it, and would not, by its reduction, be deprived of any advantage which he would not have had if it had never been granted. If, however, the creditor advances money to the principal debtor, or abstains from pressing him for payment in circumstances where payment is not hopeless, in reliance on the cautionary obligation, the cautioner's obligation is not considered as gratuitous.[3]

Failure of Consideration. While, subject to the limitations indicated, it is the rule of the law of Scotland that consideration is not essential to contractual obligation, yet if the original intent of the contract was that a gift or payment was made in view of something which was to be given or done in return for it, and that consideration fails, money which has been paid may be recovered, although the circumstances may not amount to breach of contract. In Roman law this subject was treated in connection with the action by which the money might be recovered (*condictio causa data causa non secuta*);[4] by the institutional writers in Scotland as an illustration of the obediential obligation of restitution.[5] The general character of this principle of law is explained by Lord President Inglis in the following passage: "There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data causa non secuta*, or a *condictio sine causa*, or a *condictio indebiti*, according to the particular circumstances. In our practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for

[1] Stair, i. 17, 3; Bell, *Prin.*, sec. 246. In English law a consideration is necessary to support a cautionary obligation, unless it is undertaken under seal, but the consideration may consist in a benefit to the principal debtor at the cautioner's request (see Smith, *Mercantile Law*, 12th ed., p. 612). Since the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, sec. 3), it is no longer necessary that the consideration should appear in the writing by which the guarantee is constituted. But it is not correct to say, as is stated in the notes to Bell's *Prin.*, sec. 246, that this statute has obviated the necessity for consideration.

[2] *Sutherland* v. *Low*, 1901, 3 F. 972.

[3] *Bennie's Trs.* v. *Couper*, 1890, 17 R. 782; *Young* v. *Clydesdale Bank*, 1889, 17 R. 231; *Royal Bank* v. *Greenshields*, 1914, S.C. 259.

[4] *Dig.*, xii. 4; see also xix. 5 (*De præscriptis verbis et in factum actionibus*), Code IV. 6.

[5] Stair, i. 7, 7; Bankton, i., viii. 21; Ersk. iii. 1, 10; Bell, *Prin.*, sec. 530. For English law, see Leake, *Contracts*, 7th ed., p. 68; Chitty, *Contracts*, 17th ed., 56.

the rule which they are intended to enforce is of universal application in mutual contracts. If a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part, or any available part, of his contract. No doubt, if he perform a part and then fail in completing the contract I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no farther; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been." [1]

In *Cantiere San Rocco* v. *Clyde Shipbuilding Co.* [2] the passage just quoted was accepted in the House of Lords as an authoritative statement of the law of Scotland, and it was decided that when a contract, which was not, at the date of contracting, illegal,[3] could not be carried out, though the failure might not be attributable to the fault of either party, money paid in advance might be recovered. In a contract whereby a Scotch firm undertook to build marine engines for an Austrian firm an instalment of the price had, in accordance with the provisions of the contract, been paid on signature. Before the engines had been commenced war with Austria was declared, and the Austrian firm in consequence became alien enemies. It was not in dispute that the result was not to avoid the contract *ab initio*, but to preclude further performance. In an action raised after the restoration of peace, concluding for repayment of the instalment paid, the defenders were assoilzied in the Court of Session, mainly on the ground that the case for repetition depended on the contract being avoided. The judgment was reversed in the House of Lords, where it was decided, treating the question as one of the law of Scotland, and reserving consideration of the law of England, that the principle expressed in the phrase *causa data causa non secuta* applied to any case where the performance promised for the consideration given was not rendered, whatever the causes of that failure might be.

Condictio causa data.—As illustrations of cases where money may be recovered when paid for a consideration which has failed, the following may be instanced: If a man buys property which already belongs to him, the price, if paid, may be recovered.[4] Money paid or presents given in view of marriage must be restored if the marriage does not take place.[5] When a premium is paid on apprenticeship, and the master dies or becomes bankrupt so that the apprenticeship cannot be completed, the premium, or a portion of it, may be recovered.[6] But it was held, anomalously, that there was no claim for the return of a part of the premium when the contract was ended by the death of the apprentice.[7] When a forged banknote is given in payment, both parties believing it to be genuine, the party who took it may recover its value.[8] When money is paid for the assignation

[1] In *Watson* v. *Shankland*, 1871, 10 M. 142, 152 (affd. 11 M. (H.L.) 51).

[2] 1922, S.C. 723, revd. 1923, S.C. (H.L.) 105. See also *Davis & Primrose* v. *Clyde Shipbuilding Co.*, 1918, 56 S.L.R. 24 (O.H. Lord Dewar).

[3] As to illegal contracts see *infra*, Ch. XXXIII.

[4] *Dig.*, xviii. 1, 16.

[5] *Dig.*, xii. 4, 6-10; Ersk. iii. 1, 10.

[6] *Cutler* v. *Littleton*, 1711, M. 583. But this is not the law in England (*Ferns* v. *Carr*, 1885, 28 Ch. D. 409).

[7] *Shepherd* v. *Innes*, 1760, M. 589.

[8] *Leeds Bank* v. *Walker*, 1883, 11 Q.B.D. 84, and earlier authorities there cited.

of a lease, and the assignation is rendered impossible by the refusal of the landlord to consent, the payment may be recovered.[1] It has been held in England that where shares in a company are sold and paid for, but the company exercises a power to refuse to register the transferee, the price cannot be recovered, on the ground that the seller's contract is not to place the buyer on the register but only to furnish a genuine transfer and certificates, and not to do anything to impede registration.[2] In *Stevenson* v. *Wilson*,[3] however, it was decided that the seller, as his name remained on the register, was bound to receive the dividends and pass them on to the buyer, and the buyer was entitled to a declarator that the seller held the shares for him. In the opinion of the Lord President (Dunedin), the only way in which the seller could escape from this trust position was by rescinding the contract, which would involve the obligation to return the price. If freight is paid in advance, it has been held in Scotland that it may be recovered if the ship is lost or so disabled that the voyage cannot be completed,[4] unless there is some specialty in the terms of the charter-party which leads to the conclusion that the payment was intended to be absolute whether the voyage was completed or not.[5]

Rescission of Contract Involves Restitution. -It may also be taken as an illustration of the general rule that money may be recovered if the consideration has failed that if one party has the right to rescind a contract, it is a condition of the exercise of his right that any payments made by the other party must be restored. Thus when parties have entered verbally into a contract relating to heritage, in which writing is necessary to a completed obligation, each may have a right to resile, but only on condition of repayment of the price.[6] When it is ultimately determined that an agreement on which the parties have acted is void because no real agreement has been arrived at, each party is under an obligation to restore anything he may have received.[7] When a policy of insurance is rescinded by the insured on the ground that he has been induced to take it by the misrepresentations of the agent for the company, he is entitled to recover the premiums paid, in spite of the argument that in the meantime he has had the benefit of the insurance.[8] Policies of insurance invariably contain a clause under which all premiums paid are forfeited in the event of the policy being avoided on the ground of concealment or misrepresentation by the insured, and, under this clause, the company may avoid the policy and yet retain the premiums.[9]

In cases of breach of contract the party aggrieved has an action for

[1] *Wright* v. *Colls*, 1849, 8 C.B. 150; *Wright* v. *Newton*, 1835, 2 Cr. M. & R. 124.

[2] *London Founders' Association* v. *Clarke*, 1888, 20 Q.B.D. 576; Buckley, *Companies Acts*, 10th ed., 42.

[3] 1907, S.C. 445.

[4] *Hogg* v. *Inglis' Trs.*, 1777, M. App. Mutual Contract, No. 1; *Watson* v. *Shankland*, 1871, 10 M. 142 (affd., on specialties, 1873, 11 M. (H.L.) 51). In this case it was admitted in the Court of Session that by English law such payments were irrecoverable (see Carver, *Carriage by Sea*, 7th ed., sec. 562; Leake, *Contracts*, 7th ed., p. 73), but held that the English rule was not in accordance with the general mercantile law of other countries. In the House of Lords the question was expressly left open.

[5] *Leitch* v. *Wilson*, 1868, 7 M. 150, as explained in *Watson* v. *Shankland*, *supra*.

[6] *Lawson* v. *Auchinleck*, 1699, M. 8402; opinion of Lord M'Laren in *Paterson* v. *Paterson*, 1897, 25 R. 144, 191.

[7] See, *e.g.*, *Hamilton* v. *Western Bank*, 1861, 23 D. 1033; *Edgar* v. *Hector*, 1912, S.C. 348.

[8] *British Workman, etc., Assurance Co.* v. *Cunliffe*, 1902, 18 T.L.R. 502; *Refuge Assurance Co.* v. *Kettlewell* [1909], A.C. 243 (see opinions in C.A. [1908], 1 K.B. 545).

[9] *Standard Life Assurance Co.* v. *Weems*, 1884, 11 R. (H.L.) 48, per Lord Blackburn, at p. 50; *Macdonald* v. *National Mutual Life Assoc.*, 1906, 14 S.L.T. 173, 249.

damages, but in addition to this, and whether damages have been suffered or not, he is clearly entitled to recover any part of the price or other consideration which he may have paid.[1]

It is a question as yet undecided whether the principle of repetition of payments made on a consideration which has failed applies to the case where a purchaser, who has bought with warrandice of his title, is evicted.[2] The practical importance of the question is that, assuming an affirmative answer, the buyer, by claiming repetition of the price, might recover more than he has lost by the eviction, in the case where the value of the subject has in the meantime diminished. It is decided that no such claim is admissible in the event of partial eviction, as in the case where property is sold, and a right of way subsequently established over it.[3]

Condictio indebiti.—Closely akin to the *condictio causa data causa non secuta* is the *condictio indebiti*, a term which is still commonly used in Scotland to denote an action having for its object the recovery of money paid under the mistaken belief that it was due.[4] Its ordinary application is in such cases as payment of a debt which has been already discharged,[5] over-payment of a tradesman's account,[6] payment of freight for more goods than have actually been carried,[7] payments made under a mistake in identity,[8] payment of a widow's annuity under the mistaken belief that her husband was dead.[9] Where the purchaser of goods was directed to pay to one party, and by mistake paid to another, the payment would be recovered.[10] On this principle a trader, who had bargained with a railway company that his rates should not exceed the lowest charged to any other trader, was held entitled, on the facts coming to his knowledge, to recover payments which, on this standard, were too high.[11] When executors who were directed to make full payment to creditors who had acceded to a composition made by the deceased, paid by mistake to one who had not acceded, and had been paid in full, they were held entitled to insist on repayment.[12] Where the contract for the sale of a leasehold quarry professed to convey certain houses in so far only as they belonged to the seller, and it was admitted that the price paid covered them, it was held, on its being established that they belonged to the landlord, that the purchaser was entitled to repetition of the price paid for the houses, although the circumstances precluded the avoidance of the contract on the ground of misrepresentation.[13] Where a feuar, on making use of a mutual gable, paid half the cost of erecting it,

[1] *Aird & Cogkill* v. *Pullan & Adams*, 1904, 7 F. 258. See *Dig.*, xix. 5, 7: "*Si tibi decem dedero ut Stichum manumittas, et cessaveris, confestim agam præscriptis verbis, ut solvas quanti mea interest, aut, si nihil interest, condicam tibi, ut decem reddas.*"

[2] *Cairns* v. *Howden*, 1870, 9 M. 284; *Duncan, Galloway & Co.* v. *Duncan, Falconer & Co.*, 1913, S.C. 265 (opinion of Lord Hunter, Ordinary).

[3] *Welsh* v. *Russell*, 1894, 21 R. 769. See opinion of Lord M'Laren, that in all cases the right arising on eviction is to indemnification for the loss, not to repetition of the price.

[4] *Dig.*, xii. 6; Stair, i. 7 9; Ersk. iii. 3, 54; Bell, *Prin.*, sec. 531. For English law, see Leake, *Contracts*, 7th ed., p. 66; Chitty, *Contracts*, 17th ed., 66; 2 Smith, *L.C.*, notes to *Marriot* v. *Hampton*.

[5] *Ramsay* v. *Robertson*, 1673, M. 2924; *Earl of Peterborough* v. *Murray*, 1745, M. 2930.

[6] *Balfour* v. *Smith & Logan*, 1877, 4 R. 454. See a converse case, where too little had been charged, *Ward* v. *Wallis* [1900], 1 Q.B. 675.

[7] *Henderson & Co.* v. *Turnbull & Co.*, 1909, S.C. 510.

[8] *Crédit Lyonnais* v. *Stevenson*, 1901, 9 S.L.T.; *Tainsh* v. *Rollo*, 1824, 3 S. 47.

[9] *Masters and Seamen of Dundee* v. *Cockerill*, 1869, 8 M. 278; *North British Insurance Co.* v. *Stewart*, 1871, 9 M. 534 (payment of policy in belief that the insured was dead).

[10] *Kleinwort & Co.* v. *Dunlop Rubber Co.*, 1907, 97 L.T. 263 (H.L.).

[11] *Dalmellington Iron Co.* v. *Glasgow and South-Western Rly. Co.*, 1889, 16 R. 523.

[12] *Moore's Exrs.* v. *M'Diarmid*, 1913, 1 S.L.T. 278, 298.

[13] *Duncan, Galloway & Co.* v. *Duncan, Falconer & Co.*, 1913, S.C. 265.

he was entitled to recover what he had paid on discovering that it had already been paid by his superior.[1] When *A.* pays money to *B.* to meet a counterpart which *C.* is to supply, and does so in the belief that *C.* is solvent and therefore able to fulfil his obligation, he may recover his money if it turns out that *C.* is bankrupt.[2] Where a bank had certified a cheque for five dollars, and paid it after it had been fraudulently altered to five hundred, the difference was held recoverable.[3] Where money is paid by mistake to an agent it may be recovered if it is still in his hands, not if he has received it in good faith and paid it to his principal, or, probably, ascribed it to meet a debt due by that principal.[4]

Where a debtor has a statutory right to deduct income tax or some other tax from his payment, and omits to do so, it is somewhat doubtful whether he can recover it. In *Galashiels Provident Society* v. *Newlands*[5] it was inferred from the terms of sec. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), that there was no such claim in the case of interest on a bond; but in *Agnew* v. *Ferguson*,[6] a case where mineral royalties were paid without deduction, the other Division of the Court came to an opposite conclusion, relying on the general principle that money paid by mistake can be recovered. It is settled in England that if a payment is made without deduction of income tax it cannot be recovered.[7] In *Glasgow Corporation* v. *Glasgow Tramways Co.*[8] it was held that deductions which a tenant could claim under sec. 6 of the Valuation Act, 1854 (17 & 18 Vict. c. 19) could be afterwards recovered.

Mistaken Payments in Bankruptcy.—It is, it is conceived, a rule in bankruptcy that if a creditor is paid on a ranking given by mistake,[9] or, conversely, if a creditor gives up to the trustee money which he might have retained under some preferential right,[10] the mistake may be rectified by the recovery of the money, provided, in the latter case, that there are still funds available in the hands of the trustee.[11]

***Condictio indebiti* an Equitable Right.**—Repayment of money paid by mistake has always been regarded as an equitable claim, not to be sustained unless it appears that retention of the money would be inequitable.[12] So where freight had been paid on more goods than had in fact been shipped, and the excess was re-demanded, it was held that the shipowner might plead in defence his claim for dead freight, even on the assumption that a claim for dead freight is an illiquid claim of damages, which could not ordinarily be set against a liquid debt.[13] When rates had been collected on a property which was afterwards found not to be within the burgh, it was held that they could not be recovered, because repayment would fall

[1] *Robertson* v. *Scott*, 1886, 13 R. 1127.

[2] *Kerrison* v. *Glyn, Mills, Currie & Co.*, 1911, 17 Com. Cas. 41 (H.L.); *British-American Continental Bank* v. *British Bank for Foreign Trade* [1926], 1 K.B. 328.

[3] *Imperial Bank of Canada* v. *Bank of Hamilton* [1903], A.C. 49.

[4] *Continental Caoutchouc Co.* v. *Kleinwort*, 1904, 9 Com. Cas. 240, see opinion of Collins, M.R., at p. 248.

[5] 1893, 20 R. 821. This is law in England (*Lamb* v. *Brewster*, 1879, 4 Q.B.D. 607).

[6] 1903, 5 F. 879.

[7] *Hill* v. *Kirschenstein* [1920], 3 K.B. 556, construing sec. 211 of the Income Tax Act, 1918 (8 & 9 Geo. V. c. 40).

[8] 1897, 24 R. 628; revd., on a separate ground, 1898, 25 R. (H.L.) 77. See also *Weavers of Ayr* v. *Bone*, 1823, 2 S. 401.

[9] *Keith* v. *Grant*, 1792, M. 2933; *Duncan* v. *Bruce*, 1836, 14 S. 583.

[10] *James, ex parte*, 1874, L.R. 9 Ch. 609; *Rhoades, In re* [1899], 2 Q.B. 347. *Simmonds, ex parte*, 1885, 16 Q.B.D. 308.

[11] *Simmonds, supra.*

[12] Ersk. iii. 3, 54.

[13] *Henderson* v. *Turnbull*, 1909, S.C. 510.

on the existing ratepayers, and the benefit of the payments had been enjoyed by their predecessors.[1] And if a party has received a payment without negligence or misrepresentation on his part, and has been led to alter his position in reliance on that payment, especially if the claim for repetition has been unnecessarily delayed, the money cannot be recovered.[2]

Mistake in Fact or Law. –In one case reported in a single line, in another where the point was not necessary for the decision, it was laid down that it was immaterial, in an action for repetition of money paid by mistake, whether the mistake was in fact or in law.[3] But in two cases which were taken to the House of Lords, the Lord Chancellor expressed the opinion that this doctrine was not maintainable, and that a *condictio indebiti* must be founded on a mistake in fact.[4] As these opinions were *obiter*, it has never been definitely decided whether they are to be regarded as ruling the law of Scotland or not.[5] But if so, the only cases in which repetition is excluded on the ground that the mistake was on a question of law are cases of payments made in ignorance as to the general law –*e.g.*, as suggested by Lord Brougham, of payments by a cautioner in ignorance of the law (as it then stood) that discussion of the principal must precede his liability ;[6] payment by a tenant of an increase in rent which was irrecoverable by statute ;[7] payment by an army agent of too large a gratuity on a misconstruction of the regulations[8] —not payments made on a mistaken impression as to the obligations imposed by a particular contract.[9] And, on English authority, a mistaken payment in the course of bankruptcy proceedings may be rectified, though due to ignorance of law.[10]

Negligence in Payment.—It is clearly established that money paid by mistake may be recovered although the party who has paid it may have had the means of discovering the true facts.[11] English law goes further, and holds that negligence in payment is no bar to such an action, though in extreme cases it may be evidence that the payment was really well advised.[12]

[1] *Bell* v. *Thomson*, 1867, 6 M. 64.

[2] *Dixon* v. *Monklands Canal Co.*, 1831, 5 W. & S. 445 ; *Crédit Lyonnais* v. *Stevenson*, 1901, 9 S.L.T. 93 ; *Holt* v. *Markham* [1923], 1 K.B. 504. The principle was recognised, though proof that the recipient had altered his position failed, in *Kleinwort & Co.* v. *Dunlop Rubber Co.*, 1907, 97 L.T. 203 (H.L.), and in *Jones Ltd.* v. *Waring & Gillow* [1926], A.C. 670, in the latter case by a very narrow majority.

[3] *Stirling* v. *Earl of Lauderdale*, 1733, M. 2930 ; *Carrick* v. *Carse*, 1778, M. 2931. The law is so laid down by Erskine (iii. 3, 54), and seems to have been assumed in *Keith* v. *Grant*, 1792, M. 2933. As to the Roman law, see Mackenzie's *Roman Law*, 6th ed., 256.

[4] *Wilson & M'Lellan* v. *Sinclair*, 1830, 4 W. & S. 398 (Lord Lyndhurst) ; *Dixon* v. *Monklands Canal Co.*, 1831, 5 W. & S. 445 (Lord Brougham), founding on the English law, the paucity of Scotch authority, and the analogy of the criminal law. But surely the foundation of a *condictio indebiti* is that the defender has no justification for retaining money which was not due to him and, if so, the analogy of the criminal law is simply misleading. And it is not an absolute rule in England that money paid under mistake in law cannot be recovered (*Rogers* v. *Ingham*, 1876, 3 Ch. D. 351 ; Leake, *Contracts*, 7th ed., p. 66, 68 ; Pollock, *Contract*, 9th ed., p. 492).

[5] See the question discussed in *Dickson* v. *Halbert*, 1854, 16 D. 586. In *Bremner* v. *Dick* (1866, 3 S.L.R. 24), an Outer House case, repetition was refused, on the ground that the mistake alleged was in law. In *Oswald* v. *Magistrates of Kirkcaldy*, 1919, S.C. 147, Lord President Strathclyde expressed the opinion that payments made under a mistake in law cannot be recovered.

[6] *Dixon* v. *Monklands Canal Co.*, 1831, 5 W. & S. 445.

[7] *Sharp* v. *Knight* [1917], 1 K.B. 771.

[8] *Holt* v. *Markham* [1923], 1 K.B. 504.

[9] *Baird's Trs.* v. *Baird & Co.*, 1877, 4 R. 1005 ; *Cooper* v. *Phibbs*, 1867, L.R. 2 H.L. 149 (opinion of Lord Westbury) ; *Baylis* v. *Bishop of London* [1912], 2 Ch. 318.

[10] Cases cited *supra*, note 10, p. 61.

[11] *Baird's Trs.* v. *Baird & Co.*, 1877, 4 R. 1005.

[12] *Kelly* v. *Solari*, 1841, 9 M. & W. 54 ; *Imperial Bank of Canada* v. *Bank of Hamilton* [1903], A.C. 49 ; *Jones Ltd.* v. *Waring & Gillow* [1926], A.C. 670.

But the authorities in Scotland are not conclusive on this point.[1] And on the question whether it is equitable that the money should be refunded, the negligence of the pursuer in paying, or of the defender in receiving payment, may be material.[2]

Payments Known Not to be Due.– It is a general rule that if a man chooses to make a payment in the knowledge that it is not due, he cannot recover it. "To recover over-payments . . . it is necessary that the pursuer should show that they were made in error or in ignorance, and in such circumstances as will entitle him to be relieved against his own mistake."[3] But the knowledge must be present to the mind at the time when the payment was made; a fact forgotten is not known.[4] And in *Agnew* v. *Ferguson*,[5] a lessee of minerals was held entitled to recover income tax on royalties, although he knew that he had the right to deduct it, and had relied on a tacit arrangement with the former landlord, under which the royalties were paid in full and the income tax afterwards repaid. If a man knows or believes that a particular claim is unfounded but pays in preference to fighting the question in the law courts, a mere protest will not entitle him to recover if the correctness of his view is afterwards established,[6] but a definite reservation will preserve recourse.[7] A mere protest will be sufficient if the party claiming the payment had the power to inflict some immediate disadvantage in the event of a refusal, as where market dues were paid on a threat of seizure of goods,[8] or where the shipping controller, whose permit was necessary for the sale of a ship, demanded and received a payment for which there was no legal justification.[9]

Mistake on Collateral Point.—It is not sufficient to support a claim for repayment that the pursuer was led to pay through a mistake in fact, if that mistake did not induce the belief that the money was legally exigible, but merely the belief that payment was reasonable or desirable. So where a society which had undertaken to pay pensions to the widows of members paid to a woman whose husband was mistakenly supposed to be dead, and added a gratuity, it was held, on the reappearance of the husband, that the sums paid as a pension were recoverable, those paid as gratuities were not.[10] It has, however, been held in England that a charitable donation may be recovered if induced by misrepresentation by the recipient, though there may be no question of fraud.[11] And when the holder of a postponed security paid off a prior incumbrance it was held that he could not recover his pay-

[1] In support of the view that negligence may be a bar, see *Wilson & M'Lellan* v. *Sinclair*, 1830, 4 W. & S. 398; *Youle* v. *Cochrane*, 1868, 6 M. 427, per Lord Ardmillan; *Balfour* v. *Smith & Logan*, 1877, 4 R. 454, per Lord President Inglis. But see opinion of Lord Shand in the case last cited.

[2] *Crédit Lyonnais* v. *Stevenson*, 1901, 9 S.L.T. 93, where the negligence consisted in accepting payment; *In re Horne* [1905], 1 Ch. 76.

[3] Per Lord Kinnear, *Balfour-Melville* v. *Duncan*, 1903, 5 F. 1079. Cf. *Gordon* v. *Hughes*, 1824, 2 Sh. App. 310.

[4] *Dalmellington Iron Co.* v. *Glasgow and South-Western Rly. Co.*, 1889, 16 R. 523; *Brownlie* v. *Miller*, 1880, 7 R. (H.L.) 66, per Lord Blackburn, at p. 80.

[5] 1903, 5 F. 879. On this case the rule of *condictio indebiti* might be expressed—payments which are not due may be recovered, if made in the belief that they are due, or with a reasonable expectation of repayment.

[6] *Balfour-Melville* v. *Duncan*, 1903, 41 S.L.R. 149; *Whiteley* v. *The King*, 1909, 26 T.L.R. 19.

[7] *Glasgow Corporation* v. *Glasgow Tramways Co.*, 1897, 24 R. 628; revd., on a separate ground, 1898, 25 R. (H.L.) 77; *Lanarkshire Steel Co.* v. *Caledonian Rly.*, 1903, 6 F. 47; Bell, *Prin.*, sec. 535.

[8] *Maskell* v. *Horner* [1915], 3 K.B. 106. [9] *Brocklebank* v. *The King* [1925], 1 K.B. 52.

[10] *Masters and Seamen of Dundee* v. *Cockerill*, 1869, 8 M. 278.

[11] *In re Glubb* [1900], 1 Ch. 354.

ment although it was discovered that the security subjects did not belong to the debtor.[1] So if money is paid on a compromise it cannot be recovered on the plea that the claim compromised has afterwards turned out to be groundless.[2]

Enforceable Payments. —It would seem to be the import of the case of *Youle* v. *Cochrane*[3] that if a payment could have been in any way compelled, it cannot be recovered, though it was made under a mistake in fact, and the means of compulsion were not used. *A.* chartered a ship to *B.* for two years, the master, as *A.'s* agent, having a lien over all goods shipped. *B.*, under a sub-charter, carried *C.'s* goods, and received part of the freight in advance. At the port of discharge *C.'s* agent paid the whole freight, being unaware of the fact that part had already been paid. As an amount exceeding that sum was due by *B.* to *A.* on the original charter-party, it was received by the master on *A.'s* account. *C.* sued *A.* for repetition of the sum his agent had paid by mistake. It was held that as *A.*, by putting in force his lien over the cargo, could have enforced full payment of the freight, he was entitled to keep it though it had been paid by mistake. But it is not a general rule, though it is so laid down by Paulus,[4] that a man is entitled to keep a payment made by mistake, merely because it happens to be payment of a debt due to him by a third party. So a payment made by mistake has been recovered from an executor-creditor.[5] And money paid to a bank or other agent for behoof of *A.*, and recoverable, in a question with *A.*, on the ground that it was paid by mistake, may be recovered from the bank, in spite of a claim to retain it to meet a balance due to them by *A.*[6]

Payments under Decree or Diligence. —When a decree has been obtained, and payment has been made under it, the party who has paid has no remedy if his only case is that facts have come to his knowledge which would have formed a valid defence to the action.[7] So where decree was obtained for a debt, the defendant could not recover the amount he had paid under it on the ground that he had subsequently found a receipt for it.[8] A claim for repetition would involve reduction of the decree, and a decree cannot be reduced on a mere mistake.[9] It has further been held in England that when legal action has been taken, and resulted in payment without its being prosecuted to an actual decree, the payment cannot be recovered on the ground of mere mistake. So when proceedings were taken against *A.* by a local authority for a share of certain expenses due by the owners of premises abutting on a certain street, and the proceedings were withdrawn on *A.'s* paying the sum claimed, he could not recover it on discovering that his premises did not in fact abut on the street.[10] The principle of law,

[1] *Aiken* v. *Short*, 1856, 1 H. & N. 210.

[2] Stair, i. 7, 9. In a liquidation subject to the supervision of the Court, a compromise may be set aside if it is sanctioned by the Court in ignorance of material facts, on the ground that the Court is a party to the transaction, and entitled to be fully informed (*D. & H. Henderson* v. *Stewart*, 1894, 22 R. 154). Without the sanction of the Court the compromise is not binding.

[3] 1868, 6 M. 427.

[4] *Dig.*, xii. 6, 44.

[5] *Ramsay* v. *Robertson*, 1673, M. 2924; *Earl of Peterborough* v. *Murray*, 1745, M. 2930.

[6] *Kerrison* v. *Glyn, Mills, Currie & Co.*, 1911, 28 T.L.R. 106; 17 Com. Cas. 41 (H.L.).

[7] Bell, *Prin.*, sec. 535; *Marriot* v. *Hampton*, 1797, 7 T.R. 269, and 2 Smith, *L.C.*

[8] *Marriot* v. *Hampton*, *supra*.

[9] *Begg* v. *Begg*, 1889, 16 R. 550; *Mackintosh's Tr.* v. *Stewart's Trs.*, 1906, 8 F. 467.

[10] *Moore* v. *Vestry of Fulham* [1895], 1 Q.B. 399. In the converse case, where a debtor was sued for a sum less than was due, paid, and took a discharge of all claims, in the knowledge that the creditor's demand was due to a mistake, it was held that the fact that he paid under pressure of legal process would not save him from liability to pay the balance of his debt (*Ward* v. *Wallis* [1900], 1 Q.B. 675).

it was stated, is that money paid under the pressure of legal process cannot be recovered. On this point there is no recent decision in Scotland, and in an early case a *condictio indebiti* was admitted of money paid under pressure of diligence.[1]

Second Payment after Debt Assigned.—In two early cases it appears to have been held that when a debt was paid twice it could not be recovered if the second payment were made to a party to whom the debt had been assigned for full value.[2] But the grounds of judgment were not explained: it does not seem obvious why an assignee should be in a better position than the cedent, and in a recent case the Lord Ordinary, in similar circumstances, held that he was bound to repay.[3] And where a bank paid a cheque which had been fraudulently altered in amount, it was held they could recover from the party to whom they paid, although he was a *bona fide* and onerous indorsee.[4]

Title to Sue.—An action for the recovery of money paid by mistake may be at the instance of the party who is the ultimate loser, though he may not be the party who made the payment. As the obligation to repay is not contractual but obediential or implied by law, the rules as to title to sue on contract have no application. In *Dawson* v. *Stirton*[5] a landlord agreed to take over the waygoing crop at a price to be paid in an arbitration between him and the trustees for the outgoing tenant's creditors. By a separate agreement the incoming tenant undertook to take over the crop at the price the arbiters should fix. Before the arbitration was concluded, the incoming tenant paid £100 in advance, on account of the value of the crop, to the trustees. On the arbitration being concluded the landlord, in ignorance of this prepayment, paid the whole sum due under it. It was held, though with some doubt, that the incoming tenant, although in making the prepayment he must be held to have acted as the landlord's agent, had a title to sue for repayment without the concurrence of the landlord.

[1] *Finlayson* v. *Kinloch*, 1629, M. 2923.
[2] *Earl of Mar* v. *Earl of Callender*, 1681, M. 2927; *Duke of Argyll* v. *Halcraig's Repres.*, 1723, M. 2929.
[3] *Wallet* v. *Ramsay*, 1904, 12 S.L.T. 111.
[4] *Imperial Bank of Canada* v. *Bank of Hamilton* [1903], A.C. 49.
[5] 1863, 2 M. 196.

CHAPTER IV

DELIVERY

In Mutual Contracts.—When a mutual contract, involving obligations on each side, is reduced to writing and duly executed by the parties, it is immaterial in whose custody the actual document may be. The obligations on each side are imposed by the signature, and there is no necessity for delivery.[1] So where a lease was signed in duplicate by landlord and tenant it was held that the contractual relationship was fully established without any delivery of the actual copies by either party. The agent for the landlord, in whose hands both duplicates were, refused to deliver his copy to the tenant unless he found security for the fulfilment of the obligations imposed by the lease, and, on his failure to comply with this demand, insisted that he should remove from the premises. It was held that this attitude was quite unjustifiable. "The whole argument for the landlord," said Lord President Inglis, "proceeds on a wrong idea of the law of delivery. In the ordinary case mutual contracts do not require delivery. Whoever holds the document holds it for all the parties and against all the parties."[2]

Deeds in Implement of Prior Obligation.—Again, delivery is not of importance, even in the case of unilateral deeds, if the deed was one which the granter was under a prior obligation to execute. So in a question as to the validity of a bond and disposition in security in the sequestration of the granter, it was held that the criterion of preference was priority of infeftment, and that, as the bond was executed in fulfilment of a prior obligation, it was immaterial that the granter had not delivered it until after he was sequestrated.[3]

Deeds Defective in Form.—In cases—such as obligations relating to heritage—where the law requires a probative writing for the constitution of a contract, the want of the statutory formalities which render a deed probative is not supplied by the delivery of the deed. A man may deliver a deed as his obligation and yet resile from it on the ground that the deed is *ex facie* improbative.[4] But if the only objection is the latent one that the witnesses have not seen the granter sign or heard him acknowledge his signature, a party who has delivered the deed cannot found on the informality.[5]

Unilateral Deeds, Donation.—The real importance of delivery in contract is in the case of writings which are unilateral in character, and which are not granted in pursuance of any prior obligation. The most important case

[1] *Stair*, i. 7, 14; Ersk. iii. 2, 44; Bell, *Prin.*, sec. 84; *Crawford* v. *Vallance's Heirs*, 1695, M. 123 4, 16990; *Lockhart* v. *Baillie*, 1709, M. 8430; *Robertson's Trs.* v. *Lindsay*, 1873, 1 R. 323.

[2] *Robertson's Trs.* v. *Lindsay*, *supra*, at p. 326.

[3] *Cormack* v. *Anderson*, 1829, 7 S. 868.

[4] *Goldston* v. *Young*, 1868, 7 M. 188; and see *post*, Chap. X.

[5] *Baird's Tr.* v. *Murray*, 1883, 11 R. 153; *Young* v. *Paton*, 1910, S.C. 63; *MacLeish* v. *British Linen Co.*, 1911, 2 S.L.T. 168; *Boyd* v. *Shaw*, 1927, S.C. 414.

is that of alleged donation. The decisions may be divided into two classes: (1) Where it is averred that some unilateral deed or writing amounts to a donation; (2) where the purchaser of property takes the title in favour of a third party, or where the creditor in a contract arranges that a third party shall have the right to demand payment. To cases of this second class the term *jus quæsitum tertio* has been applied.

Delivery as Necessary to Donation. In cases of the first class it is conceived that delivery of the deed or writing, or some equivalent for delivery,[1] is an essential feature of the pursuer's case. Without it there is at the utmost no more than proof of an intention to give, revocable at the will of the party who has formed it, and insufficient for the constitution of any obligation. A man who has executed a conveyance or assignation, but has neither delivered nor intimated it, has clearly not bound himself in any way. Delivery, or some equivalent for delivery, is necessary to distinguish the deliberative from the obligatory stage.[2]

Clause Dispensing with Delivery. A clause in a deed dispensing with delivery does not give it any contractual effect while undelivered. It remains revocable by the granter, and the subject disponed by it may be attached by his creditors. The effect of the clause is merely to make the deed effectual, though conceived as a disposition *inter vivos*, if the granter dies without revoking it.[3] Its effect is testamentary, not contractual.

Deed Held for Wife or Children.—A deed which remains in the possession of the granter may be held as delivered, if in favour of his wife or children, on the ground that a husband or father is the natural custodier of writs belonging to his wife or children.[4] So when a man entered in his books that he had transferred certain sums to his wife and children, and the existence of these entries was known to them, they were held, on his death, entitled to the sums in question, the objection that there had been no delivery being met by the plea that the donor was the proper custodier of obligatory documents belonging to his wife or children.[5] But the importance of this rule is in the law of succession, not in the law of contract. Such deeds, though undelivered, may be effectual at the death of the granter, but no case suggests that an entirely latent deed could be founded on as an obligation in the lifetime of the granter, merely because it was conceived in favour of wife or child.[6] And it would certainly have no effect in a question with his creditors.[7]

Deed Reserving Granter's Liferent. Erskine lays down the rule that a deed disposing of property but reserving the granter's liferent may be effectual without delivery, because the granter is supposed to retain it in virtue of his reserved liferent, and not because his intention to dispose of the property is not final.[8] But here again the effect of the deed is only testamentary, and the granter's power to revoke it is not excluded.[9]

[1] As to equivalents, see *infra*, p. 71.

[2] *Shaw* v. *Muir's Exrx.*, 1892, 19 R. 997; and see *supra*, p. 17.

[3] Ersk. iii. 2, 44; *A.* v. *B.*, 1683, M. 17003; *Eleis* v. *Inglistoun*, 1669, M. 16999; *Leckie* v. *Leckie*, 1776, M., App. Presumption, No. 1.

[4] Ersk. iii. 2, 44; Dickson, *Evidence*, sec. 921; *Lord Lindores* v. *Stewart*, 1715, M. 17006; and other cases in Morison, *voce* Writ; *Forrest* v. *Wilson*, 1855, 20 D. 1201; *Smith* v. *Smith's Trs.*, 1884, 12 R. 186.

[5] *Smith* v. *Smith's Trs.*, *supra*.

[6] M'Laren, *Wills*, 3rd ed., i. 419.

[7] *Hodge* v. *Morrison*, 1883, 21 S.L.R. 40.

[8] Ersk. iii. 2, 44. Per Lord Lyndhurst (*obiter*) in *Brack* v. *Johnston*, 1831, 5 W. & S. 61.

[9] Dickson, *Evidence*, sec. 923; *Drummond* v. *Lord Advocate*, 1749, M. 4874; affd. 1751, 1 Paton, 503, where a deed of this kind was held not to confer any right on the disponee on the attainder of the granter.

Jus quæsitum tertio. The second class of cases presents more complicated questions. The phrase *jus quæsitum tertio* is used in two connections. It may be asked whether the debtor in a contract has subjected himself to liability to a third party, so as to give that party a title to sue. Cases of this class, in which delivery is rarely a prominent feature, will be considered in a subsequent chapter.[1] Alternatively, where an obligation is directly conceived in favour of a third party, and where therefore his title to sue may be undisputed, the question may be raised whether the terms of the writing, and the actings of the parties, amount to an irrevocable gift to that third party. In this question delivery of the document by which the contract is constituted is a very important, though not necessarily a final or conclusive element.

Title in Name of Third Party.—The mere fact that in lending money *A.* has arranged that the bond shall be payable to *C.*, or that in purchasing property he has taken the title in *C.'s* name, does not amount to an irrevocable gift to *C.* Any effect which such destinations have is testamentary, not contractual.[2] To establish donation some proof of the *animus donandi*, beyond the mere form of the title, is required. This has been held with regard to a bond payable to a third party ;[3] or to a trustee for him ;[4] to a deposit receipt in a third party's name ;[5] to a policy of insurance expressed to be payable to some one other than the insurer ;[6] to a purchase of land with an unrecorded disposition in a third party's favour.[7] The additional proof of the *animus donandi* may consist in the delivery of the document to the party in whose favour it is conceived, or, in certain cases, registration in a public register,[8] but it is now settled that neither of these is absolutely necessary. Proof of the motives which induced the form of the title, and of the actings of the alleged donor, may be led, and may be sufficient to prove a completed and irrevocable donation.

In *Crosbie's Trs.* v. *Wright*[9] a deposit receipt had been taken in the name of the depositor, his sister, and her husband "to be paid to any, or survivor or survivors, of them." In a question raised after the depositor's death there was no evidence that the deposit receipt had been delivered either to the sister or her husband, but their evidence was that the deceased had told them about it, and about receipts in similar terms which had preceded it. It was held that there was sufficient evidence of a *donatio mortis causa*, and that delivery of the receipt was not (as the Lord Ordinary had thought) indispensable. Lord Shand laid stress on the fact that the donee's case was for a *donatio mortis causa*, and observed that for a donation *inter vivos* delivery was necessary. But while in this and in certain other cases[10] a *donatio mortis causa* was in question, there are two cases[11] in which it was

[1] *Infra*, Chap. XII.
[2] The testamentary effect of destinations is beyond the scope of the present work.
[3] *Hill* v. *Hill*, 1755, M. 11580 ; *Walker's Exr.* v. *Walker*, 1878, 5 R. 965.
[4] *Cameron's Trs.* v. *Cameron*, 1907, S.C. 407.
[5] *Jamieson* v. *Macleod*, 1880, 7 R. 1131 ; *Lord Advocate* v. *Galloway*, 1884, 11 R. 541 ; *Rose* v. *Cameron's Exr.*, 1901, 3 F. 337.
[6] *Carmichael* v. *Carmichael's Exrx.*, 1919, S.C. 636 ; revd. 1920, S.C. (H.L.) 195. Narrated *infra*, p. 69.
[7] *Balvaird* v. *Latimer*, 5th December 1816, F.C. ; *Stewart* v. *Rae*, 1883, 10 R. 463.
[8] As to registration see *infra*, p. 72.
[9] 1880, 7 R. 823.
[10] *Gibson* v. *Hutcheson*, 1872, 10 M. 923 ; *Blyth* v. *Curle*, 1885, 12 R. 674 ; *Scott's Trs.* v. *Macmillan* 1905, 8 F. 214.
[11] *Thomson's Exrs.* v. *Thomson*, 1882, 9 R. 911 ; *Boucher's Trs.* v. *Boucher's Trs.*, 1907, 15 S.L.T. 157 (O.H. Lord Dundas).

found that a donation *inter vivos* of the money in a deposit receipt was established, on evidence that the alleged donor was aware that he had placed the money beyond his own control, although the deposit receipt was never delivered, and was found in the donor's repositories after his death, and although in one case (*Boucher's Trs.*) there was no evidence that the donee was aware of the gift.

In *Carmichael* v. *Carmichael's Exrx.*[1] a father took out a policy on the life of his son, then aged nine. By its terms the sum insured was not payable in the event of the death of the son before majority; in that event the father could claim repayment of the premiums. In the event of the son attaining majority, and of payment thereafter by him or his assignee of an annual premium, the sum of £1,000 was payable, on his death, to his executors, administrators, or assignees. The father paid all the premiums. The son attained majority, and died before his next birthday, and before the date at which any premium was payable by him. He had not exercised certain options which the policy conferred upon him. By his will he left his whole estate to his aunt, who was confirmed as executrix. The proceeds of the policy were claimed by the executrix and by the father. It was proved that the policy had never been delivered to the deceased, or definitely intimated to him, but that he was aware of the terms, and had inquired whether its validity would be affected by his service in the Royal Air Force. On these facts the majority of a Court of seven judges preferred the claim of the father, on the ground that the policy originally belonged to him, and that delivery was necessary to complete a gift to the son. On appeal it was held that the question was not strictly one of donation, but whether the son had acquired a *jus quæsitum* in the policy, and an answer in the affirmative was rested partly on the terms of the policy, partly on the whole circumstances of the case.[2] But while the case for a *jus quæsitum tertio* was sustained, an argument, based on a dictum of Lord Stair,[3] was rejected. It was argued that Lord Stair meant that the mere existence of the name of a *tertius* as the party to be benefited gave him an irrevocable right. It was held, on a review of the authorities, that the only admissible meaning of Lord Stair's dictum, in this connection, was that if on the general construction of the contract a right was conferred on a *tertius*, the parties who had conferred that right could not revoke it. It did not mean that the mere terms of a title in favour of a *tertius* were conclusive.

Intimation as Delivery.—It is not to be inferred that intimation of an *animus donandi*, given to the party favoured, necessarily vests him with a *jus quæsitum*, and thereby in effect converts an intention to give into a completed and irrevocable gift. That may be held in cases, considered on a prior page,[4] where there was nothing of the nature of a voucher of which delivery could be expected. When such a voucher does exist, as in the case of deposit receipts or policies of insurance, and the normal method of

[1] 1919, S.C. 636; revd. 1920, S.C. (H.L.) 195.

[2] The distinction between a donation to a third party and the bestowal of a *jus quæsitum* on him is expressly taken by Lord Dunedin, but without any attempt to explain in what the difference consists.

[3] Stair, i. 10, 5. "It is likewise the opinion of Molina, and it quadrates with our customs, that when parties contract, if there be any article in favour of a third party, at any time, *est jus quæsitum tertio*, which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform." The reference to the works of Molina (better known as Desmoulins) is incorrect, and I have not been able to discover the passage referred to.

[4] *Supra*, p. 17.

completing the gift would be to transfer the voucher, it is conceived that something more than mere intimation is necessary to supply the want of delivery. And if the party who is alleged to have made the gift retains a beneficial interest in the subject, and draws any income which it may yield, the case for the donee, if it rests solely on intimation, would seem to be hopeless. Thus, in *Anderson* v. *Robertson*, *A.* executed a conveyance *inter vivos* of a house in favour of his niece. He informed her that he had done so, had her name entered as proprietor in the valuation roll and in the superior's books, and receipts for rates and feu-duty, though paid by *A.*, were taken in the name of the niece. On the other hand, *A.* retained the conveyance in his own possession, let the house, and received the rent. On *A.'s* death it was held that the conveyance had never been delivered, and that the niece had no right to the house.

And the decision in *Carmichael* v. *Carmichael's Exrx.* was founded on, unsuccessfully, in a case where a party, investing in National War Bonds, had taken the title in favour of his wife and one or other of his children, then in minority. The certificates were kept by his agents, for safe custody on his behalf. Under a mandate by the wife the interest was paid into a bank account kept jointly by the investor and his wife. It was held that there was no *jus quæsitum* in the children (none was claimed by the wife) and observed that the fact that the father drew the interest during his lifetime was almost fatal to any such claim.[1]

Delivery of Vouchers.—Delivery of a document which is the voucher of a right to money or property, even where the party to whom it is delivered is the nominal creditor, is not necessarily conclusive proof of donation. There is a legal presumption against donation, which may overcome the presumption arising from delivery.[2] In *Brownlee's Exrx.* v. *Brownlee*[3] the law was explained by Lord President Dunedin as follows: "The rule seems to be this: When a person is asked to give up something, be it land, corporeal moveables, or money, which he has reduced into possession, he can assume the defensive and put the claimant to shew his title. But if in answer to the claimant he is willing or forced to admit that the something only came into his possession by donation from a person whom the claimant, either by special or universal title, represents, then the onus is put upon him to prove the *animus donandi*, as well as the delivery of the thing. No doubt the fact of delivery may be evidence of the *animus donandi*. Its strength will vary with the circumstances. But none the less the *animus donandi* is a separate question and must be proved as well as the delivery."[4] It has since been explained that Lord Dunedin, in this opinion, must be read as referring only to cases where the delivery or transfer in question does not involve a "deed of trust" within the meaning of the Trusts (Scotland) Act, 1696,[5] and therefore to cases of property, such as corporeal moveables, negotiable instruments, or deposit receipts, where the mere physical transfer gives a complete title. But where a conveyance of some kind is necessary,

[1] *Drysdale's Trs.* v. *Drysdale*, 1922, S.C. 741.

[2] Stair, i. 8, 2; iv. 45, 17; Ersk. iii. 3, 92; *Sharp* v. *Paton*, 1883, 10 R. 1000; *Milne* v. *Grant's Exrs.*, 1884, 11 R. 887 (opinion of Lord Young); *Dawson* v. *M'Kenzie*, 1891, 19 R. 261; *Brownlee* v. *Robb*, 1907, S.C. 1302; *Brownlee's Exrx.* v. *Brownlee*, 1908, S.C. 232; *Penney* v. *Aitken*, 1927, S.C. 673, opinion of Lord Hunter. The presumption does not hold where donor and donee are parent and child. The presumption is then for donation rather than loan. *Malcolm* v. *Campbell*, 1889, 17 R. 255.

[3] 1908, S.C. 232, 239.

[4] *Brownlee's Exrx.* v. *Brownlee*, 1908, S.C. 232, 239.

[5] Act, 1696, c. 25. See, as to the construction of this Act, *infra*, Chap. XX.

and that conveyance is granted in unqualified terms, proof that the grantee holds in trust for the granter is limited to the writ or oath of the grantee, and that statutory rule is not elided by the fact that the grantee, in his defences, explains his possession on the footing of donation. So where *A.* had purchased a house, and the seller had, at his request, granted a disposition in favour of *B.*, which had been duly recorded in the Register of Sasines, and, with the other title deeds, delivered to *B.*, it was held that the onus lay upon *A.* to prove any limitation upon the apparently unqualified title thus created: that the proof was limited to the writ or oath of *B.*; and that parole evidence was not rendered competent by the defender's averment of donation from the pursuer.[1]

Nature of Delivery: Equivalents.—Such being the main cases in which delivery is of importance, we proceed to consider what amounts to delivery, and what equivalents for it are recognised.

In Scotland the witnesses to a deed attest only the fact that it has been signed, not, as in England, the fact that it has been delivered, and consequently the fact of delivery has to be proved by evidence apart from the deed itself. Delivery means more than physical transfer; it imports that the granter has consented to place the deed beyond his own control.[2] That is a question of fact in such case, although presumptions, more or less strong, may arise from the circumstances under which the deed is found.

Deed in Possession of Grantee.—The fact that a deed is found in the possession of the party in whose favour it is conceived raises a presumption that it was delivered, and, if there is no evidence as to the means by which he obtained it, or as to the object with which it was placed in his hands, the presumption will be conclusive.[3] But the presumption will yield to proof that the possession was obtained by fraud,[4] or—subject to the rule that proof of trust is limited to the writ or oath of the alleged trustee [5]—that the deed was handed over merely for safe custody, or for some purpose inconsistent with an intention to place it beyond the granter's control.[6]

Granter Dying after Authorising Delivery.—If the granter of a deed authorises its delivery, but dies before it is actually delivered, the mandate to deliver falls by his death, and the deed must be taken as undelivered. Thus when *A.*, as one of several co-obligants, signed a bond and disposition in security, and returned it to the agent for himself and the other co-obligants, but died before money was advanced or the bond delivered to the creditor, it was held that his mandate to the agent to deliver it on the loan being advanced fell by his death, and therefore that his representatives were not liable.[7] If, however, the granter's death takes place after the deed has been actually dispatched to the grantee, it will be held as delivered. So when a letter containing money to pay an account was addressed to the creditor, and left to be posted, but the writer died before it actually was posted, it was held to be delivered, and therefore that the creditor in question

[1] *Newton* v. *Newton*, 1923, S.C. 15.
[2] See opinion of Lord Kinnear in *Cameron's Trs.* v. *Cameron*, 1907, S.C. 407, 421.
[3] *Miller's Exrx.* v. *Miller's Trs.*, 1922, S.C. 150.
[4] *Mair* v. *Thom's Trs.*, 1850, 12 D. 794.
[5] *Supra.*
[6] *M'Aslan* v. *Glen*, 1859, 21 D. 511; *Miller* v. *Milne's Trs.*, 1859, 21 D. 377; *Sharp* v. *Paton*, 1883, 10 R. 1000; *Brownlee* v. *Robb*, 1907, S.C. 1302. The terms of a writing which may have accompanied the transfer of a deed are not necessarily conclusive in the question whether it has been delivered. So where a bond was given to trustees for the granter to be kept by them "until further notice" it was held that proof of the whole facts was competent, and shewed that delivery was complete. *Collie* v. *Pirie's Trs.*, 1851, 13 D. 506.
[7] *Life Association of Scotland* v. *Douglas*, 1886, 13 R. 910.

might claim the money in a question with the general creditors of the deceased.[1] In a question of jurisdiction, depending on the defender's ownership of heritable property in Scotland, it was held that he had not ceased to be owner by signing a disposition of his property and posting it to the disponee. The transfer of property did not take place until the disposition actually arrived and was accepted by the disponee.[2]

Deed in Hands of Third Party.—When a deed is placed in the hands of a third party the question whether it is to be regarded as delivered is one of the granter's intentions, to which, subject to the rule that written instructions, if duly attested, cannot be redargued by parole evidence,[3] all presumptions must yield. But certain presumptions arise from the position of the depositary. It is clear that no delivery is effected by placing a deed in the hands of the granter's own law agent.[4] To deliver a deed to a party who is agent for the grantee and not also agent for the granter has the same effect as delivery to the grantee himself.[5] Where the depositary is a neutral party, it is laid down that a gratuitous deed is held for the granter, and revocable by him, an onerous deed held for the grantee, and to be regarded as delivered.[6] When the deed is placed in the hands of a law agent for both granter and grantee, the same presumptions have been said to be raised ;[7] if so, in the case of a gratuitous deed the presumption against delivery is a slight one, and yields readily to indications of an intention to the contrary. And in *Maule* v. *Ramsay*,[8] a case of a gratuitous bond of provision, Lord Wynford laid it down that the fact that the deed was found in the repositories of a party deceased who had acted as law agent for granter and grantee raised a presumption that it was delivered and obligatory. Other cases indicate that there is no presumption of importance, and that the question of delivery is one of intention to be decided on the whole circumstances of the case.[9]

Effect of Registration.—Where a deed which is *ex facie* irrevocable is recorded in a public register, the effect of the act as involving delivery to the grantee depends on the particular register and on the object of the registration, as appearing from the warrant to register. The system of records in Scotland admits of any deed being recorded in the Books of Council and Session (or Sheriff Court Books) for preservation, or for preservation and execution, and of deeds relating to land being recorded in the Register of Sasines, originally only for publication, but now, under sec. 12 of the Land Registers (Scotland) Act, 1868 (31 & 32 Vict. c. 64), also for preservation and execution. Where a deed is recorded for preservation it is retained by the registrar, only an extract being given out ; when it is recorded in the

[1] *Crawford* v. *Kerr*, 1807, M., App. Moveables, No. 2. Contrast *Stanfield's Creditors* v. *Scot's Children*, 1696, 4 Brown's Supp. 344, where the deed was found ready for delivery, but no active steps to deliver it had been taken.

[2] *Dowie* v. *Tennant*, 1891, 18 R. 986. In so far as the judgment proceeded on the ground that the defender might have recalled his disposition it seems difficult to reconcile it with *Crawford* v. *Kerr*, *supra*, where the same argument was advanced but repelled.

[3] *Cowan* v. *Ramsay*, 1675, M. 12379 ; *Logan* v. *Logan*, 1823, 2 S. 253.

[4] Ersk. iii. 2, 43 ; *Irvine* v. *Irvine*, 1738, M. 11576.

[5] Bell, *Prin.*, sec. 23.

[6] Ersk. iii. 2, 43, correcting Stair, iv. 42, 8, and followed by Bell, *Prin.*, sec. 23 ; *Lord Lindores* v. *Stewart*, 1714, M. 7735 which seems inconsistent with *Sinclair* v. *Purves*, 1707, M. 11572.

[7] Dickson, *Evidence*, sec. 943 ; Nicolson's note to Ersk. iii. 2, 43.

[8] 1830, 4 W. & S. 38, at p. 73.

[9] *Fulton* v. *Johnston*, 1761, M. 8446 ; *Maiklem* v. *M'Gruthar*, 1842, 4 D. 1182 ; *Stewart* v. *Stewart*, 1842, 1 Bell's App. 796 ; *M'Creath* v. *Borland*, 1860, 22 D. 1551 ; *Geddes* v. *Geddes*, 1862, 24 D. 794 ; Menzies, *Conveyancing* (Sturrock's Ed.), p. 199,

Register of Sasines for publication only, it is transcribed in the register and returned.[1]

Books of Council and Session.—When a deed is recorded in the Books of Council and Session either for preservation alone, or for preservation and execution, there is a strong presumption that it is to be regarded as delivered. Erskine states this as an absolute rule,[2] and though his statement has been criticised as too widely expressed,[3] yet in most of the cases which have occurred[4] the deed recorded has been held as delivered, even where, as in *Obers* v. *Paton's Trs.*, the grantee had no knowledge either of the deed or the revoking. In the cases cited, with one exception, there was evidence which satisfied the Court that the intention of the granter, in recording the deed, was to place it beyond control, and, this being established, it was held that the deed was delivered. In the exception referred to,[5] the granter had executed a deed conveying a particular heritable subject (reserving a liferent) and all the moveable property of which he might be possessed at his death. The deed was recorded for preservation: subsequently he executed another deed, disposing of the same subject to other parties. It was held at his death that the first deed was delivered and effectual in so far as related to the heritable subject, not as to the moveables, but the reason for the distinction does not appear.

Register of Sasines.—When a disposition of lands, absolute or in security, is recorded in the Register of Sasines, the recording is equivalent to infeftment under the older system of conveyancing, and completes the title of the disponee to the subjects. It is, therefore, as between the disponer and disponee, equivalent in its effects to delivery,[6] and the disponee is *prima facie* entitled to enforce delivery of the disposition as an adjunct of his right.[7] But if a party takes a disposition of lands, or a bond and disposition in security, in favour of himself as trustee for a third party, the fact that the deed is recorded in the Register of Sasines is not *per se* equivalent to delivery to the third party. It remains within the power of the party who directed the destination to revoke it.[8] In *Cameron's Trs.* v. *Cameron, C.*, in advancing money on several occasions on heritable security, took the bonds in favour of himself as trustee for his children, providing that his own discharge should be sufficient. The bonds were recorded in the Register of Sasines, but were not delivered to the children, nor were they made aware of the destination in their favour. Some of these bonds were uplifted by *C.* during his lifetime; two remained at his death. In a special case the question was raised whether the registration of the bonds in the Register of Sasines involved delivery to the children, and it was held that it did not, because it did not shew any intention by the parent to place the sum due under the bonds beyond his own control. From the opinions of the majority of the Court it would

[1] For the system of registration see Ross, *Lectures*, ii. 201; Menzies, *Conveyancing*, 580. The subject is treated with exceptional learning and perspicuity by Mr H. P. Macmillan in Green's *Encyclopædia*, article "Registration."

[2] *Inst.*, iii. 2, 44. It has been pointed out that Erskine is referring to registration in the Books of Council and Session—not to registration in the Register of Sasines—*Cameron's Trs.* v. *Cameron*, 1907, S.C. 407, per Lord President Dunedin, at p. 413.

[3] *Tennent* v. *Tennent's Trs.*, 1869, 7 M. 936, at p. 948.

[4] *Leckie* v. *Leckie*, 1776, M. App. Presumption, No. 1; *Downie* v. *MacKillop*, 1843, 6 D. 180; *Tennent* v. *Tennent's Trs.*, *supra*; *Obers* v. *Paton's Trs.*, 1897, 24 R. 719.

[5] *Leckie* v. *Leckie*, *supra*.

[6] *Bruce* v. *Bruce*, 1675, M. 17000; *Burnet* v. *Morrow*, 1864, 2 M. 929; *Stewart* v. *Rae*, 1883, 10 R. 463; *Cameron's Trs.* v. *Cameron*, 1907, S.C. 407, per Lord President Dunedin.

[7] *Burnet* v. *Morrow*, *supra*.

[8] *Cameron's Trs.* v. *Cameron*, 1907, S.C. 407. (Seven Judges, Lord Kyllachy dissenting.)

appear that even if the children had been informed of the terms of the bonds they would still have been undelivered to them, and revocable by the parent. The authority of this decision is perhaps not beyond question ;[1] at all events, it will not be extended to analogous cases. It was distinguished where a father, in purchasing land, took the title in favour of his pupil children, and the disposition was recorded in their names. Then, although the father, as tutor, might have power to sell the property, the proceeds of the sale would belong to the children, and the donation to them was complete.[2]

Register of Shareholders.—In the case of shares in a company the register of shareholders is analogous to the Register of Sasines in the case of heritable property, and the registration of the name of a donee is equivalent to delivery of the shares to him, and, provided that there is evidence of the *animus donandi*, will complete the gift. It is immaterial that the donor may retain the share certificates, which are not of the nature of documents of title.[3] In *Inland Revenue* v. *Wilson* a father purchased shares and had them registered in the name of his minor son. He kept the certificates in his own possession. In a question with the authorities of the Inland Revenue, who maintained that the shares were to be regarded as the property of the father, his evidence was that he intended to make a completed gift, and it was held that his intention had been effectually carried out.

Intimated Assignation.—The right of a creditor in a debt is fully transferred by an assignation followed by intimation to the debtor, and accordingly it was held that an intimated assignation was preferable to posterior diligence, although the deed of assignation had not been delivered to the assignee.[4] The assignee, it was assumed in the argument, would be entitled to insist on the delivery of the assignation, or, if it had been cancelled or destroyed by the cedent, to set it up by an action of proving of the tenor. In these cases, however, the assignation was known to the assignee, and it would appear it was not gratuitous. It does not follow that a latent and gratuitous assignation would be effectual and irrevocable, merely because it was intimated to the debtor in the obligation assigned. A receipt, by which *A.* undertakes to account to *C.* for money received from *B.*, is not sufficient, without intimation to *C.*, to vest any completed right in him.[5] But it is probably the law that an assignation duly intimated, even although the assignee may have no knowledge of it, is to be considered as delivered to him. In *Jarvie's Tr.* v. *Jarvie's Trs.*,[6] *A.* took out a policy of insurance on his own life, payable to trustees for his wife and children. It was not intimated either to the trustees or to the beneficiaries, and the decision was that it still remained *A.'s* property, so as to pass under a trust deed for the benefit of his creditors. But it was observed, in consonance with prior authority,[7] that if *A.* had taken the policy in his own favour, executed an assignation to the trustees, and intimated the assignation to

[1] It was followed by Lord Hunter, Ordinary, in *Drummond* v. *Mathieson*, 1912, 1 S.L.T. 455, the case of a deposit receipt payable to the depositor "for behoof of" a third party. In *Carmichael's Exrx.* v. *Carmichael* (1920, S.C. (H.L.) 205) Lord Shaw intimated that he preferred the reasoning of Lord Kyllachy to that of the majority.

[2] *Linton* v. *Inland Revenue*, 1928, S.C. 209.

[3] *Lord Advocate* v. *Galloway*, 1884, 11 R. 541 ; *Inland Revenue* v. *Wilson*, 1927, S.C. 733, affd. 1928, S.C. (H.L.).

[4] *Dick* v. *Oliphant*, 1677, M. 6548 ; *M'Lurg* v. *Blackwood*, 1682, M. 845.

[5] *Arnott* v. *Drysdale*, 1863, 1 M. 796.

[6] 1887, 14 R. 411.

[7] *M'Lurg* v. *Blackwood*, *supra*.

the insurance company, a right would have vested in the trustees even if they were unaware of the existence of the policy.

Revocability of Delivered Deeds: Trust Deed. A deed of trust, not expressed to be made in contemplation of marriage, is revocable if there are no beneficiaries except the truster, or if the beneficiaries specified are not in existence, and is not rendered irrevocable by delivery to the trustees.[1] Where there are beneficiaries in existence, it has been treated as a question of construction whether or not the provisions in their favour are to be regarded as testamentary merely, leaving the deed revocable as in substance one for administration of the truster's affairs.[2] Elements in favour of irrevocability are an express statement to that effect;[3] a direction to the trustees to hold for some one other than the truster;[4] an express power to the trustees to advance part of the capital to the truster;[5] the fact that a part only of the truster's estate, or his whole existing estate, but not *acquirenda*, is disposed of.[6] On the other hand, a reserved power to revoke is effectual, though inconsistent with the other terms of the deed;[7] and the fact that the whole of the granter's property, including *acquirenda*, is conveyed, points strongly to the conclusion that the deed was intended to be testamentary and revocable.[8] It is not an argument of any force against irrevocability that vesting in the beneficiaries is postponed, or contingent on survivance of the granter.[9]

Ante-nuptial Marriage Contracts.—In the case of trust deeds executed in contemplation of marriage, the law has developed on exceedingly technical lines. An ante-nuptial marriage contract, to which both husband and wife are parties, and by which provisions are made in favour of the wife, is irrevocable *stante matrimonio*, even although the wife, and all parties interested, agree to revoke it,[10] on the ground, as put by Lord Deas in *Menzies* v. *Murray*, that it is of the nature of a protection against marital influence on the one side and self-sacrifice on the other. But this rule has not been extended to similar deeds to which the husband is not a party. These, where there is no provision in favour of the husband, or where, if there is, he is a consenting party, are revocable, although declared to be irrevocable and duly delivered to the trustees, provided that there are no provisions in favour of any other party who is in existence.[11] The existence of a child, if there is a provision in favour of the issue of the marriage, precludes revocation.[12] The result of the decisions has been expressed by Lord Ardwall:

[1] *Byres' Trs.* v. *Gemmell*, 1895, 23 R. 332.

[2] *Walker* v. *Amey*, 1906, 8 F. 376; *Bertram's Trs.* v. *Bertram*, 1909, S.C. 1238; *Nelson* v. *Nelson's Trs.*, 1921, 1 S.L.T. 82.

[3] *Murray* v. *Macfarlane's Trs.*, 1895, 22 R. 927; *Walker* v. *Amey*, *supra*; *De Pitchford* v. *Robertson*, 1918, 2 S.L.T. 276.

[4] Per Lord M'Laren, *Byres' Trs.* v. *Gemmell*, 1895, 23 R. 332. But see opinion of Lord Stormouth-Darling, Ordinary, in *Smith* v. *Davidson*, 1901, 8 S.L.T. 354.

[5] *Murray* v. *Macfarlane's Trs.*; *Walker* v. *Amey*; *Smith* v. *Davidson*, *supra*.

[6] *Smitton* v. *Tod*, 1839, 2 D. 225; *Robertson* v. *Robertson's Trs.*, 1892, 19 R. 849; *Murray* v. *Macfarlane's Trs.*, *supra*.

[7] *Simpson's Trs.* v. *Taylor*, 1912, S.C. 280.

[8] *Fernie* v. *Colquhoun's Trs.*, 1854, 17 D. 232; *Byres' Trs.* v. *Gemmell*, 1895, 23 R. 332; *Shedden* v. *Shedden's Trs.*, 1895, 23 R. 228.

[9] *Turnbull* v. *Tawse*, 1825, 1 W. & S. 80; *Robertson* v. *Robertson's Trs.*, 1892, 19 R. 849; *Murray* v. *Macfarlane's Trs.*, 1895, 22 R. 927.

[10] *Menzies* v. *Murray*, 1875, 2 R. 507; *Ker's Trs.* v. *Ker*, 1895, 23 R. 317; *Wilken's Trs.* v. *Wilken*, 1904, 6 F. 655.

[11] *Murison* v. *Dick*, 1854, 16 D. 529; *Mackenzie* v. *Mackenzie's Trs.*, 1878, 5 R. 1027; *Watt* v. *Watson*, 1897, 24 R. 330; *Sawrey-Cookson* v. *Sawrey-Cookson's Trs.*, 1905, 8 F. 157; *M'Gregor* v. *Sohn*, 1908, 15 S.L.T. 926.

[12] *Lyon* v. *Lyon's Trs.*, 1901, 3 F. 653.

"Where a person has granted a trust deed by which the granter is divested of certain estate in favour of trustees, and where the deed has been delivered, such deed is irrevocable if it confers a beneficial interest on persons in existence, or on persons who come into existence before the trust deed is revoked, and who are entitled to a beneficial interest under the deed." [1]

Trust Deed for Creditors. —A trust deed for the benefit of the truster's creditors is revocable after delivery to the trustee, but before intimation to the creditors.[2] But if the trust deed has been intimated to the creditors a *jus quæsitum* is conferred on them, which will preclude the revocation of the trust by any private arrangement between the granter and the trustee.[3] So it was held that a non-acceding creditor to a trust deed might maintain a direct action against the trustee for payment of a dividend on his debt.[4] When a party who had money consigned to him for the purpose of paying the debts of the consigner advertised for claims, it was decided, in *Allen* v. *Marquis*,[5] that a creditor whose claim he knew of but ignored had a right of action against him, though in an earlier case liability on this ground had been negatived.[6]

[1] *Middleton's Trs.* v. *Middleton*, 1909, S.C. 67, 69.

[2] *Carmichael's Exrx.* v. *Carmichael*, 1920, S.C. (H.L.) 195, per Lord Dunedin, at p. 201, quoting *Stoneheuer* v. *Inglis*, 1697, M. 7724, and approving dictum of Lord Cranworth in *Synnot* v. *Simpson*, 1854, 5 H.L.C. 121.

[3] Bell, *Com.*, ii. 383; More, *Notes to Stair*, i. lxiii.; *Gray* v. *Ross*, 1706, M. 7724; *Baird* v. *Murray's Creditors*, 1774, M. 7737; *Cruickshank* v. *Thomas*, 1893, 21 R. 257; *Stuart* v. *Potter, Choate* v. *Prentice*, 1911, 1 S.L.T. 377.

[4] *Ogilvie & Son* v. *Taylor*, 1887, 14 R. 399.

[5] 1828, 6 S. 595.

[6] *Pagan* v. *Campbell's Creditors*, 1823, 2 S. 125.

CHAPTER V

CAPACITY TO CONTRACT

In considering the formation of contract it has been convenient to assume a case where each party has the full or ordinary capacity to contract, and is acting as an individual for his own behoof. But it has now to be noticed that the contractual capacity of certain persons is limited, that contracts may be entered into not only by individuals, but by corporate bodies, and that a party may contract not for his own behoof, but as agent for a third party. It is proposed to deal with the law in this order; in the present chapter to consider contracts by parties with limited contractual capacity, in those following with the contractual powers of corporate bodies, and with the law relating to contracts by agents.

The cases which it is proposed now to consider are the limitations on the contractual powers of (1) pupils; (2) minors; (3) married women; and (4) persons labouring under mental derangement—permanent or temporary; (5) aliens.

(1) *Pupil*

The law of Scotland draws a distinction between the state of pupillarity, lasting, in the case of girls, to the age of twelve, in that of boys to the age of fourteen, and the state of minority, extending to the age of twenty-one.[1]

Contracts by Pupil Void.—A pupil has no power to contract, and the authorities are unanimous in holding that in cases where he has no tutor, or, having a tutor, purports to contract on his own behalf, he cannot be sued on the contract.[2] His contracts are void, and not merely voidable, so that they can be challenged by him, or in his interest, at any time within the forty years of the negative prescription, not merely, as in the case of contracts by his tutor on his behalf, within four years of his attaining majority.[3] A pupil, however, may enforce a contract beneficial to himself, though it cannot be enforced against him.[4] Where damages are found due to a pupil who has a parent alive, but that parent is proved to be unfit to receive the money, the proper course is to apply for the appointment of a judicial factor. Such an appointment may be made *de plano*, if the judge is satisfied that the pupil's natural guardian is unsuitable, and if that guardian consents; in other cases a petition for the appointment is necessary. To appoint a

[1] Ersk. i. 7, 1; Bell, *Prin.*, sec. 2066. English law makes no such distinction, classing all persons under twenty-one as infants. As to the contractual powers of an infant, see Pollock, *Contract*, 56; Leake, *Contracts*, 7th ed., p. 394,

[2] Ersk. i. 7, 14; Bell, *Prin.*, sec. 2084; Fraser, *Parent and Child*, 3rd ed., 204; *Bruce*, 1577, M. 8979. The marriage of a pupil is null (*Johnston* v. *Ferrier*, 1770, M. 8931).

[3] *Bruce, supra.* As to the effect of the negative prescription, see *Jack* v. *Halyburton*, 1743, M. 9003; *Thomson* v. *Stewart*, 1840, 2 D. 564.

[4] Ersk. i. 7, 33; Bankton, iv. 43, 15; Fraser, *Parent and Child*, 3rd ed., 206.

trustee to receive the money is incompetent when the pupil has a tutor, and, seeing that such a trustee would not be an officer of court, inexpedient in other cases.[1]

Contracts by Tutor.—A tutor, on behalf of the pupil, may enter into ordinary contracts.[2] At common law a tutor had no power, without the authority of the Court, to sell or feu the heritable property of the pupil, burden it with debt, or grant leases of more than ordinary duration.[3] Under the Trusts (Scotland) Act, 1921, sec. 4, he may exercise any of these powers, subject to the proviso that their exercise shall not be "at variance with the terms or purposes of the trust." As a father as tutor, or a mother as tutrix, act by operation of law, it would appear that the proviso is inapplicable to their case, and a petition by a mother as tutrix for authority to sell heritage was dismissed as unnecessary.[4] Contracts entered into by a tutor may be reduced by the pupil at any time within four years of his attaining majority, or proof of lesion.[5]

Money, Goods *in rem versum*.—Indirectly a pupil, by contracting, may incur obligations. Thus the Sale of Goods Act, 1893, enacts (sec. 2) that when necessaries are sold and delivered to him, he must pay a reasonable price therefor.[6] And if money is lent to a pupil, and expended on his estate, he will be liable, on the principle of recompense, in so far as he has thereby been enriched.[7] But it would appear that the right to recompense can be enforced only by the actual lender of the money, not by a person who has lent money to a tutor on a security over a pupil's heritable property. In *Scott's Tr.* v. *Scott* a father borrowed money from *A.*, obliging his pupil son and himself as tutor, disponing lands belonging to the pupil in security, and *separatim* binding himself personally, and granting a security over his own separate property. The object of the loan—the improvement of the pupil's estate—was stated in the bond. The money lent was, to the extent of £500, expended in beneficial improvements. In an action by the trustee in the father's bankruptcy the substantial questions were whether the son was liable for the £500 so expended, and, if so, whether he could set off against it arrears of rent admittedly due to him by the bankrupt. The former question the judges unanimously answered in the affirmative. The latter question depended upon whether the claim for recompense could have been enforced by *A.*, who advanced the money, or only by the father, who had actually incurred the expenditure, and it was decided that a claim

[1] *Boylan* v. *Hunter*, 1922, S.C. 80.

[2] See as to appointment and power of tutors, Fraser, *Parent and Child*, 3rd ed., 222, 307. By sec. 2 of the Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), a tutor is included in the definition of the word trustee, and consequently has the contractual powers which by the Act are given to trustees. In *Shearer's Tutor* (1924, S.C. 445) it was held that the word trustee did not include a father as tutor, but by the Guardianship of Infants Act, 1925 (15 & 16 Geo. V. c. 45, sec. 10), it is provided: "In Scotland a father or mother acting as tutor of a pupil child by virtue of the common law or of the Guardianship of Infants Act, 1886, or of this Act, shall be deemed to be and always to have been a trustee within the meaning of the Trusts (Scotland) Act, 1921."

[3] Stair, i. 6, 18; *Davidson* v. *Mackenzie*, 1826, 4 S. 632; *Scott's Tr.* v. *Scott*, 1887, 14 R. 1043; *Morison, Petr.*, 1861, 23 D. 1313.

[4] *Dempster, Petr.*, 1926, S.L.T. 157. As to the powers of a factor *loco tutoris* see *Marquess of Lothian's Curator*, 1927, S.C. 579.

[5] Bell, *Prin.*, sec. 2098; *infra*, p. 101; *Falconer* v. *Thomson*, 1792, M. 16380. A challenge on the ground of minority and lesion is not precluded by the fact that a sale, feu, or bond, has been sanctioned by the Court (*Vere* v. *Dale*, 1804, M. 16389; *Lord Clinton, Petr.*, 1875, 3 R. 62, per Lord Deas).

[6] See *infra*, p. 83. On the analogy of cases relating to minors (*infra*, p. 83) it would appear that a pupil is liable at common law to pay for necessaries.

[7] *Scott's Tr.* v. *Scott*, 1887, 14 R. 1043.

for recompense was competent only to the person who had directly paid for the improvements on which it was founded.[1]

(2) *Minor*

Contractual Powers. A minor has full contractual powers, with the exception that he cannot effectually grant any deed, *inter vivos* or *mortis causa*, by which he alters gratuitously the succession to his heritable property,[2] and with the qualification that his contracts are voidable at his instance during his minority and within four years of his attaining majority -a period known as the *quadriennium utile*—on proof of lesion.[3] But the contractual powers of the minor are limited if he has a curator.[4] His contracts then require the consent of his curator, and, if that is not obtained, are, if not void, at least voidable. With the consent of the curator the contracts of a minor are as valid as if he had no curator, that is to say, they are binding, but subject to avoidance on the ground of lesion within the *quadriennium utile*.[5] A curator has no power to act without the minor, and any contracts entered into by him alone, without the concurrence of the minor, are void.[6]

Minor Without Curators. -The general principle that a minor without curators has the same contractual powers as a person of full age has been illustrated in various circumstances. He may sell his property, heritable or moveable,[7] dispose of his moveable property as a gift,[8] borrow money,[9] become a party to a bill or bond,[10] enter into partnership,[11] acquire shares in a company, and subject himself to any liability attaching thereto.[12] He is subject to ordinary diligence,[13] and may be made a bankrupt.[14]

[1] *Scott's Tr.* v. *Scott*, 1887, 14 R. 1043 (Lord Shand dissenting), reversing judgment of Lord M'Laren (Ordinary). It is difficult to see how the decision can be reconciled with *Earl of Morton* v. *Muirhead* (1749, M. 8931), which was not cited.

[2] Fraser, *Parent and Child*, 3rd ed., 442 ; *Hunter* 1728, M. 8964 ; *M'Culloch* v. *M'Culloch*, 1731, M. 8965, both cases of donation. In *Brown's Tr.* v. *Brown* (1897, 24 R. 962), a factor *loco tutoris* had sold heritable property, and the question was whether the price was effectually disposed of by a will executed in minority. It was held that the price, as a *surrogatum* for the land, was heritable, but that the rule that a minor could not alter the succession to his heritage applied only to land. It was observed that a minor could sell his estate, and deal with the price as he pleased.

[3] *Infra*, p. 84.

[4] A father is *ipso facto* curator to his minor children, until a daughter marries, when she comes under the curatory of her husband (Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64), sec. 2). If a child is forisfamiliated, *i.e.*, if he leaves the house of his parents, and enters into work or business on his own account, the curatory of the father, in question as to the validity of his contracts, is ended (*M'Feetridge* v. *Stewarts & Lloyds*, 1913, S.C. 773), but the fact that a son had left his father's house as an apprentice to a trade or profession, and even that in that position he has married, probably does not end the curatory of the father (*Anderson* v. *Anderson*, 1832, 11 S. 10). A father, by will, may nominate curators to his minor children ; if not, a minor, after the death of his father, has no curator, unless he chooses a curator for himself, under the procedure prescribed by the Act, 1555, c. 35 ; or a curator is appointed by the Court on petition. See Fraser, *Parent and Child*, 3rd ed., 449 *et seq.*

[5] *Infra*, p. 84.

[6] Bell, *Prin.*, sec. 2096 ; Fraser, *Parent and Child*, 3rd ed., 471. So a discharge of a debt by the curator alone is not valid (*Earl of Bute* v. *Campbell*, 1725, M. 16338). See also *Stirling* v. *Campbell*, 1816, 6 Paton, 238 (vote in election of minister) ; *Allan* v. *Walker*, 1812, Hume 586 (removal of tenant).

[7] *Thomson* v. *Stevenson*, 1666, M. 8982, 8991 ; *Brown's Tr.* v. *Brown*, 1897, 24 R. 962.

[8] *Kincaid* v. ——, 1561, M. 8979.

[9] *Lord Blantyre* v. *Walkinshaw*, 1667, M. 8991.

[10] *Waddell* v. *Gibson*, 18th January 1812, F.C.

[11] *Wilson* v. *Laidlaw*, 1816, 6 Paton, 222 ; *Hill* v. *City of Glasgow Bank*, *infra*, per Lord President Inglis, at p. 75.

[12] *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68.

[13] *Thomson* v. *Ker*, 1747, M. 8910.

[14] *Gray* v. *Purves*, 1816, Hume, 411 (cessio) ; Goudy, *Bankruptcy*, 3rd ed., 81 ; but the case cited does not establish the point.

Payments to Minor. There is some doubt as to the right of a minor who has no curators to demand payment of debts due to him, without finding security for the investment or profitable employment of the money, so that the debtor may be safe from challenge on the ground of minority and lesion. A distinction is drawn between payments of capital, such as the principal sum in a bond, and payments of the nature of interest or income.[1] In *Kirkman* v. *Pym*[2] the creditor in a heritable security demanded payment of the principal sum. The debtor refused to pay, on the ground that the creditor was a minor without curators. It was held that the minor could not enforce payment, unless he was prepared to find security for the indemnification of the creditor in the event of a challenge: and, on an offer of security, a remit was made to the Lord Ordinary to consider its sufficiency. On the other hand, it has never been questioned that a minor without curators is entitled to demand payment of interest or rents on his own receipt. In *Jack* v. *North British Rly. Co.*,[3] where damages, amounting to £50 each, were due to minors as solatium for the death of their father, it was held that this was a debt analogous to a payment of income, and not to a payment which fell to be invested as capital, and payment was ordained on a discharge by the minors alone. In cases where parties have agreed to that course, a trustee has been appointed to receive damages due to the minor,[4] but where the debtor objected to this course, and the creditor was in pupillarity, the Court refused a note asking for payment until a factor *loco tutoris* should be appointed.[5]

In all cases of payments to minors of capital sums, whether they have curators or not, the party paying is entitled to demand either security in the event of the minor challenging the transaction on the ground of lesion, or evidence that the money paid has been duly invested. For, as will be explained immediately, a purchase from, or loan to, a minor, though on perfectly fair terms, may be reduced on the ground of lesion if the minor has squandered the money. In *Ferguson* v. *Yuill*,[6] £2,000 had been lent to a minor, under an obligation by him and his curators to apply the money in payment of debt. At the same time the minor disponed certain lands in security. The lender brought an action against the minor and his curators, concluding that they should be ordained either to produce evidence of payment of the debts in question and deliver the titles of the lands, or to repay the £2,000. On their failure to produce the evidence and titles, decree for payment of £2,000 was pronounced, though afterwards recalled by consent, in order to allow time for the production.

Minor Acting with Curator.—A minor who has curators, and enters into a contract with their consent and concurrence, may bind himself to any contract.[7] But the possibility of reduction on the ground of minority and lesion applies to this case as well as to the case of a contract by a minor

[1] *Per curiam* in *Kirkman* v. *Pym*, 1782, M. 8977; per Lord President Inglis in *Jack* v. *North British Rly. Co.*, 1886, 14 R. 263. See also Fraser, *Parent and Child*, 3rd ed., 438.

[2] 1782, M. 8977.

[3] 1886, 14 R. 263.

[4] *Sharp* v. *Pathhead Spinning Co.*, 1885, 12 R. 574; *Spring* v. *Blackall*, 1901, 9 S.L.T. 162. By A. S., 16th March 1926, secs. 19, 20, provision is made for payments under the Workmen's Compensation Act to persons under legal disability.

[5] *Connolly* v. *Bent Colliery Co.*, 1897, 24 R. 1172. See also *Boylan* v. *Hunter*, 1922, S.C. 80, *supra*, p. 78.

[6] 1835, 13 S. 886.

[7] Ersk. i. 7, 33; Bell, *Prin.*, sec. 2096; Fraser, *Parent and Child*, 3rd ed., 483; *Alexander* v. *Thomson*, 1813, Hume, 411; *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68 (opinion of Lord President Inglis).

who has no curators, though it is laid down as a general principle that a higher degree of lesion must be shewn in the case where the minor had the consent and concurrence of curators.[1]

Application to Court for Authority. The possibility of a reduction on the ground of minority and lesion, even in the case where a minor acts with the consent and concurrence of his curator, forms a serious practical difficulty in cases where it is proposed to enter into any important contract, such as a sale of the minor's heritable property. An attempt has been made to overcome it by obtaining the authority of the Court. But this has been refused, when asked by a curator who was not an officer of Court, such as a father or a curator chosen by the minor, on the ground that the minor with concurrence of the curator had full power to sell, and that the authority of the Court would not be a bar to a reduction on proof of lesion.[2] But a *curator bonis* who is an officer of the Court and subject to the supervision of the Accountant of Court, or a curator chosen by a minor whose accounts have been placed under the supervision of the Accountant, has obtained authority to sell.[3]

Obligations by Minor in Favour of Curator. The consent of the minor's curator will not validate an obligation by the minor in favour of the curator himself. "A consent by a guardian or father *in rem suam* is no consent at all, and leaves the deed, in the event of a minor having curators, without any legal direction from them."[4] So a cautionary obligation expressly in favour of the father or other curator who consents to it may be reduced even though the *quadriennium utile* has expired,[5] and a bond or other obligation by the minor is in the same position, provided that the creditor is proved to have been aware that the obligation was in reality undertaken on behalf of the curator who consented to it.[6] But when the fact that the minor is obliging himself on behalf of his curator does not appear *ex facie* of the bond, an assignee who has no notice of the true facts may enforce it, if it is not reduced on the ground of minority and lesion within the *quadriennium utile*.[7] The case of *Bannatyne* v. *Trotter*,[8] where it was held that an assignation of a bond in favour of a father and curator was valid, in a question with a subsequent assignee, if not reduced within the *quadriennium utile*, has been described as either a decision in "very peculiar circumstances," or else overruled by the subsequent cases.[9]

Minor with Curator Contracting Alone. When a minor who has curators acts without their consent and concurrence, the extent of his liability depends on the nature of the contract. Apart from contracts for the supply of necessaries—a point considered later—it has been decided that a contract of service is not null because the curator does not consent;[10] there are opinions,

[1] Ersk. i. 7, 33; *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473 (per Lord Fraser, Ordinary).

[2] *Wallace* v. *Wallace*, 8th March 1817, F.C.; *Gillam's Curator*, 1908, 15 S.L.T. 1043. But such an application was formerly competent (*Campbell* v. *Campbell*, 1738, M. 8930).

[3] *Gilligan's Curator, Petr.*, 1908, 15 S.L.T. 1042.

[4] Per Lord Cunningham in *Manuel* v. *Manuel*, 1853, 15 D. 284, 287.

[5] *Mackenzie* v. *Fairholm*, 1666, M. 8959, followed in *Manuel* v. *Manuel*, *supra*. Cf. *M'Gibbon* v. *M'Gibbon*, 1852, 14 D. 605.

[6] *Thomson* v. *Pagan*, 1781, M. 8985; *Manuel* v. *Manuel*, 1853, 15 D. 284.

[7] *Carstairs* v. *Moncrieff*, 1672, M. 8962.

[8] 1704, M. 8983.

[9] See opinion of Lord President M'Neill in *Manuel* v. *Manuel*, 1853, 15 D. 284, 287.

[10] *Heddel* v. *Duncan*, 5th June 1810, F.C.; *Argo* v. *Smarts*, 1853, 1 Irv. 250. *M'Feetridge* v. *Stewarts & Lloyds*, 1913, S.C. 773.

though no decision, that the same rule applies to a contract of apprenticeship,[1] and that an antenuptial contract of marriage was not on this ground void, or voidable without proof of lesion.[2] But, in the general case, the rule is laid down by the institutional writers that an obligation by a minor who has curators, but acts without them, is so far null that it may be reduced at any time (subject to the negative prescription); that the objection may be stated *ope exceptionis*; and that no proof of lesion is required;[3] though it is observed by Erskine[4] that if the obligation be judged beneficial to the minor it may be sustained. So a lease by,[5] or in favour of,[6] a minor; a disposition of property by him,[7] even where, as his liferent was reserved, it was argued that there was no lesion;[8] an alteration of the destination of an entail;[9] a bill, though observed to be safe from challenge on the ground of minority and lesion, because it was granted in the course of trade;[10] a bond,[11] *a fortiori* a cautionary obligation, have been held to be null and void on the ground of the want of the concurrence of the minor's curator.

Minor with Curator Furth of Scotland.—In *M'Fetridge* v. *Stewarts & Lloyds*[12] a minor brought an action of damages for personal injury against his employers. It was opposed that the action was excluded on the ground that he had already accepted compensation under the Workmen's Compensation Act. To meet this argument the plea of the minor was that his agreement to accept compensation was without the consent of his father and curator, and was therefore void, or, alternatively, that it was reducible on the ground of minority and lesion. The Lord Ordinary sustained the former plea, holding that the agreement was not in any way binding on the minor without the consent of the curator. The Court decided that as the minor was working for himself in Scotland, and his father was resident in Ireland, the minor was forisfamiliated and no longer subject to curatory. The agreement was therefore *prima facie* binding, but subject to reduction on the ground of minority and lesion, of which a proof was allowed. Though it was not necessary to decide the point, the opinions were that if a minor's curator was permanently resident abroad, the want of his consent would not, in any case, invalidate the minor's contracts, though the minor might be entitled to reduce the contract on the plea of lesion.

Where a minor entered into a contract of apprenticeship with the consent of his elder brother, whom he represented as his curator, and his actual curator (an uncle) knew of this and did not interfere, it was held, in a petition for the minor's imprisonment for deserting his service, that the want of the uncle's consent did not affect the liability of the minor.[13] The grounds of this decision are not stated.

[1] *Stevenson* v. *Adair*, 1872, 10 M. 919. In England a contract for the apprenticeship or employment of an infant may be sustained, as falling under the head of necessaries, if advantageous to the infant (*Roberts* v. *Gray* [1913], 1 K.B. 520). There an infant, who was a professional billiard player, entered into a contract with another professional for a tour abroad. He refused to fulfil the contract, and pleaded infancy. It was held that as the contract would have conduced to his skill in his profession he was bound by it, and liable in damages.

[2] *Bruce* v. *Hamilton*, 1854, 17 D. 265.

[3] Stair, i. 6, 33; Bankton, i. 7, 56; Ersk. i. 7, 33; Fraser, *Parent and Child*, 3rd ed., 493, where all the early cases are cited.

[4] Ersk. i. 7, 33.

[5] *Lady Cardross* v. *Hamilton's Reprs.*, 1708, M. 8951. This case was reversed (*Hamilton* v. *Lady Cardross*, 1712, Robertson, 37), but probably on the ground of ratification.

[6] *Seton* v. *Caskieben*, 1622, M. 8939.

[7] *Kincaid* v. ——, 1561, M. 8979.

[8] *Craig* v. *Lindsay*, 1757, M. 8956.

[9] *Muirhead* v. *Muirhead*, 1724, M. 8955.

[10] *Craig* v. *Grant*, 1732, M. 8955.

[11] *Airth* v. ——, 1602, M. 8939.

[12] 1913, S.C. 773.

[13] *Harvie* v. *M'Intyre*, 1829, 7 S. 561.

Marriage : Breach of Promise. The marriage of a minor is not in any way affected by the want of the consent of his curators : [1] and, on the ground that the office of curator relates to the estate and not to the person of the minor, it was held that he was liable in damages for breach of promise of marriage, although his curator had not consented to his engagement.[2]

Liability of Minor. A minor contracting without his curators is liable in so far as the money obtained by him under the contract has been employed for his benefit,[3] and it would seem that his contract is completely binding if ratified or homologated by him after his majority.[4] In these particulars there seems to be no distinction between a contract entered into with consent of curators or without it.

Necessaries.—A minor, whether he had acted with the consent of his curator or not, is liable to pay for necessaries supplied to him on credit. This liability may be rested either on the provisions of sec. 2 of the Sale of Goods Act, 1893, or on the common law. Sec. 2, after providing that capacity to buy and sell is regulated by the general law concerning capacity to contract, enacts : " Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery." [5]

It is very doubtful whether this section, in its application to Scotland, imposes any liability on a minor which the common law would not have recognised, except in the case where necessaries are ordered for the household by a minor living with his parent or other guardian. In that case it was held that the goods must be taken to have been ordered for the parent, and, even where the minor expressly pledged his own credit, such a pledge was merely a cautionary obligation on his part for his parent's debt, and reducible.[6] In other respects a minor has been held liable at common law in cases which the Sale of Goods Act, as construed by the English Courts, would not reach. Thus it does not allow action on a bill or bond, though given for necessaries,[7] an action which has often been sustained in Scotland, where the Courts will inquire to what extent the bond or bill represents a sum due for necessaries, and to that extent sustain it.[8] And even though the articles are such as would usually fall within the definition of necessaries, the tradesman who has supplied them cannot recover anything under the Sale of Goods Act if

[1] Fraser, *Parent and Child*, 3rd ed., 489.

[2] *Whitehead* v. *Philipps*, 1902, 10 S.L.T. 577 (O.H., Lord Pearson). The Lord Ordinary also held that a promise to marry by a minor could not be reduced on the ground of minority and lesion. But as to this see *Ditcham* v. *Worrall*, 1880, 5 C.P.D. 410, and Chitty, *Contracts*, 17th ed., 586.

[3] Stair, i. 6, 33. As to what expenditure is *in rem versum*, see *infra*, p. 85.

[4] *Lady Cardross* v. *Hamilton's Repres.*, 1708, M. 8951 ; revd. 1712, Robertson, 37.

[5] 56 & 57 Vict. c. 71, sec. 2. The liability imposed by this section is an obligation imposed by law and not by contract ; it arises *re*, not *consensu*, and is therefore not for the price but for the value of the goods (*Nash* v. *Inman* [1908], 2 K.B. 1 ; see opinion of Fletcher Moulton, L.J., at p. 8). In Scotland a minor who bought necessaries was liable for the price as a contractual obligation. It is conceived that this rule is not altered by the Act, which only alters the common law in so far as inconsistent with it (sec. 61). For English law, see Pollock, *Contract*, 9th ed., 71 ; Benjamin, *Sale*, 6th ed., p. 57 ; Chalmers, *Sale of Goods Act*, 7th ed., 13 ; *Roberts* v. *Gray* [1913], 1 K.B. 520 ; *Stocks* v. *Wilson* [1913], 2 K.B. 235.

[6] *Hamilton* v. *Forrester*, 1825, 3 S. 572.

[7] *In re Soltykoff* [1891], 1 Q.B. 413.

[8] See, *e.g.*, *Scoffier* v. *Read*, 1783, M. 8936 ; *Creech* v. *Walker*, 1624, M. 13425 ; *Wilkie* v. *Dunlop*, 1834, 12 S. 506.

the minor is already supplied in that particular;[1] whereas in *Fontaine* v. *Foster*[2] it was held to be no defence to an action by a tailor that the minor was already supplied with similar clothes under his curator's directions.

The principle upon which the cases before the Sale of Goods Act were decided appears to be that the case must be looked at from the point of view of the minor's creditor, and that he is justified in supplying articles which *ex facie* are for the minor's own use, in so far as these may be considered by the Court to be reasonably necessary to a person in the minor's position in life. This must doubtless be taken with the qualification, given effect to in an English case,[3] that the test is not whether the articles could be considered as extravagant, if paid for, but whether they are so necessary that the minor is justified in obtaining them on credit, and whether they are reasonable in amount.[4] The narrowest definition of necessaries must include food, clothing, lodging, medical attendance.[5] Beyond these, and in cases where the minor had a curator and acted without his consent, action has been sustained for a hotel bill,[6] for the fees of a "pedagogue,"[7] for the price of a horse;[8] and, in an exceptional case, where the minor, aged fifteen, was the son of a peer and held a commission in the army, and the question related to the validity of an arrestment of his private property, for the account of a "toyman."[9] But where an account by a haberdasher was sustained, in so far as it consisted of articles for the minor's own use, a charge for a "woman's black silk cloak," as obviously not so intended, was refused.[10] If a minor is married, necessaries for his wife form a good charge against him.[11] It has been observed generally that an account might be enforced against the minor though the articles were not such as would be accounted necessaries if the action were against the father, and based on his obligation to aliment his children.[12] But a loan of money does not fall within this description, and must be recovered, if it is recoverable at all, on the separate plea that it was expended to the minor's advantage.[13]

Minority and Lesion.—It is a very general rule that contracts made by, or on behalf of, a person who is under the age of twenty-one are subject to reduction on the ground of enorm lesion, provided that he takes the appropriate steps before he attains the age of twenty-five.[14] This applies to contracts by a tutor on behalf of a pupil,[15] and to contracts by a minor though with consent and concurrence of his curator,[16] and even to contracts entered into under authority granted by the Court.[17]

Enorm lesion has been defined as meaning that "the consideration which the minor got must be immoderately disproportionate to what might have been got."[18] Whether it was so or not is to be determined by considering the transaction in question as at the date when it was entered into, not according to the altered circumstances at the date when its reduction is attempted. So provisions in favour of a wife in an antenuptial marriage

[1] *Nash* v. *Inman* [1908], 2 K.B. 1.
[2] 1808, Hume, 409.
[3] *Ryder* v. *Wombwell*, 1868, L.R. 4 Ex. 32.
[4] See *Gray* v. *Purves*, 1816, Hume, 411.
[5] *Harper* v. *Hamilton*, 1687, M. 8927; *Inglis* v. *Sharp's Exrs.*, 1631, M. 8941; *Fontaine* v. *Foster*, 1808, Hume, 409.
[6] *Wilkie* v. *Dunlop*, 1834, 12 S. 506.
[7] *Drummond* v. *Broughton*, 1627, M. 8939.
[8] *Brown* v. *Nicolson*, 1629, M. 8940. The minor was the "laird of Cockburnspath."
[9] *Johnston* v. *Maitland*, 1782, M. 9036.
[10] *Scoffier* v. *Read*, 1783, M. 8936.
[11] *Rynd* v. *Earl of Dunfermline*, 1634, M. 8942.
[12] *Johnston* v. *Maitland*, 1782, M. 9036.
[13] *Scoffier* v. *Read*, 1783, M. 8936. As to expenditure *in rem versum*, *infra*, p. 85.
[14] Stair, i. 6, 44; Ersk, i. 7, 34; Bell, *Prin.*, sec. 2098; Fraser, *Parent and Child*, 3rd ed., 498.
[15] *Falconer* v. *Thomson*, 1792, M. 16380.
[16] *Supra*, p. 80.
[17] *Supra*, p. 81.
[18] Per Lord President Dunedin, *Robertson* v. *Henderson & Sons*, 1905, 7 F. 776, 785.

contract are good if they were fair, looking to the husband's means at the time, though at the date of the challenge his circumstances may have so far improved that they appear inadequate.[1] And if a minor purchases an article at a fair price, it is not lesion should it be accidentally injured or destroyed.[2] In cases where the minor's obligation is not gratuitous the whole circumstances must be considered. Thus where a minor was injured in the course of his employment, and settled his claim for a payment of £30, with an assurance from the employers that while they could not guarantee him a permanent situation they would do all in their power to keep him in employment, and they in fact employed him for more than three years, it was held that the question whether the settlement amounted to enorm lesion could not properly be decided (as it had been by the Lord Ordinary) simply on the ground that £30 was less than any reasonable arbitrator would have awarded had a claim been prosecuted under the Workmen's Compensation Act, but that the offer of employment must be taken as part of the advantage which the minor received, and that, taking this into consideration, there was no lesion.[3]

Onus of Proof of Lesion.—In cases where the minor has entered into an obligation or granted a deed for which he has received no return, such as pure gifts, gratuitous surrender of rights, and cautionary obligations, the existence of enorm lesion is a rule of law and requires no proof.[4] In other cases, such as a purchase by a minor, a lease, a compromise of claims, a contract of partnership, or a submission to arbitration, it must be proved that the terms of the contract were materially disadvantageous.[5] To such cases the general rule applies, that less injury will suffice if the minor acted alone than if he acted with the consent or advice of his curator or other guardian.[6]

Loans and Sale.—Where money is lent to a minor, or his property sold and the price paid, there is a presumption of lesion which is not rebutted by proof that the terms of the loan or sale were perfectly fair. It must also be shewn that the money is still part of the minor's estate, or has been expended in a manner profitable to him. A minor is lesed if money is put into his hands which he squanders, and has to repay.[7] As already stated, a party who makes a payment to a minor is entitled to demand evidence of its profitable employment. Should he fail to do so, he cannot recover money lent, or resist a demand for the return of property purchased, unless he can prove that the expenditure of the loan or price has been *in rem versum* of the minor. That phrase certainly covers the maintenance and education of the minor,[8] payment of debts for which he was liable,[9] the

[1] *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473; revd., on a separate ground, 1888, 15 R. (H.L.) 21.

[2] Stair, i. 6, 44; Ersk. i. 7, 36; *Edgar* v. *Edgar*, 1614, M. 8986.

[3] *Robertson* v. *Henderson & Sons*, 1905, 7 F. 776.

[4] Stair, i. 6, 44; Ersk. i. 7, 37.

[5] Fraser, *Parent and Child*, 3rd ed., 503; *Robertson* v. *Henderson & Sons*, 1905, 7 F. 776; *M'Feetridge* v. *Stewarts & Lloyds*, 1913, S.C. 773 (compromises); *Hill* v. *City of Glasgow Bank*, 1874, 7 R. 68 (partnership); *Williamson* v. *Fraser*, 1739, M. 8965; *Falconer* v. *Thomson*, 1792, M. 16380 (arbitration); *Munro* v. *Munro*, 1735, *Elchies* v. *Minor No.* 1; *Gibson* v. *Scoon*, 6th June 1809, F.C. (leases); *Sutherland* v. *Lady Kinminity*, 1737, M. 12732 (purchase of gold watch).

[6] *Supra*, p. 81.

[7] *Thomson* v. *Stevenson*, 1666, M. 8982; *Harkness* v. *Graham*, 1833, 11 S. 760 (sequel in 14 S. 1015); *Houston* v. *Maxwell*, 1631, M. 8986; *Lord Blantyre* v. *Walkinshaw*, 1667, M. 8991; *Ferguson* v. *Yuill*, 1835, 13 S. 886.

[8] *Stark* v. *Tennant*, 1843, 5 D. 542; and see cases as to liability for necessaries, *supra*, p. 83.

[9] *Harkness* v. *Graham*, 1836, 14 S. 1015.

payment of fees on his entry into a profession,[1] expenditure on his property, if beneficial,[2] the expenses of litigation in defence of his title.[3] In the analogous case of a married woman Lord M'Laren was prepared to hold that any *bona-fide* expenditure on her separate estate was *in rem versum* of her, though it could not be shewn that any benefit had resulted.[4]

Marriage Contracts.—The objection of minority and lesion applies to antenuptial marriage contracts, and decree of reduction has been pronounced in several cases, all marked by the feature that the minor had conveyed property in return for provisions which were either grossly inadequate or illusory owing to the other spouse's want of means.[5] In such cases the wife may reduce the contract in a question with her husband's creditors.[6] The Court has the power to rectify the contract by reducing the provisions made by the minor to a reasonable amount.[7] So when a minor husband had made provisions for his bride's father as well as for her, the former provisions were reduced though the latter were sustained.[8] In the case of provisions by one spouse for the other the lesion must be substantial, and reduction was refused where the contract gave the husband no more than he would have obtained in virtue of his *jus mariti*.[9] In *Cooper* v. *Cooper's Trs.*,[10] a widow brought an action for the reduction of her antenuptial marriage contract, executed by her when a minor, by which she renounced her right to terce and *jus relictæ*, and was provided with an annuity of £80. She had in her turn conveyed all her property to her husband, but as a matter of fact she had no property to convey. The contract had been revised by her guardians in Ireland (who were not, according to Scots law, her curators), but it was admitted that they knew nothing about the rights of a widow in her husband's estate. At the date of the marriage the husband's means amounted to £15,000, mostly invested in his business. At his death he left more than £50,000. In these circumstances it was held that the question of lesion was to be considered as at the date of the contract, and that so considered the provision for the pursuer was not so unreasonable as to amount to enorm lesion. Lord Young was of opinion that a party who conveyed nothing could not suffer lesion by an antenuptial marriage contract, though his or her prospective rights at the dissolution of the marriage were renounced. Lord Rutherfurd Clark dissented from the judgment, holding that a discharge of legal rights for an inadequate return amounted to lesion, and that the provision made for the pursuer was grossly inadequate considering the husband's position at his marriage. On appeal, it was held that the case fell to be decided by the law of Ireland, and the question of lesion was not considered.[11]

Minor Engaged in Trade.—There are certain contractual obligations where

[1] *Corser* v. *Deans*, 1672, M. 8944, 9026.
[2] *Earl of Morton* v. *Muirhead*, 1749, M. 8931; *Scott's Tr.* v. *Scott*, 1887, 14 R. 1043; *M'Adam* v. *Laird of Lag*, 1605, M. 8939.
[3] *Macara* v. *Wilson*, 1848, 10 D. 707; *Gifford* v. *Rennie*, 1853, 15 D. 451.
[4] *Henderson* v. *Dawson*, 1895, 22 R. 895.
[5] *Gordon* v. *Gordon*, 1669, M. 8992, and following cases in Morrison; *Earl of Leven* v. *Montgomery*, 1683, M. 5803.
[6] *Byres* v. *Reid*, 1708, M. 8995; *Lyon's Crs.* v. *Stewart*, 1714, M. 6059.
[7] *Carmichael* v. *Lady Castlehill*, 1698, M. 8993; *M'Gill* v. *Ruthven*, 1664, M. 5696, per Lord Fraser (Ordinary) in *Cooper* v. *Cooper's Trs.*, *infra*.
[8] *Davidson* v. *Hamilton*, 1632, M. 8988.
[9] *Anderson* v. *Abercrombie's Trs.*, 1824, 2 S. 662.
[10] *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473; revd., on a separate ground, 1888, 15 R. (H.L.) 21.
[11] 1888, 15 R. (H.L.) 21.

the plea of minority and lesion will not avail. If a minor is engaged in a trade or profession, it is an established rule that his obligations entered into in the course of his business are as fully binding upon him as if he had been of full age. "A minor who betakes himself to any business or profession, as trade, manufacture, law, etc., cannot be restored against deeds granted by him in relation to that employment."[1] So a bond or bill for goods supplied is binding,[2] and a minor who by want of skill or attention in his business causes loss is liable in damages.[3] But the mere fact that a minor is in trade or in a profession does not preclude the plea of minority and lesion, except with respect to contracts entered into in the course of his trade. Thus cautionary obligations granted by a minor in trade,[4] or even by one practising as a lawyer,[5] are reducible. But in the case of a bill there is a presumption that it was granted in the course of trade,[6] and from one decision it would appear that the presumption would be conclusive in a question with a holder in due course.[7] And it has been decided that where money is lent to a minor in trade there is no presumption of lesion, and that it rests with him to prove that it was not expended in the purposes of his trade, or otherwise *in rem versum*.[8] The right to compensation under the Workmen's Compensation Act, though it presupposes an employment, does not arise directly out of that employment, and therefore an agreement for the settlement of a claim is subject to the ordinary rules as to minority and lesion, even assuming—a point left undetermined—that an ordinary workman is to be considered to be in trade.[9]

In *Boath* v. *Andrew Lawson Ltd.*[10] the Lord Ordinary held that when a memorandum of agreement under the Workmen's Compensation Act was recorded, the provisions of the second schedule of the Workmen's Compensation, 1906 (now re-enacted by sec. 25 (4), of the Workmen's Compensation Act, 1925 (15 & 16 Geo. V. c. 84)), made the sheriff and the sheriff-clerk final judges of the adequacy of the consideration, and that all proof of lesion was excluded. A subsequent decision to the same effect was based on the principle that official approval of the contract was conclusive against lesion.[11]

Obligations in trade do not include cases where the minor is really gambling on the Stock Exchange. In *Dennistoun* v. *Mudie*,[12] a minor, nineteen years of age, and engaged as a clerk, was sued by a firm of stock-brokers for a balance resulting from what the Court held to be purely speculative transactions. There was nothing in his appearance to suggest

[1] Ersk. i. 7, 38; approved in *M'Feetridge* v. *Stewarts & Lloyds*, 1913, S.C. 773.

[2] *Galbraith* v. *Lesly*, 1676, M. 9027; *Campbell* v. *Turner*, 1822, 1 S. 266; *Grieve* v. *Tait*, 1732, M. 9036; *Bennet* v. *Reid's Trs.*, 1828, 6 S. 854. Cf. *Robertson* v. *M'Intosh Brothers*, 1867, 5 S.L.R. 118 (a decision on special facts).

[3] *Heddel* v. *Duncan*, 5th June 1810, F.C., where a minor who was sheriff-clerk depute, and by want of care allowed the loss of consigned money, was held liable in relief to his employer (the sheriff-clerk), who had to make good the loss.

[4] *Wall* v. *Brownlee*, 1724, M. 9035; *Macmichael* v. *Barbour*, 1840, 3 D. 279.

[5] *Henderson* v. *Lafreis*, 1697, M. 9030; *Dundas* v. *Allan*, 1711, M. 9034; *Corser* v. *Deans*, 1672, M. 9026; prior stage of case, M. 8944. In *Gairdner* v. *Chalmers* (1636, M. 9024), a minor, who was a notary, drew up a bond under which he was himself the obligant. It was sustained, on the combined effect of these facts and homologation by payment of interest after majority.

[6] *Craig* v. *Grant*, 1732, M. 8955.

[7] *Campbell* v. *Turner*, 1822, 1 S. 266.

[8] *Macdonald* v. ——, 1789, M. 9038.

[9] *Robertson* v. *Henderson & Sons*, 1905, 7 F. 776; *M'Feetridge* v. *Stewarts & Lloyds*, 1913, S.C. 773.

[10] 1924, S.L.T. 138 (Lord Morison).

[11] *Patrick* v. *Baird*, 1926, S.N. 101 (Lord Constable).

[12] 1850, 12 D. 361.

that he was of full age; he made no statement on the subject, and the stockbrokers made no inquiries. It was held that minority and lesion was a sufficient defence.

Minor in Partnership.—A minor who enters into partnership in a trading firm cannot plead minority and lesion in a question with the creditors of the firm.[1] But in a question between the partners, he is not liable for advances made by another partner to the firm, unless these can be shewn to be *in rem versum* of him. In *Wilson* v. *Laidlaw*,[2] a minor had been introduced by his father as a partner in a trading concern, which failed. In an action against him for a debt due by the firm for money advanced by *A.* the minor did not dispute his liability for the firm's debts, but averred that *A.* was in reality a partner, and brought a reduction of the partnership on the ground of minority and lesion. It was held to be proved that *A.* was a partner, and that, in a question with him, the minor was entitled to be relieved of his obligation.

Minor Misstating Age.—It is a relevant answer to the plea of minority and lesion that the minor represented that he was of full age, that there was nothing in his appearance to induce the other party to disbelieve him, and that the contract was induced by his representation.[3] A mere assertion in the deed by which the contract was constituted that the minor is of full age is not enough, and is *prima facie* evidence that the other party knew or suspected that he was dealing with a minor.[4] Nor is it a bar to reduction that the minor for other purposes and to other persons had held himself out as major.[5] It is a question of the circumstances of each case whether a minor who appears to be of full age is bound to warn the party whom he asks to deal with him. That he had not done so when entering into gambling transactions on the Stock Exchange was held to be no bar to reduction, but it was a feature in the case that he did not look of full age, and that the stockbrokers whom he employed had neglected obvious means of information[6] Where, on the other hand, a young man of twenty had stayed for some time at an hotel, and after leaving had accepted a bill of exchange for the hotelkeeper's account, he was found liable on it, in spite of a plea that he had a curator, that the obligation had been incurred without the curator's consent, and was to the minor's lesion, but the ground of the decision may have been either that he was bound to warn the hotelkeeper that he was a minor, or that the charges for his entertainment at the hotel fell under the head of necessaries.[7]

Personal Bar Irrelevant.—When there is no case of representation of majority the plea of minority and lesion is one open to every one until he reaches the age of twenty-one: and the fact that the party in the particular case was well acquainted with business, and therefore in no need of legal protection, is immaterial.[8]

[1] *Grieve* v. *Tait*, 1732, M. 9036; *Wilson* v. *Laidlaw*, 1816, 6 Paton, 222; see interlocutor of Lord Hermand (Ordinary), at p. 226; *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68.

[2] *Supra.*

[3] Stair, i. 6, 44; Ersk. i. 7, 36; Fraser, *Parent and Child*, 3rd ed., 527; *Kennedy* v. *Weir*, 1665, M. 11658; *Wemyss* v. *His Creditors*, 1637, M. 9025; see *Stocks* v. *Wilson* [1913], 2 K.B. 235; *Leslie Ltd.* v. *Sheill* [1914], 3 K.B. 607.

[4] *Kennedy* v. *Weir*, *supra.*

[5] *Sutherland* v. *Morson*, 1825, 3 S. 449. An extreme case, since the minor, by representing himself as of full age, had obtained the degree of M.D., which would naturally induce others to believe him to be twenty-one. The report gives neither argument nor opinions.

[6] *Dennistoun* v. *Mudie*, 1850, 12 D. 613; see also *Wall* v. *Brownlee*, 1724, M. 9035.

[7] *Willie* v. *Dunlop*, 1834, 12 S. 506.

[8] See case where the minor was in practice as a lawyer, *supra*, p. 87, note 5.

Minor Contracting with Minor.—Where both parties to a contract are minors—a case not illustrated by any decision in Scotland—it has been laid down, on the authority of the civil law, that the plea of minority and lesion so far applies that if the transaction was a loan the minor who lent the money could not recover it unless he could prove that it was expended *in rem versum* of the borrower.[1]

Quadriennium utile.—Reduction of a contract on the ground of minority and lesion is competent only during minority or within four years after majority is attained—a period known as the *quadriennium utile*.[2] The expiry of this period does not preclude the objection that the contract is not merely voidable on proof of lesion, but void, and therefore does not exclude action in the case of deeds granted by a pupil or by a minor with curators but without their consent, or deeds for the benefit of the curator.[3] But when minority and lesion is the only plea in defence, action within four years of majority is a condition of the legal privilege of a minor, and the expiry of that period excludes the plea even where the minor was not aware of his right to reduce the contract.[4] The exception to this is the case of a marriage contract entered into by a woman under the age of twenty-one. It has been decided that as she is not in a position to act effectually against her husband during the subsistence of the marriage, she may reduce the contract after its dissolution.[5]

Ratification by Minor.—The ratification or homologation of a contract after the attainment of majority, but within the *quadriennium utile*, is a bar to a subsequent challenge on the ground of minority and lesion.[6] But ratification, whether express or inferred from acts approbative of the contract, can have no effect unless the party was at the time aware that he had the right to reduce the contract;[7] and it must be a free and deliberate act. So where a young man, fourteen days after his majority, executed a deed ratifying certain bills on which he had become liable during minority, and it was proved that he was acting under the influence of his father, who was an interested party, it was held that he was entitled to reduce the bills.[8] In general it would appear that where rent is paid or received after majority, or interest is paid on a bond, it will amount to homologation, and exclude a challenge on the ground of lesion.[9] No acts of homologation or ratification of a deed granted in minority are effectual after action has been taken by the creditors of the party for its reduction on the ground of minority and lesion.[10]

Betting and Loans (Infants) Act.—Under the provisions of the Betting and

[1] Bankton, i. 7, 92; Ersk. i. 7, 40; Fraser, *Parent and Child*, 3rd ed., 539.

[2] Stair, i. 6, 44; Ersk. i. 7, 35; Fraser, *Parent and Child*, 3rd ed., 533.

[3] *Supra*, p. 81.

[4] *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68, per Lord President Inglis.

[5] *Lyon's Creditors* v. *Stewart*, 1714, M. 6059; *Cooper* v. *Cooper's Trs.*, 1885, 12 R. 473.

[6] Stair, i. 6, 44; Fraser, *Parent and Child*, 3rd ed., 531; *Kyle* v. *Allan*, 1832, 11 S. 87; *Forrest* v. *Campbell*, 1853, 16 D. 16; *Lord Advocate* v. *Wemyss*, 1896, 24 R. 216; revd. 1899, 2 F. (H.L.) 1. The Infants Relief Act, 1874 (37 & 38 Vict. c. 62), which excludes action on a ratification, after majority, of a contract made during infancy, does not apply to Scotland (*Whitehead* v. *Philipps*, 1903, 10 S.L.T. 577).

[7] *M'Gibbon* v. *M'Gibbon*, 1852, 14 D. 605.

[8] *Melvil* v. *Arnot*, 1782, M. 8998; see also *Leiper* v. *Cochran*, 1822, 1 S. 552 (fraud).

[9] *Gairdner* v. *Chalmers*, 1636, M. 9024; *Gordon* v. *Hall*, 1757, M. 15178; *Lady Cardross* v. *Hamilton's Reprs.*, 1708, M. 8951; revd. 1712, Robertson, 37; *Adam* v. *Adam*, 1861, 23 D. 859; *Johnston* v. *Hope*, 1630, M. 9041. For exceptional cases in which homologation was held not to be proved, see *Cockburn* v. *Halyburton*, 1672, M. 9009; *Harrie* v. *Gordon*, 1726, M. 5712.

[10] *Harkness* v. *Graham*, 1833, 11 S. 760.

Loans (Infants) Act, 1892 (55 Vict. c. 4), it would appear that where money has been lent to a minor the creditor cannot found on a ratification of the loan after the attainment of majority. The Act provides (sec. 5): "If any infant who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever." By sec. 7 it is provided that in the application of the Act to Scotland the word "infant" means and includes any minor or pupil. It has yet to be decided whether the Act applies only to loans which are actually void as contracts, such as loans to a pupil or to a minor without the consent of his curator, or whether its terms are sufficiently general to cover the case of a loan to a minor, which, though not void, is voidable on proof of lesion.

Procedure in Reduction.—There is some doubt as to the procedure necessary to set aside, during the *quadriennium utile*, an obligation undertaken in minority. It may probably be laid down that some form of legal process is necessary; it is not enough to intimate privately that the obligation is repudiated.[1] The earlier authorities seem to establish that an action of reduction must be brought within the *quadriennium utile*.[2] In *Stewart* v. *Snodgrass*[3] a minor had granted a promissory note. After the age of twenty-five he brought an action of reduction on the ground of minority and lesion. It was held that his challenge was too late, and that it was not enough to save it that he had, before attaining the age of twenty-five, stated the plea in defence to an action (which was ultimately sisted) at the instance of the creditor. It was explained that the right to reduce an obligation on the ground of lesion was a privilege afforded by law to a minor only if he satisfied certain conditions; one of these being that he instituted an action of reduction before he was twenty-five. And the suspension of a bill, on the ground of minority and lesion, was held to be incompetent, even in a question with the party in whose favour it was granted, though it was observed that it might be competent in a case of intrinsic nullity, as where it was granted by a minor without the concurrence of his curator.[4] But these decisions were pronounced at a period in the law when an action of reduction was the only competent method of challenging the validity of a written obligation, whereas by subsequent legislation a plea to that effect may be stated *ope exceptionis* in defence to an action either in the Sheriff Court[5] or the Court of Session;[6] and in *M'Feetridge* v. *Stewarts & Lloyds*[7] it was held that an award of compensation under the Workmen's Compensation Act, and receipts granted by the workman, might be set aside on the

[1] *Marquis of Montrose* v. *Livingston*, 1697, M. 9046; *Ramsay* v. *Maxwell*, 1672, M. 9042; *Stewart* v. *Snodgrass*, 1860, 23 D. 187; and see Ersk. i. 7, 35.

[2] The service of the summons within the *quadriennium utile* is enough; (*M'Dougall* v. *Arbuthnot*, 1681, M. 9044).

[3] 1860, 23 D. 187; but see *Harkness* v. *Graham*, 1833, 11 S. 760.

[4] *Waddell* v. *Gibson*, 18th January 1812, F.C.

[5] Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII, c. 51), Schedule I., Rule 50.

[6] A. S., 20th March 1907, sec. 6; C.A.S., 1913, C. iv. 4 (*d*).

[7] 1913, S.C. 773.

ground of minority and lesion in an action by the workman for damages at common law.

Title to Sue. A reduction on the ground of minority and lesion may be at the instance of the minor, of his heirs or personal representatives,[1] of his creditors,[2] or of a party to whom he has assigned the right to reduce[3]

Minor's Obligation of Restitution. —In certain cases a minor, if he takes advantage of the right to reduce the contract, must repay or restore anything he has obtained under it. Thus if he reduces a sale of his property, he must repay the price, if it has been separately invested and is still extant.[4] If he purchase goods, though he may not be compellable, in the event of lesion, to complete the contract by paying the price, still he must restore the goods if still in his own possession.[5] But, as already stated, the purchaser of property sold by a minor must see to the proper application of the money, and should he fail to do so, with the result that the money is squandered by the minor, must restore the property, with no right to repayment. So where heritable property was sold by a girl in minority, and the price expended for her own purposes, it was held that her heir might recover the property without tendering repayment of the price.[6]

Questions with Third Parties.—Where a minor has sold property, and the purchaser has transferred it to a third party, the authorities, which all relate to dispositions of heritable property, establish that it can be recovered if the third party's right was merely gratuitous, or if he had notice of the state of the title.[7] In the case of a third party who takes for onerous causes and without notice that his author's title is derived from a minor, a distinction is stated by Erskine [8] between real rights, where a party purchasing on the faith of the records is safe,[9] and personal rights where, "though they be onerous purchasers, the minor may be restored against them, if the right they have acquired be purely personal, for it is a general rule in all personal rights that every exception is good against the onerous purchaser, which is good against the original creditor." This statement of the law is doubted by Lord Fraser,[10] but apparently under the impression that Erskine by the phrase "personal rights" meant rights relating to moveable property, whereas he is contrasting heritable rights completed by infeftment with rights not so completed. As regards moveable property, seeing that a sale by a minor is at most voidable, it can hardly be the law that there is any *vitium reale* in a title derived from him, so as to enable him to recover the property sold from a *bona fide* sub-purchaser, but a different rule may be applicable to the case of a sale which is actually void for want of capacity to enter into it, such as a sale by a pupil, or, possibly, by a minor with curators and without their consent.

[1] Ersk. i. 7, 42; *Bruce* v. *Hamilton*, 1854, 17 D. 265. As to the computation of the *quadriennium utile*, in the case where the minor dies before attaining the age of twenty-five, see Fraser, *Parent and Child*, 3rd ed., 501.

[2] *Harkness* v. *Graham*, 1833, 11 S. 760, where it was held that ratification by the minor, after action taken by a creditor, was ineffectual.

[3] *Robertson* v. *Oswald*, 1584, M. 8980.

[4] Ersk. i. 7, 41; Fraser, *Parent and Child*, 3rd ed., 540; see *Rose* v. *Rose*, 1821, 1 S. 154.

[5] *Stocks* v. *Wilson* [1913], 2 K.B. 235. Contrast *Brown* v. *Nicolson*, 1629, M. 8940, where the minor was held liable for the price, though he offered restitution, on the ground that the article purchased was a necessary, and the contract therefore binding.

[6] *Houston* v. *Maxwell*, 1631, M. 8986; and see *Thomson* v. *Stevenson*, 1666, M. 8982, 8991; Ersk. i. 7, 41.

[7] Ersk. i. 7, 40; *Lindsay* v. *Ewing*, 1770, M. 8997.

[8] i. 7, 40.

[9] *Gourlie* v. *Gourlie*, 1728, M. 10288.

[10] *Parent and Child*, 3rd ed., 538.

(3) *Married Woman*

The Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64), provides (sec. 1): "After the passing of this Act the property, heritable or moveable, of a married woman shall not be subject to the right of administration of her husband, and that right is hereby wholly abolished, and a married woman shall, with regard to her estate, have the same powers of disposal as if she were unmarried, and any deed or writing executed by her, with reference to her heritable estate in Scotland or to her moveable estate, shall be as valid and effectual as if executed by her with consent of her husband according to the present law and practice; (sec. 3) A married woman shall be capable of entering into contracts and incurring obligations, and be capable of suing and being sued, as if she were not married, and her husband shall not be liable in respect of any contract she may enter into or obligation she may incur on her own behalf."

In view of legislative provisions so absolute in their terms, it would seem unnecessary to repeat the statement of the prior law on the subject contained in the former edition of this work.[1]

(4) *Parties Mentally Deranged*

Effect of Insanity.—It is laid down by Stair and Erskine that, according to the law of Scotland, persons who are insane cannot contract, and that their seeming contracts are void, even although their insanity has not been followed by cognition or other judicial process whereby they may be deprived of the administration of their estate.[2] So contracts have been reduced at the instance of a tutor appointed in a subsequent process of cognition,[3] or of the lunatic himself on recovery,[4] or of his heir,[5] even in a case where thirty years had elapsed since the lunatic's disposition of lands and they had been transferred to a third party.[6] And where an action for the reduction of a contract was rested on the alternative grounds of insanity at the time and facility and circumvention, it was held that a counter issue of homologation might meet the plea of facility and circumvention, which merely went to make the contract voidable, but not the issue of insanity, which, if established, inferred that the contract was void.[7] When a merchant, on whose estate a *curator bonis* was ultimately appointed, had entered into contracts for the purchase of goods in which he dealt, and it was proved that he was in fact insane at the time, it was decided that the curator was

[1] P. 110. See also Walton, *Husband and Wife*, 2nd. ed.

[2] Stair, i. 10, 13; Ersk. iii. 1, 16. It has been held in England that insanity does not affect the validity of a contract unless the other party knew he was dealing with a lunatic (*Imperial Loan Co.* v. *Stone* [1892], 1 Q.B. 599). The decision seems to proceed on historical grounds peculiar to the law of England. If the other party did know of the insanity the contract is void, and third parties cannot maintain a title founded on it. So when *A.* obtained a power of attorney from one whom he knew to be insane, and under it sold shares, it was held that the lunatic, on recovery, might insist on the company replacing the shares. The case was assimilated to that of a forged transfer (*Daily Telegraph Newspaper Co.* v. *M'Laughlin* [1904], A.C. 776).

[3] *Moncrieff* v. *Maxwell*, 1710, M. 6286. See Fountainhall's report, M. 6288 (lease).

[4] *Alexander* v. *Kinneir*, 1632, M. 6278.

[5] *Loch* v. *Dick*, 1638, M. 6278; *Lindsay* v. *Trent*, 1683, M. 6280.

[6] *Lindsay* v. *Trent*, *supra*; see Home's report, M. 6282. In Fountainhall's report (M. 6281) the reporter, commenting on the form of the interlocutor, points out that "if the furiosity be proved, then the deed is simply null."

[7] *Gall* v. *Bird*, 1855, 17 D. 1027.

entitled to repudiate the contracts, and that no damages could be claimed by the seller.[1] The decision proceeded on the footing that it was immaterial that the sellers were not aware of their customer's insanity, and that the English rule to the contrary [2] did not apply to Scotland.

The rule applied in the earlier cases above referred to seems to have been that if there was proof of insanity all contracts were void. And this would no doubt hold good in the case of a congenital imbecile;[3] subject to the rule, resting on common law [4] and statute,[5] that where necessaries are sold and delivered to a person who, by reason of mental incapacity, is incompetent to contract, he must pay a reasonable price therefor, and to the principle that if money is advanced to a lunatic it may be recovered on proof that it was beneficially expended on his estate.[6]

In cases of insanity less pronounced, it is conceived that the law cannot be laid down so broadly. Insanity, in cases of civil rights, must be taken as a question of degree, and the validity of a contract entered into by a party who has not been judicially deprived of the control of his property must be judged on a consideration of the question whether the party's intelligence was sufficient to enable him to apprehend the particular contract. The rule is well settled in relation to wills,[7] and it is conceived that the same principle is applicable to contracts. It is indeed stated in Bell's *Commentaries* that "less capacity is required to make a will or settlement than to transact a bargain,"[8] but Lord Young has expressed an opinion exactly to the opposite effect:[9] and as the question in both cases is one of capacity to assent, it would seem that the criteria by which it may be judged ought to be the same.

Lucid Interval.—Insanity, again, is a question of fact: it is not a status like minority, and a particular contract may have been entered into during a lucid interval, and would then be binding.[10] But if there was proof of general insanity, the onus would lie on the party upholding the contract to prove the recovery at a particular time.[11]

Supervening Insanity.—The effect of supervening insanity on continuing contracts seems somewhat more doubtful. It has been held that temporary insanity did not put an end to the contract between agent and client; the agent, therefore, was entitled to charge for work done while his client was insane.[12] But in England it has been decided that the mandate of a law

[1] *Loudon* v. *Elder's Curator*, 1923, S.L.T. 226 (O.H., Lord Blackburn).

[2] *Supra*, p. 92, note 2.

[3] Bell, *Com.*, i. 132.

[4] *Ballantyne* v. *Evans*, 1886, 13 R. 652.

[5] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sec. 2. As to necessaries, see *supra*, p. 83; *Mitchell & Baxter* v. *Cheyne*, 1891, 19 R. 324 (legal expenses of opposition to petition for appointment of *curator bonis*).

[6] *Dig.*, xliv. 7, 46. *Furiosus et pupillus obligantur ubi ex re actio venit.* As to the analogous case of a pupil, see *supra*, p. 78.

[7] *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625, opinion of Lord President Inglis, at p. 631; *Watson* v. *Noble's Trs.*, 1825, 4 S. 200; affd. 2 W. & S. 648; *Ballantyne* v. *Evans*, 1886, 13 R. 652; *Nisbet's Trs.* v. *Nisbet*, 1871, 9 M. 937; *Hope* v. *Hope's Trs.*, 1896, 23 R. 513; revd. 1898, 1 F. (H.L.) 1; *Sivewright* v. *Sivewright's Trs.*, 1920, S.C. (H.L.), 63. It has been held that a marriage might be annulled on the ground of insanity where the husband, though capable of understanding the nature of the contract and the obligation involved in it, was subject to an insane delusion—that he was pursued by imaginary enemies, from whom a wife might protect him—affecting his motive for entering into the marriage (*Jackson* v. *Jackson* [1908], P. 308).

[8] Bell, *Com.*, i. 133.

[9] *Ballantyne* v. *Evans*, 1886, 13 R. 652.

[10] Bell, *Com.*, i. 132.

[11] See *Nisbet's Trs.* v. *Nisbet*, 1871, 9 M. 937 (will made in lunatic asylum); *Towart* v. *Sellars*, 1817, 5 Dow. 231.

[12] *Wink* v. *Mortimer*, 1849, 11 D. 995.

agent to carry on an action falls by the insanity of the client.[1] In *Pollock* v. *Paterson*,[2] where a party who subsequently became insane had granted a mandate, he remained liable on business contracts entered into by the mandatary until the insanity was in some way made public.

Insanity of Partner.—The insanity of a partner does not necessarily dissolve a contract of partnership, but it is a ground on which the dissolution of the partnership may be decreed by the Court, on the application of the other partner, or on behalf of the insane partner.[3] In *Eadie* v. *MacBean's Curator*,[4] it was held that if the contract of partnership imposed no active duties on the partner who had become insane, if he was merely a contributor of capital, dissolution would not be decreed when opposed by the *curator bonis*.

Lunatic Deprived of Estate. -Where a party has been cognosced and a curator appointed, he is deprived of his estates and reduced to the position of a pupil, so that he cannot dispose of his property or affect it by any contract.[5] The result of the appointment of a *curator bonis*, on an application to the Court by petition, is the same. In *Mitchell & Baxter* v. *Cheyne*,[6] a *curator bonis* had been appointed to a person alleged to be incapable of managing his own affairs. He reclaimed, and on the Court adhering, appealed to the House of Lords. The agents who were acting for the *incapax*, after the *curator bonis* had been appointed, but before he had obtained extract of his appointment or entered on his duties, obtained from the *incapax* two cheques for expenses already incurred and to be incurred in the proceedings. The *incapax* had at the time money standing in his name in bank sufficient to meet the cheques, but the bank refused to pay without the authority of the *curator bonis*. In an action against the *curator bonis* the payees maintained that the cheques, when presented, operated as an assignation in their favour of the funds standing to the credit of the *incapax*. This view the Court rejected, holding that a party on whose estates a *curator bonis* had been appointed had no further power of disposing of them. The pursuers were found liable in the expenses of the bank and of the *curator bonis*.

Intoxication. -A man who has reached such a degree of intoxication that he has, in the words of Lord Stair, "lost his reason," is, for the time being, unable to bind himself by contract. Intoxication may produce incapacity to consent, and therefore incapacity to contract.[7] But even in cases of intoxication amounting to complete incapacity it would appear that a party cannot be relieved from his contract unless he repudiates it as soon as he recovers his senses and finds out what he has done. In *Pollok* v. *Burns*[8] a signature to a bill was obtained at a time when the party was seriously under the influence of drink. On being asked for payment he tried to evade the demand, and it was not until six months afterwards, when he was charged for payment, that he put forward, in a suspension, the defence of intoxication. It was held that he was barred from taking that plea, even on the assumption that a degree of intoxication sufficient to preclude consent had been proved. "When the plea of intoxication is taken by the person who says he was intoxicated and incapable when he did the act which he wishes to repudiate, he is bound, the moment his sober senses return,

[1] *Yonge* v. *Toynbee* [1910], 1 K.B. 215.
[2] 10th December 1811, F.C.
[3] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 35.
[4] 1885, 12 R. 660.
[5] Ersk. i. 7, 50; Bankton, i. 7, 10; Fraser, *Parent and Child*, 3rd ed., 685.
[6] 1891, 19 R. 324.
[7] Stair, i. 10, 13; Ersk. iii. 1, 18.
[8] 1875, 2 R. 497.

and he knows what he has done, to take his ground at once. That is essential." [1]

It might well be argued that a contract made by a person so intoxicated as to be incapable was completely void, so that no one could found upon it. But it would seem to be merely voidable. So it was held that intoxication was no defence to an action on a bill of exchange at the instance of an onerous indorsee.[2]

Partial Intoxication. The mere fact that a man entered into a contract when he was under the influence of drink, but not completely intoxicated, is not in general a ground for the reduction of the contract. A man may have the capacity to contract though he has not all his wits about him. So in a case where the issue of intoxication was submitted to a jury, the form of the issue was: "Whether the said minute of agreement was signed by the said *A.* when so much intoxicated as to be wholly incapable of understanding business." [3] In *Taylor* v. *Provan* [4] it was laid down that a party challenging an obligation on the ground of intoxication must be prepared to shew that he comes within the case figured by Lord Stair: "Those who through drunkenness have not for a time the use of reason do not legally contract." [5] But the circumstances attending a bargain concluded during a drinking bout may be such as to lead to the conclusion that though neither party had actually lost his senses, neither, at the time, had any serious intention of contracting. In two cases reported by Hume,[6] where the proof fell short of complete intoxication, but shewed that both parties were seriously under the influence of drink, the sale by a farmer of his whole stock of sheep was held not to be binding. The contract, as was explained in a more recent case,[7] was one which no person in his sober senses would propose, and the decision was not that persons partially intoxicated could not bind themselves by contract, but that, on the particular facts, no serious contract had been intended. Accordingly, where a man had in the morning been negotiating for the purchase of some cattle, but had not agreed to the price which the seller asked, and, coming back in the evening, when he was in a state of partial intoxication, completed the purchase at the price which he had formerly refused to give, it was held that the sale was not reducible.[8]

The decision just referred to indicates that there is no general obligation to abstain from dealing with a man known to be partially intoxicated. But to induce a man to drink, with the object of obtaining his consent to a contract, would amount to fraud.[9] And where it is proved that any false or fraudulent statement or device has been resorted to, the fact that the party was not sober may be material in considering whether the fraud was the inducing cause of the contract.

It is difficult to appreciate the exact ground of decision in the most recent

[1] Per Lord Justice-Clerk Moncrieff (*Pollok* v. *Burns*, 1875, 2 R. 497, at p. 503). But, assuming that the other party has not been prejudiced by the delay in repudiation, is this a reasonable ground of judgment?

[2] *Wilson & Fraser* v. *Nisbet*, 1736, M. 1509. English law is to the same effect (*Mathews* v. *Baxter*, 1873, L.R. 8 Ex. 132).

[3] *Johnston* v. *Clark*, 1854, 17 D. 228; *Duncan* v. *Martin*, 1839, MacFarlane's Rep. 270.

[4] 1864, 2 M. 1226.

[5] Stair, i. 10, 13.

[6] *Jardine* v. *Elliot*, 1803, Hume, 684; *Hunter* v. *Stevenson*, 1804, Hume, 686.

[7] *Taylor* v. *Provan*, 1864, 2 M. 1226, per Lord Justice-Clerk Inglis, at p. 1232.

[8] *Taylor* v. *Provan*, *supra*.

[9] *Couston* v. *Miller*, 1862, 24 D. 607.

case on this subject - *Harvey* v. *Smith*.[1] There *S.* had agreed to purchase a model lodging-house. The transaction had been concluded by missives of offer and acceptance, both written by a law agent acting for the seller, and signed by each party, with the addition of the words "adopted as holograph." *S.*, who was a man of limited education, was not assisted by a law agent. In an action concluding for implement of the purchase, *S.* put forward the defence that he was intoxicated at the time. The evidence was that though he had been drinking he was not so intoxicated as not to know what he was doing. The Lord Ordinary upheld the contract. The Court reversed, on the ground that *S.* was not in a condition or position to appreciate the effect of adding the words "adopted as holograph" to his signature. But a decision rested on this ground seems to involve the violent assumption that *S.*, though unable to appreciate the technical effect of adopting a deed as holograph, was in a condition to appreciate the equally technical rule that a contract relating to heritage is not binding unless entered into by writing probative of both parties.

(5) *Aliens*

Alien Amy. —An alien in time of peace has the ordinary power to contract and hold property, except that he cannot be registered as the owner of a British ship.[2]

Alien Enemy.—When war is declared certain persons become alien enemies. In this respect the law has regard to residence or carrying on business, not to nationality, allegiance, or domicile.[3] Thus, on the one hand, "trading with the most loyal British subject, if he be resident in Germany, would, during the present war, amount to trading with the enemy"[4]; on the other hand, the enemy nationality or allegiance of a person resident in this country, at least if his residence is recognised by the State by his registration or internment, does not make him an alien enemy in a question of his title to sue, of his power to contract, or of the legality of contracting with him.[5] Enemy character was held to attach to a firm resident in a neutral country, on an admission that its members were also interested as partners in another firm which carried on business in an enemy country.[6] A company registered in Britain may be an alien enemy, if it is controlled by persons who individually are alien enemies, and the fact that the bulk of its shares are held by enemies, while not in itself conclusive, is evidence from which enemy control may be inferred.[7] A company registered and controlled by British or neutral subjects may, it is conceived, be an alien enemy if it is carrying on business in an enemy country,[8] but the Court of Appeal declined to hold that enemy character attached to such a company merely because its main assets and business were held and carried on by an agent in a German colony.[9] Scrutton, L.J., founded his decision on the ground that there was

[1] 1904, 6 F. 511.

[2] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 1.

[3] *Janson* v. *Driefontein Mines* [1902], A.C. 484; *Porter* v. *Freudenberg* [1915], 1 K.B. 857. The various definitions of the word "enemy," for the purpose of a particular statute or proclamation, are collected and considered in *Deutsche Bank, in re* [1921], 2 Ch. 291.

[4] Per Lord Atkinson, *Daimler* v. *Continental Tyre Co.* [1916], 2 A.C. 307, at p. 319.

[5] *Schulze, Gow & Co.* v. *Bank of Scotland*, 1914, 2 S.L.T. 455; *Schaffenius* v. *Goldberg* [1916], 1 K.B. 284.

[6] *Van Uden* v. *Burrell*, 1916, S.C. 391.

[7] *Daimler* v. *Continental Tyre Co.* [1916], 2 A.C. 307; *Badische Co., in re* [1921], 2 Ch. 331.

[8] *Central India Mining Co.* v. *Société Coloniale Anversoise* [1920], 1 K.B. 753.

[9] *Ex parte Muhesa Rubber Plantations* [1917], 1 K.B. 48.

no proof that business had in fact been carried on during the war, but the opinions of the other judges amount to holding either that it is possible to trade in an enemy country without carrying on business there, or that carrying on business in an enemy country does not make a company an alien enemy.[1] The mere fact that a company, primarily registered in a British colony, was also registered in the enemy state, did not make it an alien enemy, in the absence of proof that it had carried on business in the enemy country after the declaration of war.[2]

Title to Sue. An alien enemy, during war, cannot sue in a British Court either personally or by an agent or mandatory.[3] He may, on English authority, be sued, and if so, may lodge defences and appeal against an adverse decision.[4] Actions pending before the war, to which an alien enemy was a party, have in all recent cases in Scotland been sisted until the restoration of peace.[5] As it is contrary to public policy that a British asset should be hampered for the ultimate benefit of an alien enemy, arrestments on the dependence of the action sisted were recalled.[6] The English Courts have decided that the members of a firm, dissolved on the ground that one partner was an alien enemy, might sue for the purpose of ingathering the firm's assets, and might add the name of the enemy partner as a plaintiff.[7]

Contracting with Alien Enemy.—During war it is illegal to enter into any contract with an alien enemy, except under royal licence.[8] The fact that war is imminent, and that the contract was induced by its imminence, is no objection. So where a company registered in the Transvaal effected an insurance of gold in transit shortly before the Boer War, and the gold was seized by the Boer forces before war was actually declared, it was held that although the company became an alien enemy on the declaration of war, its prior transactions were not affected, and the policy created a debt on which the company might sue after peace was restored.[9] On war being declared pending contracts become illegal if they involve intercourse with alien enemies, or if when carried out they would tend to strengthen the enemy resources. The Courts have refused to reach the conclusion that all executory contract with alien enemies are avoided on the declaration of war.[10] Contracts described as concomitants of property, such as leases, and probably feu-contracts, are not affected.[11] Shares in a British company held by an alien enemy are not forfeited, but during the war do not afford a qualification for a vote by proxy at a meeting of the company.[12] A policy of insurance on

[1] It is difficult to see how these opinions can be reconciled with the opinion of Lord Ludley in *Jansen* v. *Driefontein Mines* [1902], A.C. 484, or with the dicta of Lord Parker and Lord Parmoor, in *Daimler* v. *Continental Tyre Co.* [1916], 2 A.C. 307, at pp. 346, 351.

[2] *Nigel Gold Mining Co.* v. *Hoade* [1901], 2 K.B. 489.

[3] *Arnauld & Gordon* v. *Boick*, 1704, M. 10159; *Johnson & Wight* v. *Goldsmid*, 15th February 1809, F.C.

[4] *Porter* v. *Freudenberg* [1915], 1 K.B. 857. There is no Scotch authority as to the competency of suing an alien enemy, but probably the English rule would be followed. See Dicey, *Conflict of Laws*, 3rd ed., app. note 9.

[5] *Orenstein & Koppel* v. *Egyptian Phosphate Co.*, 1915, S.C. 55; *Craig Line Steamship Co.* v. *North British Storage Co.*, 1915, S.C. 113; *Van Uden* v. *Burrell*, 1916, S.C. 391.

[6] *Van Uden* v. *Burrell*, *supra*.

[7] *Rodriguez* v. *Speyer Brothers* [1919], A.C. 59.

[8] As to the system of royal licence, see Trotter, *Contract During and After War*, p. 51.

[9] *Jansen* v. *Driefontein Mines* [1902], A.C. 484; *Blomart* v. *Earl of Roxburgh*, 1664, M. 16091.

[10] *Ertel Bieber* v. *Rio Tinto* [1918], A.C. 260.

[11] *Halsey* v. *Lowenfeld* [1916], 2 K.B. 707; *Ertel Bieber* v. *Rio Tinto*, *supra*, opinion of Lord Dunedin.

[12] *Robson* v. *Premier Oil and Pipe Line* [1915], 2 Ch. 124.

the life of an alien enemy may be kept in force by the payment of the premium.[1] Where a German subject left England for Germany, under royal licence, and gave his solicitor a power of attorney for twelve months, declared to be irrevocable, it was decided that the absentee had become an alien enemy but that the validity of the power of attorney was not affected. Its irrevocable character excluded the objection that its exercise might involve intercourse with an alien enemy.[2] A contract of service with an alien enemy has been stated to be a point not yet settled.[3] It is not illegal to receive payment of a debt from an alien enemy, and to give a receipt.[4]

Executory Contracts.—These cases are, however, exceptions. The general rule is that all contracts which are at the declaration of war executory, so that something remains to be done by each party, fall if either party becomes an alien enemy. That result may be due to the fact that the contract if carried out would involve intercourse with the enemy, or would tend to strengthen his resources; or, in cases where neither of these elements is present, on the ground that the continuance of the contract till the conclusion of the war—a period which cannot be estimated—would in effect be to enforce a contract different to that to which the parties had agreed. This last consideration was applied to a contract for the supply of iron to a German firm. There was no obligation to take the iron in any particular year. It was argued that as the contract did not involve any intercourse with the enemy during war it was only suspended and not avoided. The answer was that to enforce a contract which was intended to operate in the immediate future after the expiry of an indeterminate period would be in effect to make a contract for the parties which they had not made for themselves.[5] On one or other of these grounds it has been decided that the following contracts are avoided if one party becomes an alien enemy: Contracts for the supply of goods,[6] charter parties,[7] policies of marine insurance,[8] bills of lading,[9] partnerships,[10] commercial agency.[11]

Effect of Suspensory Clauses.—In certain pre-war contracts for the supply of goods to enemy nationals there were clauses providing for the suspension of deliveries during war. It is conceived that it is now settled that such a clause is ineffective to preserve a contract which without it would fall. If "war" is construed as meaning a war other than one between Britain and the country in question, the clause is inapplicable to the case; if "war" is construed generally, the clause is contrary to public policy and can receive no effect, as tending to hamper the British, and liberate the enemy, stock of the article to be supplied under the contract.[12] So where there was a contract for the supply of iron-ore to a German firm by instalments during 1914-1915

[1] *Seligmann* v. *Eagle Insurance Co.* [1917], 1 Ch. 519 (Neville, J.).
[2] *Tingley* v. *Muller* [1917], 2 Ch. 144.
[3] *Anglo-Austrian Bank, in re* [1920], 1 Ch. 69 (Younger, J.).
[4] *Halsey* v. *Lowenfeld* [1916], 2 K.B. 707.
[5] *Dishington Hematite Iron Co.* v. *Possehl* [1916], 1 K.B. 811. See also opinion of M'Cardie, J., in *Naylor Benzon & Co.* v. *Krainische Industries* [1918], 1 K.B. 331; affd., on a separate ground [1918], 2 K.B. 486.
[6] *Esposito* v. *Bowden*, 1857, 7 E. & B. 763, 110 R.R. 816; *Zinc Corporation* v. *Hirsch* [1916], 1 K.B. 541; *Ertel Bieber* v. *Rio Tinto* [1918], A.C. 260.
[7] *Clapham S.S. Co.* v. *Vulcaan* [1917], 33 T.L.R. 546.
[8] *Furtado* v. *Rodgers*, 1802, 3 Bos. & P. 191.
[9] *Karberg* v. *Blythe* [1915], 2 K.B. 379; *Duncan Fox & Co.* v. *Schrimpft & Bonke* [1915], 3 K.B. 355.
[10] *Rodriguez* v. *Speyer Brothers* [1919], A.C. 59; *Stevenson* v. *Cartonnagen Industrie* [1918], A.C. 239.
[11] *Tingley* v. *Muller* [1917], 2 Ch. 144.
[12] *Zinc Corporation* v. *Hirsch* [1916], 1 K.B. 541; *Ertel Bieber* v. *Rio Tinto* [1918], A.C. 260.

with a clause providing for suspension of deliveries in the event of war, it was decided, on the assumption that the clause covered war between Britain and Germany, that the contract was avoided on the declaration of war. That would clearly have been the result apart from the suspensory clause. The clause was unenforceable as contrary to public policy; it would tend to give the enemy a free hand in dealing with their existing supply of iron-ore, also to limit the use of the stock available in Britain.[1]

Enemy Debts. Debts are not abrogated by the fact that the creditor has become an alien enemy. Pending the war, they cannot lawfully be paid, directly or through a neutral.[2] A debtor, sued by one whom he believed to be an alien enemy, did enough if he lodged the money in Court, when intimation would be made to the public authorities.[3] But though not payable during war the debt subsists, bears interest,[4] may be arrested,[5] and may—apart from specific legislation[6]—be recovered on the restoration of peace. Thus in bankruptcy a dividend must be set aside for an alien enemy;[7] dividends on shares accrue in his favour;[8] where he had paid in advance for machinery to be constructed, and the contract fell on the declaration, he could, after peace was restored, recover what he had paid.[9] Where it was found that a partnership with an alien enemy was dissolved, the British partners were bound, as at the conclusion of peace, to account for the enemy's share in the firm's assets, and for a share in the profits subsequently accruing in so far as attributable to the use of the capital held by the enemy partner at the date of dissolution of the partnership.[10]

Enemy Property.—Again, an alien enemy does not forfeit his property in this country. "It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property, with any fruits which it may have borne in the meantime."[11] So where a ship was in 1914 in course of construction for an Austrian firm, and the property in her so far as constructed had passed to the purchaser, it was held he was entitled to a portion of the price she brought when completed and requisitioned by the Government, the portion corresponding to the stage which the ship had reached when war with Austria was declared.[12]

[1] *Ertel Bieber* v. *Rio Tinto, supra.*
[2] *Rex* v. *Kupfer* [1915], 2 K.B. 321.
[3] *Guyot-Guenin* v. *Clyde Soap Co.*, 1916, S.C. 6.
[4] Per Lord Atkinson, *Stevenson* v. *Cartonnagen Industrie* [1918], A.C. 239.
[5] *Davis & Primrose* v. *Clyde Shipbuilding Co.*, 1918, 56 S.L.R. 24 (O.H., Lord Dewar).
[6] See Treaty of Peace Order, 1919.
[7] *Ex parte Boussmaker*, 1806, 13 Vesey 71.
[8] *Robson* v. *Premier Oil and Pipe Line* [1915], 2 Ch. 124.
[9] *Contiere San Rocco* v. *Clyde Shipbuilding Co.*, 1922, S.C. 723; revd. 1923, S.C. (H.L.) 105.
[10] *Stevenson* v. *Cartonnigen Industrie* [1918], A.C. 239.
[11] Per Finlay, L.C. in *Stevenson, supra.* See also *Ferdinand of Bulgaria, in re* [1921], 1 Ch. 107.
[12] *Penney* v. *Clyde Shipbuilding Co.*, 1919, S.C. 363; affd. 1920, S.C. (H.L.) 68.

CHAPTER VI

CONTRACTS BY CORPORATE BODIES

Definition of a Corporation. "A corporation may be described as an ideal and legal person intended to perpetuate the enjoyment of certain rights and privileges for the public benefit."[1] To this definition, in modern times, must be added the words "or for commercial purposes."

A corporation is a separate person in law, distinct from the individuals of whom it may be composed. The principal general characteristics of corporate existence are that the body may sue and be sued in its corporate name: that it has perpetual succession, if not limited in point of time by the charter or Act of Parliament by which it is founded; that it may make rules and by-laws in accordance with its constitution.[2] It has been laid down that the common law of Scotland, in regard to corporations, rests on the civil law, and differs materially from the law of England.[3]

Origin.—It is not within the power of a body of individuals to form themselves into a corporation.[4] It requires the authority of the State. That authority may be given by royal charter, by an Act of Parliament applicable to the particular case, or by a general statute providing means whereby, by following certain prescribed procedure, corporate privileges may be obtained. But the Crown may delegate the power to grant a charter erecting a body into a corporation; and many corporations owe their corporate privileges to a charter granted by a burgh—usually termed a seal of cause[5]—or by a lord of regality or baron of barony. It has been held that where a particular body possessed a charter from a lord of regality, and had always exercised the privileges of a corporation, its corporate existence could not be challenged on the ground that the lord of regality had no express power to grant the charter.[6] If a particular body has, from time immemorial, acted as a corporation, the existence of a charter, or seal of cause, will be presumed, though none can be produced.[7] And probably corporate privileges may be acquired by immemorial use, even though it is admitted, or clear from the nature of the case, that no charter was ever granted. Thus the Society of Writers to the Signet may point to authority, just short of an actual decision, in favour of their corporate existence, though

[1] Bell, *Prin.*, sec. 2176.

[2] Ersk. i. 7, 64; Bell, *Prin.*, sec. 2178.

[3] *University of Glasgow* v. *Faculty of Physicians*, 1837, 15 S. 736, per consulted judges, at p. 737; 1840, 1 Robinson, 397. For Roman law, see *Dig.*, iii. 4; xlvii. 20; Savigny, *System*, sec. 86 *seq.*; English law, Pollock, *Contract*, 9th ed., p. 155 *seq.*; Leake, *Contracts*, 7th ed., p. 427; Lord Halsbury's *Encyclopædia*, article on "Corporations."

[4] Ersk. i. 7, 64; *Crawford* v. *Mitchell*, 1761, M. 1958 and 14553.

[5] As to a seal of cause, see Kames, *Elucidations*, p. 53.

[6] *Fleshers of Canongate* v. *Wight*, 1835, 14 S. 135.

[7] Bell, *Prin.*, sec. 2177; *Fotheringham* v. *Langlands*, 1776, M. App., Burgh Royal, No. 2; *Skirving* v. *Smellie*, 19th January 1803, F.C.; *Dempster* v. *Master and Seamen of Dundee*, 1831, 9 S. 313.

admittedly they never had a charter.[1] And opinions have been expressed that the minister, elders, and heritors of a parish form a corporation,[2] though a kirk-session does not.[3]

A charter may be construed as forming a corporation though it contains no express provision to that effect; though no name is conferred on the new body; though there is no provision for maintaining the corporate succession.[4] But if the question is raised whether a charter confers privileges on the particular persons named and their successors as individuals, or upon them and their successors as a corporation, the former construction will hold if the charter is addressed to the grantees alone (*litteræ clausæ*); the latter, if it is addressed to all mankind, or to public officers (*litteræ patentes*).[5]

Contracts by Corporation. - Corporations necessarily act by agents. The charter or statute by which it is founded may fix the persons whose concurrence is necessary to bind the corporation as a body; if not, a majority of the individual members, or governing body, is sufficient.[6] But by a valid act the majority may delegate their powers to a committee, or to a single agent.[7]

The law of Scotland does not prescribe any particular form, such as sealing with the common seal, as indispensable to any contract on behalf of a corporation. A verbal agreement to compromise a claim between the claimant and the governing body of a corporation, with actings following upon it, has been held binding on the corporation.[8] But the particular charter, or a general statute, may determine the method by which a corporation may contract.[9]

Contractual Powers. - Certain contractual powers, without which their continued existence would be impossible, are necessarily possessed by all corporations, whatever their origin. They must have power to employ labour, to take a lease, to purchase goods, to open an account with a bank, and to draw cheques thereon.[10] The power to purchase and hold land would seem to be implied;[11] not necessarily to sell it.[12] Gratuities and pensions to officials are within the ordinary powers of public bodies,[13] or of companies while still carrying on business,[14] though not, it would seem, when they are

[1] *Graham* v. *Writers to the Signet*, 1825, 1 W. & S. 538; *Writers to the Signet* v. *Inland Revenue*, 1886, 14 R. 34.

[2] *Earl of Galloway* v. *Kirk-Session of Dalry*, 23rd February 1810, F.C.

[3] *Kirk-Session of North Berwick* v. *Sime*, 1839, 2 D. 23.

[4] *University of Glasgow* v. *Faculty of Physicians*, 1837, 15 S. 736; 1840, 1 Robinson, 397.

[5] *University of Glasgow* v. *Faculty of Physicians, supra.*

[6] *Meiklejohn* v. *Masterton*, 1805, M. App., Burgh Royal, No. 17; affd. 1810, 5 Paton, 298.

[7] *Bow* v. *Patrons of Cowan's Hospital*, 1825, 4 S. 276.

[8] *Park* v. *University of Glasgow*, 1675, M. 2535; cf. *Cook* v. *North British Rly. Co.*, 1872, 10 M. 513. As to English law see *Lawford* v. *Billericay Rural Council* [1903], 1 K.B. 772.

[9] *E.g.*, Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), sec. 72 (county council); Town Councils Act, 1900 (63 & 64 Vict. c. 49), sec. 9; Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), sec. 76 (on which see *Dey* v. *Pullinger Engineering Co.* [1921], 1 K.B. 77) and sec. 77.

[10] Ersk. i. 7, 64; Bell's *Prin.*, sec. 2178.

[11] Bell, *Prin.*, sec. 2178; Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), sec. 16; *Nicol* v. *Magistrates of Aberdeen*, 1870, 9 M. 306.

[12] *Heiton* v. *Waverley Hydropathic Co.*, 1877, 4 R. 830; *In re Kingsbury Collieries* [1907], 2 Ch. 259.

[13] *Mackison* v. *Burgh of Dundee*, 1909, S.C. 971; affd. 1910, S.C. (H.L.) 27.

[14] *Cameron* v. *Glenmorangie Distillery Co.*, 1896, 23 R. 1092; *Cyclists' Touring Club* v. *Hopkinson* [1910], 1 Ch. 179. But in *Fraser* v. *City of Glasgow Bank* (1880, 7 R. 961) it was held that when the directors of a company granted a pension, without being under any obligation to do so, it did not form a debt in the liquidation of the company.

being wound up.[1] But it is not within the implied power of a corporation to borrow money,[2] unless it is a trading company ;[3] nor to issue, or accept, bills of exchange.[4] It is suggested that the ordinary or general powers of trustees, as detailed in the Trusts (Scotland) Act, 1867, and the Trusts (Scotland) Act, 1897, may be accepted as a statement of the inherent and necessary contractual powers of all corporations.[5]

Chartered and Statutory Bodies.—When the question is whether a particular corporation has the power to enter into a contract which is not one of those into which all corporations have the power to enter, there is a distinction between corporations acting under a charter and corporations acting under the provisions of a statute.

Chartered Body.—In English law the two cases are in marked contrast. "The difference between a statutory corporation and a corporation at common law is perfectly well settled : the former can do such acts only as are authorised directly or indirectly by the Act creating it ; the latter (speaking generally) can do anything that an individual can do."[6] And even if a particular contract is expressly prohibited in the charter, it will, if done, be valid, though it may expose the corporation to forfeiture of its corporate privileges.[7] The law of Scotland on this subject is not settled so clearly as might be desired. The distinction between the powers under a charter and under a statute is recognised. Thus if statutory funds are devoted to the promotion of, or opposition to, bills in Parliament, the expenditure must be justified by shewing that it was expressly or impliedly authorised by the Act ;[8] if, on the other hand, the funds expended were part of the common good of a burgh (in regard to which the burgh acts in virtue of its charters) it is enough if the expenditure was made in the honest belief that the interests of the burgh would be advanced.[9] But it would seem to be established that in Scotland even a corporation acting under its charter has limits set to its contractual powers, though these are not easy to define. Thus a contract prohibited by the charter, as interpreted by usage, would be void.[10] And even where no express prohibition can be found there is authority for the statement that the objects of the corporation, to be gathered from its nature and history, form a real, though elastic, limit to its contractual powers. In *Ellis* v. *Henderson*[11] it was decided in the Court

[1] *Clouston* v. *Edinburgh and Glasgow Rly. Co.*, 1865, 4 M. 207 ; *Hutton* v. *West Cork Rly.*, 1883, 23 Ch. D. 654 (companies wound up under special Act) ; *Stroud* v. *Royal Aquarium, etc., Society*, 1903, 19 T.L.R. 656 (voluntary liquidation).

[2] *Cumming* v. *Walker*, 1742, M. 2501 (trade incorporation) ; *Regina* v. *Reed*, 1880, 5 Q.B.D. 483 ; *Cunliffe, Brooks & Co.* v. *Blackburn Building Society*, 1884, 9 A.C. 857. A power to borrow a specific sum implies a prohibition to borrow more. *Wenlock* v. *River Dee Co.*, 1883, 36 Ch. D. 674.

[3] *General Auction Co.* v. *Smith* [1891], 3 Ch. 432.

[4] *Bateman* v. *Mid Wales Rly. Co.*, 1866, L.R. 1 C.P. 499 ; *Peruvian Railways Co.* v. *Thames, etc., Insurance Co.*, 1867, L.R. 2 Ch. 617.

[5] The powers conferred by the Trusts (Scotland) Act, 1921, are wider, and may go beyond the powers inherent in corporate bodies, *e.g.*, in relation to selling heritage. It is conceived that the statutory definition of "trust" and "trust-deed," though it may cover some, does not cover all corporate bodies.

[6] Per Farwell, J., in *Attorney-General* v. *Manchester Corporation* [1906], 1 Ch. 643, 651.

[7] Buckley, *Companies Act*, 10th ed., 12. See opinion of Bowen, L.J., in *Wenlock* v. *River Dee Co.*, 1887, 36 Ch. D. 674, at p. 685.

[8] *Wakefield* v. *Renfrew Commissioners*, 1878, 6 R. 259 ; *Magistrates of Leith* v. *Leith Dock Commissioners*, 1897, 25 R. 126 ; affd. 1899, 1 F. (H.L.) 65 ; and see *infra*, p. 104.

[9] *Conn* v. *Corporation of Renfrew*, 1906, 8 F. 905.

[10] *Sanderson* v. *Lees*, 1859, 22 D. 24 ; *Kesson* v. *Aberdeen Wrights, etc., Incorporation*, 1898, 1 F. 36, per Lord Kyllachy (Ordinary), at p. 40.

[11] 1842, 4 D. 370 ; revd. 1844, 1 Bell's App. 1.

of Session, and not disputed in the House of Lords, that a professional body, incorporated by royal charter, was limited in its action to the purposes for which it had been incorporated. In *Finlay* v. *Newbigging*[1] it was decided that a trade incorporation could not devote its funds to petitioning Parliament in favour of reform of the constitution of royal burghs, on the ground that such expenditure, though not expressly prohibited in the seal of cause, was foreign to the objects for which the incorporation was established. In *Wigton* v. *Stranraer*,[2] a contract whereby one burgh undertook to defray part of the assessment laid upon another was refused effect, as *ultra vires* of the former burgh. In *Magistrates of Kilmarnock* v. *Aitken*,[3] a burgh undertook liability for the stipend of the minister of a new church. The contract was sustained on the ground that the support of the Established Church was within the objects for which royal burghs existed, but it was observed that a similar agreement with regard to a voluntary church would not have been enforceable. And throughout the cases dealing with the powers of existing members of trade incorporations it is assumed that such bodies have no power to enter into contracts or to expend their funds, except in furtherance of the objects for which they were incorporated.[4] Though some of these cases may admit of explanation on the ground that the act or contract in question amounted to a breach of trust, it is conceived that they establish that the powers of a body holding a charter are in Scotland confined to acts which may reasonably be supposed to have been within the contemplation of the granter.

Whatever may be the limits of the contractual powers of bodies acting under a royal charter, it is clear that their actings are in most cases limited by the principle that they hold their property in trust, and cannot do anything which would amount to a breach of that trust. This has been illustrated in cases relating to the proceedings of various trade incorporations, and to the management and disposal of the common good in burghs.

Trade Incorporations.—During the sixteenth and seventeenth centuries a number of associations of those who carried on a particular trade in a burgh were formed, in many cases obtained corporate privileges, and possessed the power of preventing non-members exercising the particular trade within the burgh. The Burgh Trading Act, 1846 (9 & 10 Vict. c. 17), deprived these bodies of the privilege of exclusive trading, but recognised and continued their existence as corporations. The Act provides that in future by-laws of such incorporations, relating to the admission of new members or the application of the funds, require confirmation by the Court of Session, but with a saving clause to the effect that by-laws and regulations might be made without such confirmation if they would have been competent before the Act: thus, it would appear, leaving the question of the validity of any subsequent action to be determined by the common law. In several cases the existing members, holding that the incorporation had no further utility, proposed to divide its assets amongst themselves; but on the question being brought before the Court, it was held that the corporate funds were held by the existing members in trust for themselves, for those who might in future qualify for membership, and ultimately for the Crown,[5] and

[1] 1793, M. 2008; cp. *Macausland* v. *Montgomery*, 1793, M. 2010.
[2] 1681, M. 2495.
[3] 1849, 11 D. 1089.
[4] The cases are collected and considered in *Kesson* v. *Aberdeen Wrights, etc., Incorporation*, 1898, 1 F. 36; and see next paragraph.
[5] *Thomson* v. *Incorporation of Candlemakers*, 1855, 17 D. 765.

therefore that the funds could not be appropriated by the existing members, either directly, or by voting fees for attendance at meetings, or acting as clerk or treasurer, or by a scheme of annuities calculated to encroach on capital.[1] And it would appear that any alteration of the rules whereby the conditions of entry to the incorporation are made more stringent, with the object of gradually diminishing the number of members, is *ultra vires*.[2] But it is within the powers of the members of such incorporations to spend a reasonable sum on entertainments, at least if sanctioned by precedent,[3] or on subscriptions to charities.[4] When *ultra vires* action is alleged, the title to intervene rests with the Crown, with any party who can shew a right, though merely contingent, to a benefit under the rules,[5] with a member of the incorporation, though admitted on terms excluding him from any benefit from the funds,[6] or with a judicial factor appointed to administer the property of the incorporation.[7]

Burghs with Common Good.—A royal burgh, or a burgh of barony, may own property, and have the power to levy customs, under its charter. That property, and the revenues derived from the customs, form the common good of the burgh. The magistrates are the administrators of the common good, and they also have power, under general or local statutes, to impose rates for various purposes. But, in questions of their power to dispose of the funds thus under their charge, the magistrates stand, in these separate capacities, in distinct positions. In dealing with the rates they are statutory bodies, and fall under the general rule that they can do nothing which the statute does not authorise; in the management of the common good they are acting under a charter.[8] An early statute [9] provides that the common good is to be observed and kept for the common profit of the town, and spent in the common and necessary things of the burgh, subject to yearly inquisition by the Chamberlain. It has for long been established that the administration of the common good by the magistrates is subject to the supervision and intervention of the Crown,[10] and may be challenged in the Court of Session,[11] but their powers of administration are so wide that instances of successful challenge of their dealings with the actual funds, as distinguished from any heritable property they may hold, are rare. They may apply their funds to promote or oppose bills in Parliament, and there is no case in which it has been held that the Court would control their discretion in the matter, if honestly exercised.[12] They may borrow money;[13] and for the debt and

[1] *Howden* v. *Incorporation of Goldsmiths*, 1840, 2 D. 996; *Muir* v. *Rodger*, 1881, 9 R. 149; *Tait* v. *Muir*, 1902, 5 F. 288.

[2] *Webster* v. *Tailors of Ayr*, 1893, 21 R. 107.

[3] *Rodgers* v. *Tailors of Edinburgh*, 1842, 5 D. 295; *Kesson* v. *Aberdeen Wrights, etc., Corporation*, 1898, 1 F. 36.

[4] *Anderson* v. *Wrights of Glasgow*, 1862, 1 M. 152. Contrast the powers of a statutory body (railway company) (*Tomkinson* v. *South-Eastern Rly. Co.*, 1887, 35 Ch. D. 675).

[5] *Kesson* v. *Aberdeen Wrights, etc., Corporation*, 1898, 1 F. 36; earlier cases there cited.

[6] *Alexander* v. *Crabb*, 1842, 5 D. 127.

[7] *Tait* v. *Muir*, 1904, 6 F. 586.

[8] *Magistrates of Leith* v. *Leith Dock Commissioners*, 1897, 25 R. 126; affd. 1899, 1 F. (H.L.) 65.

[9] Act, 1491, c. 36. Balfour, *Practiques*, p. 45.

[10] *Conn* v. *Corporation of Renfrew*, 1906, 8 F. 905.

[11] *M'Dowal* v. *Magistrates of Glasgow*, 1768, M. 2525; *Nicol* v. *Magistrates of Aberdeen*, 1870, 9 M. 306; *Kemp* v. *Glasgow Corporation, infra*, opinion of Viscount Finlay, 1920, S.C. (H.L.), at 78. It is conceived that the opinions in *Conn, supra*, refer to the title of an individual burgess to sue, and do not mean that the Court of Session has no jurisdiction.

[12] *Conn* v. *Corporation of Renfrew*, 1906, 8 F. 905. See *Eadie* v. *Corporation of Glasgow*, 1908, S.C. 207. The Borough Funds Act, 1872 (35 & 36 Vict. c. 91), if applicable to Scotland, does not appiy to expenditure from the common good (*Conn*).

[13] *Livy* v. *Mudie*, 1774, M. 2512; *Burgh of Renfrew* v. *Murdoch*, 1892, 19 R. 822.

the other expenditure of the burgh diligence may be used, and the burgh may be rendered notour bankrupt and sequestrated.[1] An argument that the administrators of a burgh were in a position analogous to that of the curators of a minor, and therefore that their deeds might be set aside on proof of lesion to the burgh, was repelled.[2] In *Kemp* v. *Corporation of Glasgow*,[3] the pursuer, suing as a ratepayer of Glasgow, and resting his title on the provisions of a local and personal act,[4] averred that certain expenditure from the common good had been devoted to payment of the election expenses of those candidates in municipal elections in neighbouring burghs who were in favour of annexation by Glasgow, and craved that the payments in question should be disallowed. The Court of Session, holding that the payments, if made, were in the interests of the City of Glasgow, and within the powers of the Corporation, dismissed the action as irrelevant. In the House of Lords proof was allowed. From the opinions it would appear that the ground of judgment was that such payments were contrary to public policy and illegal, as tending to interfere with the proper conduct of elections, and it is difficult to draw any conclusion from the case as to the powers of the magistrates with regard to the common good, except that, while their powers are extremely wide, it is not a tenable proposition that they can apply the funds to any purpose to which an individual might lawfully apply his own property.

With regard to heritable property forming part of the common good it was established, by the middle of the eighteenth century, that the magistrates had the power of sale, feuing, and leasing,[5] subject to the control of the Court of Session, if the return they received was inadequate,[6] or, in extreme cases, if it could be shewn that their acts were not in reality in accordance with the interests of the town.[7] This power was subject to any rights over particular property acquired by the inhabitants by prescriptive use.[8] The methods of contracting are regulated by the Town Councils (Scotland) Act, 1900.[9] By that Act (sec. 98) all feus, alienations, or tacks for more than five years of any heritable property, forming part of the common good must be by public roup, preceded by advertisement for three weeks in a newspaper circulating in the burgh, under the sanction of nullity. Provision is made for the publication and audit of the burgh accounts, with a right in any ratepayer dissatisfied therewith to object by petition to the Sheriff.[10]

Bodies Acting under Statute. When we turn from corporations acting under a royal charter to similar bodies acting under the provisions of a statute, the rules as to capacity to contract are much more stringent. The general rule is well established that the validity of any contract by such a corporation is to be tested by applying the rule that the statute prohibits

[1] *Wotherspoon* v. *Magistrates of Linlithgow*, 1863, 2 M. 348.
[2] *Magistrates of Edinburgh* v. *Paterson*, 1690, M. 2496.
[3] 1919, S.C. 71; revd. 1920, S.C. (H.L.) 73.
[4] Glasgow Corporation Act, 1909 (9 Edw. VII. c. cxxxvii.), sec. 14.
[5] Ersk. ii. 3, 15.
[6] *Ainslie* v. *Magistrates of Edinburgh*, 1839, 2 D. 64.
[7] See opinions in *Nicol* v. *Magistrates of Aberdeen*, 1870, 9 M. 306.
[8] On this subject, only remotely connected with contract, see Rankine, *Landownership*, 4th ed., 356.
[9] 63 & 64 Vict. c. 49, repealing and, in substance, re-enacting, 3 Geo. IV. c. 91.
[10] Secs. 91 and 96. The right of an elector to object by petition to the Sheriff has been considered, in cases dealing with an equivalent provision in the Glasgow Corporation Act, 1909, in *Eadie* v. *Corporation of Glasgow*, 1916, S.C. 163; *Kemp* v. *Corporation of Glasgow*, 1919, S.C. 71; revd. 1920, S.C. (H.L.) 73.

all acts which it does not expressly or impliedly authorise.[1] "It is now well settled that the answer to the question whether a corporation created by a statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or can be implied from the language used."[2] So where the promoters of a tramway company, established by a private Act of Parliament, who had paid the expenses of obtaining the Act, made an arrangement with the contractors for the work under which they were to receive a payment of £17,000, the ultimate ground on which it was held that this arrangement could not stand was that the company could not apply its money to any object which was not authorised by the statute, and that, though payment of the expenses of obtaining the Act was one of those objects, payment of a lump sum, without detailed charges, was not thereby impliedly authorised.[3] In *Newburgh and North of Fife Rly. Co.* v. *North British Rly. Co.*[4] the majority of the Court were of opinion that a railway company, having obtained statutory powers to issue capital and construct the line, were not entitled to assign the powers they had thus obtained to a contractor who undertook to construct the line and proposed to issue the shares. The actual point decided was that a guarantor of a dividend on the share capital was not bound where the shares were not issued by the railway company, but by the contractor, and were issued at a discount.

Implied Powers. The question whether a particular act is impliedly authorised by a statute must always turn on the construction of its terms. Illustrative cases are cited below.[5] There would seem to be no general rules, except that the powers given are to be reasonably and not judaically

[1] The leading authorities are: *Ashbury Carriage Co.* v. *Riche*, 1875, L.R. 7 (H.L.) 653; *Attorney-General* v. *Great-Eastern Rly. Co.*, 1880, 5 App. Cas. 473; *Wenlock* v. *River Dee Co.*, 1885, 10 App. Cas. 354; *Mann* v. *Edinburgh Northern Tramways Co.*, 1891, 18 R. 1140; affd. 1892, 20 R. (H.L.) 7; *London County Council* v. *Attorney-General* [1902], A.C. 165; *Nicol* v. *Dundee Harbour Trs.*, 1914, S.C. 374; affd. 1915, S.C. (H.L.) 7; *Newburgh and North of Fife Rly. Co.*, v. *North British Rly. Co.*, 1913, S.C. 1166; *Deuchar* v. *Gas, Light, etc., Co.* [1925], A.C. 691.

[2] Per Lord Haldane in *Nicol* v. *Dundee Harbour Trs.*, *supra*.

[3] *Mann* v. *Edinburgh Northern Tramways Co.*, *supra*; cf. *Newburgh and North of Fife Rly. Co.* v. *North British Rly. Co.*, 1913, S.C. 1166; *Mason's Trs.* v. *Poole & Robinson*, 1903, 5 F. 789.

[4] *Supra*.

[5] *Balfour's Trs.* v. *Edinburgh and Northern Rly. Co.*, 1848, 10 D. 1240 (railway company has no power to buy shares of another railway); *M'Gowan* v. *Bell*, 1865, 3 M. 1097 (power to hold police courts implies power to pay expenses of procurator-fiscal in a suspension); *British Fisheries Society* v. *Magistrates of Wick*, 1872, 10 M. 426 (authority to rate for "maintaining, keeping in repair, and improving" bridges, justifies a sinking fund to provide money to rebuild a bridge); *Smeaton* v. *St Andrews Police Commissioners*, 1867, 5 M. 743; 1871, 9 M. (H.L.) 24 (commissioners, having powers from Sheriff to lay sewer in prescribed line, may bargain with landowner for alterations); *Stirling County Council* v. *North British Rly. Co.*, 1896, 23 R. 924; *Dennistoun* v. *Caledonian Rly. Co.*, 1900, 7 S.L.T. 464 (railway, after their statutory powers have expired, may execute works *in suo*); *Ellice* v. *Invergarry, etc., Rly. Co.*, 1913, S.C. 849 (powers of railway company to sell line); *London County Council* v. *Attorney-General* [1902], A.C. 165 (corporation with power to use tramways cannot run omnibuses beyond tramway routes, nor (*Attorney-General* v. *Manchester Corporation* [1906], 1 Ch. 643) establish a parcel delivery service); *Attorney-General* v. *West Gloucestershire Water Co.* [1909], 2 Ch. 338 (water company cannot supply water outside its radius); *Attorney-General* v. *Mersey Rly. Co.* [1907], 1 Ch. 81 (railway cannot establish omnibus service); *Nicol* v. *Dundee Harbour Trs.*, 1914, S.C. 374, affd. 1915, S.C. (H.L.) 7 (*ultra vires* to use ferry boats for excursion traffic); *Attorney-General* v. *West Ham* [1910], 2 Ch. 560 (corporation, with borrowing powers for particular purposes, cannot use them for general expenditure); *Grieve* v. *Edinburgh Water Trs.*, 1918, S.C. 700 (Water Trustees have no implied power to execute plumber work); *Deuchar* v. *Gas, Light, etc., Co.* [1925], A.C. 691 (Gas Company, having power to convert residual products, has implied power to manufacture caustic soda to be used in the process). As to power to borrow, and grant bills, see *infra*, p. 112; as to opposing bills in Parliament, *infra*, p. 108.

construed,[1] though, on the other hand, the fact that a particular enterprise could be conveniently carried on as an adjunct to a statutory undertaking does not infer implied sanction to it.[2] The profitable character of the enterprise is irrelevant.[3] Some earlier cases in Scotland differentiate between local authorities and companies having statutory powers: allowing a wider implication of powers in the case of the latter. Thus in the question whether a railway company could expend money in opposing amalgamation with another company, opinions were given that the cases relating to the powers of local authorities had no application.[4] But the better opinion would appear to be that all statutory powers are conferred for the advantage of the public, and therefore should all receive the same construction.[5] An English case suggests a different distinction: between the wide construction to be given to the powers taken by a company in its memorandum, and the more narrow reading to be observed in cases of statutory powers.[6]

It is stated as a general rule that if a corporate body may obtain powers to enter into a particular contract by adopting the provisions of an Act of Parliament, a contract made conditionally will be validated on the Act being afterwards adopted.[7]

Contract not to Exercise Statutory Powers.– A body which has statutory powers, whether it be a local authority or a company established for profit, cannot bind itself not to use those powers in the future, or incur any obligation inconsistent with their exercise. So harbour trustees could not bind themselves not to build on land they acquired, in order to pay less for it;[8] and a servitude right, or right-of-way, cannot be established by use over a railway line.[9] But if statutory powers are conferred by permissive words, no obligation to use them is implied.[10] And probably the application of the general rule is confined to the case where property is acquired or possessed for statutory purposes; it does not, at any rate in the case of a trading company, affect contracts under which the company undertakes to limit the price to be charged for its products, even when such contracts may, in certain circumstances, entail the ruin of the company and consequently the discontinuance of the exercise of the statutory powers. Financial success is not one of the objects for which such a company receives statutory incorporation. So a company for the supply of electricity was bound by a contract under which its charges were not to exceed those imposed by a neighbouring corporation.[11] When a public body acted under a statute by

[1] *Attorney-General* v. *Great Eastern Rly. Co.*, 1880, 5 App. Cas. 473.

[2] *Attorney-General* v. *West Gloucestershire Water Co.* [1909], 2 Ch. 338; *Nicol* v. *Dundee Harbour Trs.*, 1914, S.C. 374.

[3] *Nicol* v. *Dundee Harbour Trs.*, 1914, S.C. 374; affd. 1915, S.C. (H.L.) 7.

[4] *Blackburn* v. *Stewart*, 1851, 13 D. 1243; see *Macgregor* v. *North British Rly. Co.*, 1885, 23 S.L.R. 194 (power to build and let hotel); *Smith* v. *Glasgow and South-Western Rly. Co.*, 1897, 4 S.L.T. 327 (power to run steamers).

[5] See *Ayr Harbour Trs.* v. *Oswald*, 1883, 10 R. 472; affd. 10 R. (H.L.) 85 (per Lord Blackburn); *Tomkinson* v. *South-Eastern Rly. Co.*, 1887, 35 Ch. D. 675.

[6] *Attorney-General* v. *Mersey Rly. Co.* [1907], 1 Ch. 81.

[7] *Brown* v. *Kilsyth Police Commissioners*, 1886, 13 R. 515.

[8] *Ayr Harbour Trs.* v. *Oswald*, 1883, 10 R. 472; affd. 10 R. (H.L.) 85; see explanation by Lord Sumner in *Birkdale District Electric Co.* v. *Southport Corporation* [1926], A.C. 355; and opinion of M'Cardie, J., in *County Hotel & Wine Co.* v. *L. & N.W. Rly.* [1918], 2 K.B. 251; affd., on other grounds [1921], 1 A.C. 85.

[9] *Ellice's Trs.* v. *Caledonian Canal Commissioners*, 1904, 6 F. 325; *Magistrates of Edinburgh* v. *North British Rly. Co.*, 1904, 6 F. 620.

[10] *Lord Blantyre* v. *Caledonian, etc., Junction Rly.*, 1853, 16 D. 9; *Scottish North-Eastern Rly. Co.* v. *Stewart*, 1856, 18 D. 541; revd. 1859, 3 Macq. 382.

[11] *Birkdale District Electric Co.* v. *Southport Corporation* [1926], A.C. 355, disapproving *York Corporation* v. *Leetham* [1924], 1 Ch. 557.

which they had a general power to "suspend or remove" their officials, it was decided that contracts with the officials in question, under which removal was limited to misconduct, neglect, or unfitness, were within the reasonable exercise of the statutory powers.[1]

Promoting, etc., Parliamentary Bill. A number of cases have raised the question whether a body acting under statute has the power to expend its funds in the promotion of, or opposition to, bills in Parliament or provisional orders. The Borough Funds Act, 1872 (35 & 36 Vict. c. 91), contains provisions whereby the governing body [2] of any district, with the consent of the ratepayers and the approval of a Secretary of State, may expend money in promoting or opposing any local and personal bill in Parliament, and may determine out of which rate under their control the money shall be repaid. It is still doubtful whether this Act applies to Scotland, but the balance of authority is in the affirmative.[3] Its provisions have been applied to county councils,[4] in so far as the power of opposing bills is concerned, with the substitution of the Secretary for Scotland for the Secretary of State; and to town councils.[5] Neither of those bodies require the consent of the ratepayers, but in the case of a town council any ratepayer may appeal to the Secretary for Scotland, whose determination is final. And none of the Acts derogate in any way from the powers which a statutory body may otherwise possess. These powers are to be discovered, as in other cases, by a construction of the statute under which the corporate body acts. The general points which may be said to be established have been stated by Lord Moncreiff:[6] "The fact that the expenditure results in benefit to the burgh or undertaking is not enough; it must be properly incidental to the execution of the trust. On the other hand, want of success will not of itself deprive trustees of the right of reimbursement. Express statutory powers to incur such expenditure is not essential; it may be implied. Opposition to a bill which may affect the trust is more favourably regarded than promotion of a bill with a view to obtaining extended powers. Defence of the property of the trust or the estate administered will in general warrant such an application of the rates if the opposition be proper and necessary." To this statement it may be added that it is probably the law that a corporate body is entitled to oppose any attempt to deprive it of its corporate existence. Thus a railway company may devote its funds to opposing amalgamation.[7] The same principle was applied in England to a local authority,[8] and the decision has been approved by the House of Lords in a Scots case.[9] It is, however, not reconcilable with *Perth Water Commissioners* v. *Macdonald*,[10] where statutory commissioners were held not entitled to apply their funds

[1] *Lord Advocate* v. *Ayr District Board*, 1927, S.L.T. 337 (O.H., Lord Constable).

[2] Defined as meaning "the council of any municipal borough, the board of health, local board, commissioners, trustees, or other body acting under any general or local Act of Parliament, for the management, improving, cleaning, paving, lighting, and otherwise governing places or districts."

[3] See opinions in *Perth Water Commissioners* v. *Macdonald*, 1879, 6 R. 1050; *Magistrates of Leith* v. *Leith Dock Commissioners*, 1897, 25 R. 126; affd. 1899, 1 F. (H.L.) 65; *Conn* v. *Corporation of Renfrew*, 1906, 8 F. 905.

[4] Local Government (Scotland) Act, 1889, sec. 56.

[5] Burgh Police (Scotland) Act, 1903, sec. 55.

[6] *Magistrates of Leith*, 1897, 25 R. 126, at p. 143. See *Perth Water Commissioners* v. *Macdonald*, 1879, 6 R. 1050; *Wakefield* v. *Renfrew Commissioners*, 1878, 6 R. 259; *Cowan & Mackenzie* v. *Law*, 1872, 10 M. 578; *Myles* v. *M'Ewen*, 1855, 18 D. 205.

[7] *Blackburn* v. *Stewart*, 1851, 13 D. 1243.

[8] *Attorney-General* v. *Mayor of Brecon*, 1878, 10 Ch. D. 204.

[9] *Magistrates of Leith* v. *Leith Docks Commissioners*, 1899, 1 F.H.L. 65.

[10] 1879, 6 R. 1050.

to the expenses of opposing a bill which abolished the existing commission and established a new one, and it is difficult to see the answer to the remark made by Lord Gifford in that case that statutory bodies exist for the benefit of the public, and not for the benefit of themselves, and therefore that they have no power to defend their corporate existence, unless they can justify this defence in the interests of the public. And even if expenses may be justified on the ground of defending the existence of the corporation, it would seem that, in the case of a rating body, they must be allocated on the various rates, not laid exclusively upon one.[1]

Title to Intervene. - In considering who has a title to intervene to prevent *ultra vires* acts on the part of a chartered or statutory body, it is established that it is not enough to shew that the pursuer has an interest at stake, if no definite right of his is infringed by the actings of which he complains.[2] So when harbour trustees used a steamship in pleasure cruises on a river which was outside the geographical limits within which under their statute they were allowed to sail, it was decided that although their action was *ultra vires* a shipowner with whose business their enterprise competed had on that ground no title to interdict them. He had no right to prevent other ships sailing in rivalry with his. His interests, but not his rights, were affected.[3] In *Grieve* v. *Edinburgh Water Trs.*[4] certain plumbers obtained interdict against the Water Trustees undertaking plumbing work, but an objection to their title, though stated, was not pressed, and would probably have been repelled on the ground that they had a title, not as plumbers, but as parties liable in payment of water rates. The Crown has a title to intervene in the case of maladministration of the common good of a royal burgh, but this is rested on the special ground that the common good is derived from a Crown grant,[5] and in *Nicol* v. *Dundee Harbour Trs.* opinions were expressed that the Lord Advocate, on behalf of the Crown, would have no title to object to the acts of a statutory body. The title of a ratepayer is involved in some obscurity, owing to the course of the early decisions on the subject. In the case of a burgh having a common good it is settled that an inhabitant or ratepayer has no title at common law to bring a declarator that the magistrates are maladministering the funds, or to demand an accounting.[6] But Lord Dunedin has suggested that there may be room for distinction between an objection to one specific *ultra vires* act,[7] and the general complaint of maladministration: and there is no doubt of the title of an inhabitant when the action of the magistrates invokes an interference with some established public use.[8] In *Ewing* v. *Glasgow Police Commissioners*[9] the Commissioners had resolved that the expenditure in opposing a private Act of Parliament should be paid out of money derived from rates. Ewing, as a ratepayer, brought an action of suspension and interdict against this, and a declarator that the Commissioners were bound to replace any money so taken from the corporate funds. It was held that he had no title to sue, but

[1] *Magistrates of Leith* v. *Leith Docks Commissioners, supra.*
[2] *Nicol* v. *Dundee Harbour Trs.*, 1914, S.C. 374; affd. 1915, S.C. (H.L.) 7; *Clyde Steam Packet Co.* v. *Glasgow and South-Western Rly.*, 1897, 4 S.L.T. 327.
[3] *Nicol, supra.*
[4] 1918, S.C. 700.
[5] *Conn* v. *Corporation of Renfrew*, 1906, 8 F. 905, opinion of Lord Kyllachy.
[6] Ersk. i. 4, 23; More, *Notes to Stair*, ccclxxi.; *Burgesses of Inverurie* v. *Magistrates*, 14th December 1820, F.C.; *Grahame* v. *Magistrates of Kirkcaldy*, 1882, 9 R. (H.L.) 91, per Lord Watson, at p. 96; *Conn* v. *Corporation of Renfrew*, 1906, 8 F. 905.
[7] *Nicol* v. *Dundee Harbour Trs.*, 1915, S.C. (H.L.) 7, at p. 17.
[8] *Sanderson* v. *Lees*, 1859, 22 D. 24; *Grahame* v. *Magistrates of Kirkcaldy, supra.*
[9] 1837, 15 S. 389; 1839, M'L. & R. 847.

it has been authoritatively explained that the case is not an authority for the proposition, which certainly bulks largely in the opinions given, that a ratepayer has not a sufficiently direct and immediate interest to entitle him to interfere with the methods by which the funds derived from rates are disposed of.[1] So a shipowner who was liable for harbour rates was entitled to interdict an *ultra vires* act on the part of the harbour trustees.[2] Where a ratepayer suspended a charge for payment on the ground that the money was being used for *ultra vires* expenditure, no objection was taken to his title.[3] When it was proposed to allocate certain expenditure, averred to be *ultra vires*, on the rates of ensuing years, a ratepayer had a title to bring a declarator that these rates should not be imposed on him.[4] From these authorities it is submitted that so long as the actual conclusions in Ewing are avoided that case is no bar to an action by a ratepayer designed to check illegal expenditure from rates.

Companies under Companies Act, 1908. A company registered under the Companies (Consolidation) Act, 1908 (or under prior Acts thereby repealed), is a corporation.[5] A memorandum of association must be registered with the Registrar of Joint Stock Companies :[6] and in this document must be stated, *inter alia*, "the objects of the company."[7] The contractual powers of a company are limited by its memorandum of association ; it can do nothing which is not expressly or impliedly sanctioned therein.[8] The memorandum has sometimes been spoken of as the company's charter ; it would be more exact to figure it as the company's private Act of Parliament ; the position being analogous to that of a body acting under statutory powers, not to that of a body acting under a royal charter. Thus it was held that a company which had stated as its objects in the memorandum to make, sell, or lend on hire railway waggons and all kinds of railway plant, and to act as mechanical engineers and general contractors, could not enter into a contract to purchase a concession to make a foreign railway, or finance a subsidiary company for that object.[9] And a company with power to lend money on heritable security has no implied power to guarantee the interest on a prior bond over subjects over which it holds a postponed bond,[10] though it may be entitled to purchase the subjects when sold by the prior bondholder.[11] It is not competent to extend the objects of the company, as stated in the memorandum, by a provision in the articles of association.[12]

Powers Taken in Memorandum. - The Act of 1908 does not expressly limit the powers which the company may confer upon itself in its memorandum, and in practice these are very wide.[13] But it is an established

[1] Per Lord Dunedin, *Nicol* v. *Dundee Harbour Trs., supra*, 1915, S.C. (H.L.), at p. 15.

[2] *Nicol, supra.*

[3] *Magistrates of Leith* v. *Leith Docks Commissioners*, 1897, 25 R. 126 ; affd. 1899, 1 F. (H.L.) 65 ; *Colville* v. *Dalziel P.C.*, 1927, S.L.T. 118.

[4] *Stirling County Council* v. *Magistrates of Falkirk*, 1912, S.C. 1281 ; *Farquhar & Gill* v. *Magistrates of Aberdeen*, 1912, S.C. 1294.

[5] 8 Edw. VII. c. 69, secs. 2, 16.

[6] *Ibid.*, sec. 15.

[7] *Ibid.*, sec. 3.

[8] Buckley, *Companies Act*, 10th ed., 10.

[9] *Ashbury Carriage Co.* v. *Riche*, 1875, L.R. 7 H.L. 653.

[10] *Shiell's Trs.* v. *Scottish Property Investment Society*, 1883, 10 R. 1148 ; affd. 1884, 12 R. (H.L.) 14 ; *Life Association* v. *Caledonian Heritable Security Co.*, 1886, 13 R. 750.

[11] *Paterson's Trs.* v. *Caledonian, etc., Security Co.*, 1885, 13 R. 369.

[12] *Guinness* v. *Land Corporation of Ireland*, 1882, 22 Ch. D. 349.

[13] It has been questioned, but not decided, whether, if a company in its memorandum took power to do everything which can be done by a corporate body, the registrar would be entitled to refuse a certificate of incorporation on the ground that such a memorandum failed to state the objects of the company. *Cotman* v. *Brougham* [1918], A.C. 514.

principle of construction that general words which, taken by themselves, would confer on the company practically unlimited powers, are to be controlled by reference to their context.[1] And there are certain acts which are held to be inconsistent with the conditions under which limited liability is sanctioned by the Legislature, and these remain *ultra vires* though power to do them may be taken in the memorandum. Thus no company, whether authorised by its memorandum or not, may purchase its own shares,[2] unless they are fully paid up,[3] or issue shares at a discount.[4]

Alteration of Memorandum. The objects of the company, as stated in the memorandum, cannot be altered by a mere special resolution, even by virtue of a provision to that effect in the articles of association.[5] But statutory provisions are made for the alteration of the memorandum for certain specified objects, subject to confirmation by the Court.[6]

Contracts *ultra vires* of Company. A contract which is *ultra vires* of the corporate body which professes to make it is, at least in most questions, a mere nullity, void and not merely voidable. As such it cannot be ratified by the consent, given originally or subsequently, of all the individuals who form the corporation, or have an interest in it. Many judicial expositions of this principle might be cited from the English reports ;[7] no one has put it more concisely than Lord Shand. Dealing with the unauthorised purchase of the company's own shares, he said : " The transfer is therefore an absolute nullity, and when it is maintained for the defenders that the company have adopted or homologated what was then done, the reply is obvious, that a company of this kind, carried on under the statutes with the limited powers which these statutes confer, can no more by adoption or homologation make a proceeding of this kind legal than they can lawfully enter into the original transaction itself. It is a nullity originally, and the company cannot adopt or homologate a nullity, for that is equally *ultra vires*." [8] It is clear that if a public body—*e.g.*, the town council of a burgh—exceed their statutory powers, the mere fact that they are unanimous cannot cure the invalidity of their proceedings, and it is conceived that even ratification by all the ratepayers would not make the contract good. And if a company enters into a contract

[1] *Ashbury Carriage Co.* v. *Riche*, 1875, L.R. 7 H.L. 653 ; *In re German Date Coffee Co.*, 1882, 20 Ch. D. 169 ; *Pedlar* v. *Road Block Mines* [1905], 2 Ch. 427 ; Palmer, *Company Precedents*, i., 13th ed., 580.

[2] *General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282 ; *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409. As to accepting surrender of shares, see *General Property Investment Co.* v. *Craig*, 1891, 18 R. 389.

[3] *Gill* v. *Arizona Copper Co.*, 1900, 2 F. 843.

[4] *Klenck* v. *East India Mining Co.*, 1888, 16 R. 271 ; *Ooregum Gold Mining Co.* v. *Roper* [1892], A.C. 125 ; *Welton* v. *Saffery* [1897], A.C. 299 ; cf. *Newburgh and North of Fife Rly. Co.* v. *North British Rly. Co.*, 1913, S.C. 1166 (company under Companies Clauses Acts). But a commission may be paid for subscribing to shares (Companies (Consolidation) Act, 1908, sec. 89).

[5] Per Lord Chancellor Cairns in *Ashbury Carriage Co.* v. *Riche*, 1875, L.R. 7 H.L. 653, 671 ; Companies (Consolidation) Act, 1908, sec. 7.

[6] Companies (Consolidation) Act, 1908, sec. 9 ; Companies Act, 1928 (18 & 19 Geo. V. c. 45), sec. 2. The decisions on similar provisions in the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62) are collected in Wilton, *Company Law*, 18. In *Walker & Sons, Petrs.* (1914, S.C. 280), confirmation of a resolution to sell the company's undertaking was refused. This case was distinguished in *Metropolitan Reversions Ltd., Petrs.*, 1928, S.L.T. 299 ; and the Companies Act, 1928 (sec. 2), provides that an alteration of the memorandum by giving power to sell or dispose of the whole undertaking and a power to amalgamate with any company or body of persons is within the compass of sec. 9 of the Act of 1908.

[7] *E.g.*, per Lord Chancellor Cairns, *Ashbury Carriage Co.* v. *Riche*, 1875, L.R. 7 H.L. 653, at p. 672 ; Vaughan-Williams, L.J., in *Towers* v. *African Tug Co.* [1904], 1 Ch. 558, at p. 566 ; Blackburn, J., in *Taylor* v. *Chichester, etc., Rly. Co.*, 1867, L.R. 2 Ex. 356 ; revd. 1870, L.R. 4 H.L. 628.

[8] Per Lord Shand in *General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282, 291.

which is beyond the powers, not merely of the directors, but of the company itself, it remains reducible though every shareholder may have assented to it, or subsequently ratified it.[1] Thus where the question was whether a payment not authorised by the private Act under which a company was incorporated could be sustained, it was held that it made no difference that every existing shareholder had assented to it. The law had regard to the interests not only of existing shareholders or creditors, but of those who might become shareholders in the future, and would be entitled to assume that the company's funds had not been directed to any unauthorised purpose.[2]

Plea of Personal Bar. A party maintaining an *ultra vires* contract cannot rely on the principle of personal bar or estoppel; he cannot plead that he has altered his position in reliance on the corporation being able to fulfil the contract into which it has entered. "It is well established that a corporate body cannot be estopped, by deed or otherwise, from shewing that it had no power to do that which it purports to have done."[3] Thus when a company buys its own shares the shareholders may be placed on the list of contributories in a subsequent liquidation, though a considerable time may have elapsed, during which the shareholder might have disposed of the shares to a third party.[4]

Parties Rendering Service, or Lending Money, to Corporate Body. The law would appear to be that every one dealing with a corporate body of any kind has the means of knowing, and is bound to inquire, what the contractual powers of the corporation are, and to what purposes the corporate funds may be devoted, and therefore cannot enforce any obligation, or retain any payment he may have received, if that obligation or payment be *ultra vires*. Thus parties who advance money in order to obtain a private Act of Parliament for the incorporation of a company must found their claim to repayment from the body when incorporated on a clause in the private Act, and a merely general clause authorising payment of expenditure will not justify a payment of a lump sum without detailed charges.[5] It is conceived that parties—such as solicitors or engineers—employed by a corporate body in promoting or opposing Acts of Parliament have no claim to payment unless the promotion or opposition was *intra vires*, or their claim is recognised in the Act which is obtained.[6] Again, directors who have received payment of travelling expenses without any power in the company to make such payments, must refund them.[7]

***Ultra vires* Borrowing.** On the question of *ultra vires* borrowing the authorities are exclusively English. They establish that the lender has no direct right of action, as a lender, against the company,[8] but that he has

[1] But see opinion of Lord M'Laren in *Brown* v. *Kilsyth Police Commissioners*, 1886, 13 R. 515.

[2] *Mann* v. *Edinburgh Northern Tramways Co.*, 1891, 18 R. 1140; affd. 1892, 20 R. (H.L.) 7; see also *Taylor* v. *Chichester, etc., Rly. Co.*, 1870, L.R. 4 H.L. 628; *Ashbury Carriage Co.* v. *Riche*, 1875, L.R. 7 H.L. 653; *Wenlock* v. *River Dee Co.*, 1883, 36 Ch. D. 675, note; *Towers* v. *African Tug Co.* [1904], 1 Ch. 558.

[3] Per Cave, J., *Ex parte Watson*, 1888, 21 Q.B.D. 301.

[4] *General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282.

[5] *Mann* v. *Edinburgh Northern Tramways Co.*, 1891, 18 R. 1140; affd. 1892, 20 R. (H.L.) 7; *Mason's Trs.* v. *Poole & Robinson*, 1903, 5 F. 789.

[6] Cf. *Attorney-General* v. *Mayor of Brecon*, 1878, 10 Ch. D. 204; and see judicial dicta collected in Palmer, *Company Precedents*, 12th ed., i. 77 *et seq.*

[7] *Marmor, Ltd.* v. *Alexander*, 1908, S.C. 78, and English authorities there cited.

[8] *Cunliffe, Brooks & Co.* v. *Blackburn Building Society*, 1884, 9 App. Cas. 857; *Wenlock* v. *River Dee Co.*, 1885, 10 App. Cas. 354; *Sinclair* v. *Brougham* [1914], A.C. 398.

certain rights based on the principle of following trust money. He is entitled to recover his money if still distinguishable in the company's hands.[1] He obtains an unchallengeable title if the company chooses to repay.[2] If he can shew that the money he lent has been applied in paying specific debts for which the company was liable, he is entitled to rank as a creditor in these debts;[3] though it has been decided that he has no claim to any security or preferential right which the original creditors may have possessed, on the ground that he cannot have any claim higher than what he would have had if the advance he made had been *intra vires*.[4] In *Sinclair* v *Brougham*,[5] a building society, which had no power to carry on the business of banking, had in fact done so, and received money on deposits. In its liquidation there were surplus assets after all the trade creditors had been paid. These were claimed by the shareholders and by the depositors. No individual depositor was able to point to any particular asset as obtained by his money. It was decided that the assets represented in part money which the shareholders could follow, as having been wrongfully employed by the managers in banking: in part money which the depositors could follow, as having been wrongfully borrowed, with the result that the assets were distributed *pari passu* between the depositors and the shareholders in proportion to the amount deposited or paid by each.[6]

The position of a banker having an account with a corporate body is (1) that while the balance stands in the customer's favour he is entitled, and indeed bound, to honour cheques regularly drawn, and is under no obligation to inquire whether they are drawn in furtherance of *ultra vires* expenditure or not:[7] (2) that in allowing an overdraft he takes the risk that the body has the power to borrow, and has not exceeded its limits:[8] (3) that, assuming the power to borrow, he may recover, though the cheques by which the overdraft has been constituted or increased have been devoted to purposes to which the body had no power to devote its money.[9]

***Ultra vires* Issue of Shares.**—The legal result of an *ultra vires* issue of shares is somewhat doubtful. In *Waverley Hydropathic Co.* v. *Barrowman*[10] a company issued preference shares, which it had no power to do. In a question with the ordinary shareholders it was held that the allottees were

[1] *Wrexham, etc., Rly. Co., in re* [1899], 1 Ch. 440, per Vaughan-Williams, L.J., at p. 457.

[2] *Sinclair* v. *Brougham, supra*, overruling *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 1885, 29 Ch. D. 902.

[3] *Cork & Youghal Rly. Co., in re*, 1869, L.R. 4 Ch. 748; *Sinclair* v. *Brougham, supra*.

[4] *Wrexham, etc., Rly. Co., in re* [1899], 1 Ch. 440; *Harris Calculating Machine Co., in re* [1914], 1 Ch. 920.

[5] [1914], A.C. 398.

[6] [1914], A.C. 398. This decision, which, as pointed out by Lord Sumner, p. 458, proceeded on equitable principles upon which there was no direct authority, would seem to lead to some curious results. A lender to a company which has power to borrow is, in liquidation, simply an ordinary creditor. But if the company had no power to borrow, it would appear that a lender is a beneficiary, entitled to follow his money, as trust money, in the hands of a company, as his trustee. If so, he is entitled, in the liquidation of the company, to recover his money, in preference to any other creditors (*In re Hallett's Estate*, 1880, 13 Ch. D. 696; *Jopp* v. *Johnston's Tr.*, 1904, 6 F. 1028). And if the shareholders are entitled to rank *pari passu* with the lender thus placed in the position of a beneficiary, are not they also preferable to the ordinary creditors of the company? Lord Dunedin pointed out that in Roman law (and, it may be inferred, in Scots Law) the depositors, in a question with the shareholders, could rely on the maxim *nemo debet locupletari ex aliena jactura*. But this maxim, it is submitted, would not apply except in so far as the shareholders were *lucrati, i.e.*, in so far as they were claiming a sum in excess of the amount they had paid for their shares.

[7] Per Lord Blackburn, *Cunliffe, Brooks & Co.* v. *Blackburn Building Society*, 1884, 9 App. Cas. 857.

[8] *Cunliffe, supra*, and other authorities cited, p. 112, note 8.

[9] *Paterson's Trs.* v. *Caledonian, etc., Security Co.*, 1885, 13 R. 369.

[10] 1895, 25 R. 136.

not to be regarded as holders of ordinary shares (which they had clearly never agreed to take), but as creditors of the company for the amount they had paid on their shares. In liquidation it was held that where a company had issued shares in consideration of services to be performed in the future —and therefore, as was decided, *ultra vires*—the invalidity of the transaction extended to the original consent by the allottee to become a shareholder, and therefore that he was not liable as a contributory.[1] But this decision, and an English case on which the Court relied,[2] seem to extend to *ultra vires* acts the principle that the Court will not lend its aid to enforce any rights resulting from an illegal or immoral contract; and it is difficult to see how they can be reconciled with the rule established by the House of Lords that when shares are issued at a discount the issue, though *ultra vires*, renders the allottee liable as a contributory for the difference between the amount paid and the face value of the shares.[3]

Title to Reduce *ultra vires* Act.—A reduction of acts which are *ultra vires* of a company may be at the instance of the company itself[4] or of any shareholder.[5] The title of an individual shareholder is not affected by the fact that he acquired his shares after the act of which he complains,[6] or that he is acting in the interests of a rival company in which he also holds shares,[7] unless in the latter case he sues on behalf of himself and all other shareholders.[8] But it would appear that if a shareholder has assented to the *ultra vires* act and profited by it (as when a shareholder, in full knowledge of the facts, has accepted a dividend illegally paid out of capital) he cannot afterwards challenge it.[9] A trade rival has no title to interdict a company from carrying on a business not within those justified by its memorandum.[10] There is no authority for the intervention of the Lord Advocate on behalf of the Crown.[11]

Contracts *ultra vires* of Directors.—A particular contract may be within the powers of a corporate body, but not within the powers committed to its managers or directors. If it is then undertaken by the managing body, it differs from an act which is *ultra vires* of the corporation itself in respect that it may be ratified by the corporation as a body. Thus an act which is beyond the powers of the directors of a company may be ratified by the company at a meeting called for that purpose,[12] and by a bare majority, even although a special resolution would have been necessary to confer authority on the directors *ab ante*.[13] And even without any formal ratification the acquiescence of the shareholders will bar any challenge of an act which is beyond the powers of the directors but within the powers of the company, whether the subsequent action be a question between the liquidator and

[1] *National House Property Co.* v. *Watson*, 1908, S.C. 888.
[2] *Pellatt's* case, 1867, L.R. 2 Ch. 527.
[3] *Ooregum Gold Mining Co.* v. *Roper* [1892], A.C. 125; *Welton* v. *Saffery* [1897], A.C. 299; see opinion of Lord Macnaghten, at p. 322; *Klenck* v. *East India Mining Co.*, 1888, 16 R. 271.
[4] *Mann* v. *Edinburgh Northern Tramways Co.*, 1891, 18 R. 1140; affd. 1892, 20 R. (H.L.) 7.
[5] *Balfour* v. *Edinburgh and Northern Rly. Co.*, 1848, 10 D. 1240.
[6] *Smith* v. *Glasgow and South-Western Rly. Co.*, 1897, 4 S.L.T. 327.
[7] *Smith, supra*; *Bloxam* v. *Metropolitan Rly. Co.*, 1868, L.R. 3 Ch. 337; *Mutter* v. *Eastern and Midlands Rly. Co.*, 1888, 38 Ch. D. 92.
[8] *Forrest* v. *Manchester, etc., Rly. Co.*, 1861, 4 De G. F. & J. 126; and see Pollock, *Contract*, App. D.
[9] *Towers* v. *African Tug Co.* [1904], 1 Ch. 558.
[10] *Nicol* v. *Dundee Harbour Trs.*, 1914, S.C. 374, per Lord Salvesen, at p. 385; affd. 1915, S.C. (H.L.) 7; *Clyde Steam Packet Co.* v. *Glasgow and South-Western Rly. Co.*, 1897, 4 S.L.T. 327.
[11] *Nicol, supra.*
[12] *Irvine* v. *Union Bank of Australia*, 1877, 2 App. Cas. 366.
[13] *Grant* v. *United Kingdom Switchback Rly. Co.*, 1888, 40 Ch. D. 135.

shareholders alleged to be contributories,[1] or between the company and a third party with whom the contract has been made.[2] Acquiescence implies knowledge, or means of knowledge, by the shareholders, of what has been done, but it does not necessarily postulate a conscious and intelligent appreciation of the facts; full means of knowledge, as by a circular sent to all the shareholders, will be sufficient, even though the circular was not in fact read.[3] Thus when an arrangement was made by the directors of a company whereby the shares of certain shareholders were cancelled—a contract beyond the powers of the directors, but within the powers of the company itself—and a notice was sent to every shareholder and no objection was taken, it was held that the arrangement was validated by the acquiescence of the shareholders, and could not be questioned by the liquidator on the subsequent failure of the company.[4]

Rule of *Royal British Bank* v. *Turquhand*.—In certain cases a company may be barred, in questions with third parties, from disputing the validity of contracts made by its directors, even when there has been no ratification or acquiescence. This does not apply to cases where the limits of the directors' authority, as ascertainable from the articles of association (or the statute in the case of a statutory company), have been exceeded. Third parties dealing with the company have notice of these limits, and are bound by them. So where a deed of settlement of an insurance company authorised the directors to draw bills for certain specified purposes, it was held that a party who had taken a bill drawn for another purpose could not enforce it; he had constructive notice of the deed of settlement.[5] And a statute may be read as conferring power to do a particular act conditionally on the observance of certain specified formalities; if so, the want of the formalities renders the act *ultra vires*, and it is immaterial that the party dealing with the company had no means of knowing whether they were observed or not.[6] But in the ordinary case parties dealing with a company are entitled to assume, and the company is barred from denying, that its internal management has been regularly carried on. The distinction is between an act which is manifestly imperfect on the face of it—given a knowledge and correct appreciation of the constituting documents of the company—and an act which may be valid or invalid according as the requirements of these documents have or have not been satisfied. This principle, commonly referred to as the rule in *Royal British Bank* v. *Turquhand*,[7] has been judicially explained in the following terms: "Persons dealing with joint-stock companies are bound to look at what one may call the outside position of the company, that is to say, they must see that the acts which the company is purporting to do are acts within the general authority of the company, and if these public documents, which every one has a right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint-stock company which has apparently exceeded its authority. But the case here is exactly the other way. All the public documents with which an outside person would be acquainted in dealing with the company would

[1] *Spackman* v. *Evans*, 1868, L.R. 3 H.L. 171; *Evans* v. *Smallcombe*, 1868, L.R. 3 H.L. 249; *Houldsworth* v. *Evans*, 1868, L.R. 3 H.L. 263, all arising in the liquidation of the Agriculturists' Cattle Insurance Co.; and see Pollock, *Contract*, App. D.

[2] *Phosphate of Lime Co.* v. *Green*, 1871, L.R. 7 C.P. 43.

[3] Lord Chancellor Cairns, in *Evans* v. *Smallcombe*, *supra*, L.R. 3 H.L., at p. 256.

[4] *Spackman* v. *Evans* and other cases cited, *supra*, note 1.

[5] *Balfour* v. *Ernest*, 1859, 5 C.B. (N.S.) 601.

[6] *Pacific Coast Coal Mines* v. *Arbuthnot* [1917], A.C. 607.

[7] 1856, 6 E. & B. 327.

only shew this, that by some regulation of their own, what Lord Hatherley described as the indoor management, they were capable if they had thought right of making any quorum they pleased; and an outside person knowing that, and not knowing the internal regulation, when he found a document sealed with the common seal of the company, and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorised to execute an instrument of that description."[1] So when the sale of heritable property was within the powers of the directors of a company, if authorised by a resolution passed at a general meeting, it was held that the company could not reduce a sale on the ground of an irregularity in the notices by which the general meeting was convened.[2] And third parties dealing with a company are entitled to assume that a quorum was present at a meeting;[3] that a manager or managing director possesses the authority which the company has the power to confer upon him, including the power to draw or accept bills;[4] that if the articles require the sanction of a general meeting to authorise the directors to act, that meeting has been duly held:[5] that if directors have the power to fix a quorum of their number, and issue obligatory documents signed by two of them, the quorum has been fixed at two.[6] On the same principle, a bank is not bound to inquire as to the regularity of the election of directors who sign cheques in an authorised form;[7] a burgh has been held liable for debts incurred by the magistrates who were *de facto* in office, though their election was afterwards reduced.[8]

Limits of Rule.—The limits of this doctrine of implied authority in company cases have been decided to be: (1) that the party who relies on an authority having been given must have been aware that the company had power to give it[9]; (2) that the proceedings in question must have been in the ordinary course of business, anything unusual should provoke inquiry. So there was no liability in the absence of actual authority where the sole director of a private company lodged company cheques in his private bank account,[10] or where the manager and secretary of a company pledged its assets for a debt due by another company;[11] (3) the party professing to have authority must hold a position which would make it reasonable for him to possess the authority in question, *e.g.*, however wide a power of delegation the articles of the company may confer on the directors, no one is entitled to assume that they have authorised the office-boy to accept a bill of exchange.[12]

As a company may be liable, on the rule of *Royal British Bank* v. *Turquhand*,[13] for contracts entered into by its directors without proper

[1] Per Lord Halsbury in *County of Gloucester Bank* v. *Rudry, etc., Colliery Co.* [1895], 1 Ch. 629, 633. See other dicta in Palmer, *Company Precedents*, 13th ed., i. 75.

[2] *Heiton* v. *Waverley Hydropathic Co.*, 1877, 4 R. 830. Cf. *Brown* v. *Kilsyth Police Commissioners*, 1886, 13 R. 515.

[3] *Montreal, etc., Light and Power Co.* v. *Robert* [1906], A.C. 196.

[4] *Biggerstaff* v. *Rowatt's Wharf* [1896], 2 Ch. 93; *Allison* v. *Scotia Motor, etc., Co.*, 1906, 14 S.L.T. 9; *Dey* v. *Pullinger Engineering Co.* [1921], 1 K.B. 77.

[5] *Royal British Bank* v. *Turquhand*, 1856, 6 E. & B. 327; *Fountaine* v. *Carmarthen Rly. Co.*, 1868, L.R. 5 Eq. 316.

[6] *County of Gloucester Bank* v. *Rudry, etc., Colliery Co.* [1895], 1 Ch. 629.

[7] *Mahony* v. *East Holyford Mining Co.*, 1875, L.R. 7 H.L. 869.

[8] *Muirhead* v. *Town of Haddington*, 1748, M. 2506.

[9] *Houghton & Co.* v. *Nothard & Wills* [1927], 1 K.B. 246; [1928], A.C. 1.

[10] *Underwood* v. *Bank of Liverpool* [1924], 1 K.B. 775.

[11] *Houghton & Co., supra.*

[12] *Kredit Bank Cassel* v. *Schenkers* [1927], 1 K.B. 826.

[13] 1856, 6 E. & B. 327.

authority, so it may enforce contracts tainted with a similar irregularity. Thus an insurance company which had altered its articles of association, and thereby introduced a new condition of insurance, and contracted with a policyholder on the basis of the conditions as altered, was entitled to enforce the condition, although the provisions of the Companies Acts relating to alterations in the articles had not been complied with.[1]

Knowledge of Irregularity. A party who knew that the constitution of his contract was irregular cannot enforce it against the company, but assignees from him may have a higher right. Thus where debentures were issued under a resolution passed at a meeting where no quorum was present, and the party to whom they were issued was aware of the fact, it was held that although he could not have enforced them, they were valid in the hands of a third party to whom he had transferred them.[2]

Forgery. The doctrine that a company may be barred from asserting the invalidity of its contracts applies only to irregularities; it cannot be appealed to in a case of forgery. So where the secretary of a company forged the name of directors to share certificates, and fraudulently affixed the seal of the company, it was held that cases of the class considered above had no bearing on the question of the liability of the company.[3]

Where the objection to a contract by a company is one which may be cured by ratification by the shareholders, as a general rule only the company has a title to set it aside.[4] An individual shareholder has no title to sue. But an individual shareholder may sue on relevant averments that the directors having a majority of votes are using their power to defraud the company, to prevent redress for a fraud being obtained,[5] or to stifle inquiry.[6]

Personal Liability.—In cases where actings *ultra vires* of a corporate body have resulted either in a contract with a third party which cannot be enforced against it, or in expenditure which cannot legally be met from the corporate funds, the question of the liability of those who acted on behalf of the corporation may be raised either by an outside party who finds himself with an unenforceable contract, or by those who are interested in the corporate funds.

Directors as Agents.—In cases of the former class the general rule is that the managers of a corporate body of any kind do not bind their own personal credit in entering into contracts on behalf of the corporation. They act as agents, and for a disclosed principal; the other party to the contract relies on the credit of the corporation, not on that of its administrators. So the magistrates are not personally liable for the debts of the burgh, though at one time they could be charged personally in order to constitute the debt.[7] The directors of a company, by authorising a bank to pay cheques

[1] *Muirhead* v. *Forth, etc., Mutual Insurance Association*, 1893, 20 R. 442; affd. 21 R. (H.L.) 1.

[2] *In re Romford Canal Co.*, 1883, 24 Ch. D. 85; *Davies* v. *Bolton* [1894], 3 Ch. 678; and see Buckley, *Companies Acts*, 10th ed., 477; *Howard* v. *Patent Ivory Co.*, 1888, 38 Ch. D. 156 (debentures held by directors).

[3] *Ruben* v. *Great Fingal Consolidated* [1906], A.C. 439; *Kredit Bank Cassel* v. *Schenkers* [1927], 1 K.B. 826.

[4] *Orr* v. *Glasgow, Airdrie, and Monklands Rly. Co.*, 1860, 3 Macq. 799; *Brown* v. *Stewart*, 1898, 1 F. 316; *Foss* v. *Harbottle*, 1842, 2 Hare, 461; *Macdougall* v. *Gardiner*, 1875, 1 Ch. D. 13; *Russell* v. *Wakefield Waterworks Co.*, 1875, L.R. 20 Eq. 474.

[5] *Hannay* v. *Muir*, 1898, 1 F. 306; *Mason* v. *Harris*, 1879, 11 Ch. D. 97; *Burland* v. *Earle* [1902], A.C. 83, where the law is summarised by Lord Davey.

[6] *Punt* v. *Symons* [1903], 2 Ch. 506.

[7] *Livy* v. *Mudie*, 1774, M. 2512; *Anderson* v. *Morton*, 1779, M. 2514; *Cumming* v. *Walker*, 1742, M. 2501; 3 & 4 Will. IV. c. 76, sec. 33.

drawn in a particular manner, and overdrawing the account, did not make any representation, on which personal liability could be founded, that the company had funds to meet the overdraft.[1] And the chairman of a meeting of directors, at which it is arranged to issue debentures to a creditor, does not personally guarantee their issue.[2] When directors, acting on behalf of a company, enter into a contract, and in the same capacity commit an act which amounts to a breach of it, they are not personally liable unless their conduct was fraudulent, or the other party to the contract can establish that they failed in some fiduciary duty which they owed to him.[3]

Liability on Implied Warranty.– But in these cases the principal corporation or company—was bound, though it was unable to pay. A different question is raised if the contract is *ultra vires*, and therefore the corporate body is not bound. Then the managers who contract on its behalf will be liable in damages, if their conduct was fraudulent, either for their own benefit or for that of the corporation. Apart from cases of fraud, if parties who act on behalf of a corporation know that their act is beyond the corporate power, they will be liable to anyone who is not precluded from action by sharing their knowledge. Thus directors of a company signed a bill of exchange, knowing that it was *ultra vires*. It was intended as a mere acknowledgment of debt to the person to whom it was given, and he was under an obligation to retain it in his own hands. In breach of that obligation he transferred it to a holder in due course, to whom, it was held, the directors were liable.[4] But most of the cases of *ultra vires* action arise from mere mistake. Then the managing body of a corporation or company may be liable to the party with whom they dealt on the theory that an agent represents or contracts that he has the authority of his principal, and is liable in damages for breach of that representation or contract if he has not.[5] "Speaking generally, an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this rule there is at least one well-established exception, when an agent assumes an authority which he does not possess, and induces another to deal with him on the faith that he has the authority which he assumes."[6] So if the act of a director, in contracting on behalf of the company, can be interpreted as involving a representation of fact to the effect that he has authority to bind the company, he may be personally liable if his action was *ultra vires*. Thus if directors issue debentures in excess of the company's borrowing powers, they have represented in fact that they have authority to issue them, and are personally liable to the parties to whom they are issued.[7] But an agent is not liable if his authority depends on a question

[1] *Beattie* v. *Lord Ebury*, 1874, L.R. 7 H.L. 102; *Wilson* v. *Lord Bury*, 1880, 5 Q.B.D. 518. See especially opinion of Brett, L.J., at p. 526.

[2] *Elkington* v. *Hürter* [1892], 2 Ch. 452.

[3] *Brenes & Co.* v. *Downie*, 1914, S.C. 97; *Ferguson* v. *Wilson*, 1867, L.R. 2 Ch. 77; *Nelson* v. *Dunlop, Bremner & Co.*, 1921, 1 S.L.T. 35.

[4] *West London Commercial Bank* v. *Kitson*, 1803, 12 Q.B.D. 157. In *Macgregor* v. *Dover and Deal Rly. Co.*, 1852, 18 Q.B. 618, it was held that a contract that a railway company would apply its funds to an *ultra vires* object was a *pactum illicitum*, as a contract that something would be done which the statute forbade, and therefore that no action could be founded on it, and the person who made it was not liable. But even assuming that the case is authoritative in Scotland, it does not, it is submitted, apply to a contract outside the objects of the memorandum of an ordinary company. That may be *ultra vires*, but not illegal in any wider sense.

[5] See *infra*, p. 155.

[6] Per Lindley, L.J., *Firbank's Exrs.* v. *Humphreys*, 1886, 18 Q.B.D. 54, at p. 62.

[7] *Chapleo* v *Brunswick Building Society*, 1881, 6 Q.B.D. 696; *Firbank's Exrs.* v. *Humphreys*, *supra*; *West London Commercial Bank* v. *Kitson*, 1884, 13 Q.B.D. 360

of law and he has mistakenly asserted it, at least if the other party has the same means of deciding as to the law as the agent has himself. Thus the power of a company to borrow, or to enter into any other contract, being a question of the construction of the memorandum and articles of association, of which all have notice, is a question of law, and directors are not therefore personally liable if they borrow money, or enter into other contracts, in the honest but mistaken impression that their contract is within the powers of the company.[1]

***Ultra vires* Expenditure.**—When expenditure has been judicially declared to be *ultra vires* of a corporation, and therefore not a good charge on its funds or rates, the persons who incurred it are liable to make it good. Thus if the directors of a company expend money in carrying on a trade which the company has no power to engage in,[2] or if they pay dividends out of capital,[3] or issue shares at a discount,[4] they incur personal liability in a question with the shareholders or the liquidator. And if the managers of a public body incur expenditure for which they are not entitled to rate they must bear the loss themselves.[5] The particular officers of the company or corporation who in fact make the *ultra vires* payment do not, it is conceived, incur any further liability than the others who authorise it, and cannot be singled out for recourse. Thus an action directed against the two members of an incorporation who had made a payment alleged to be *ultra vires* was dismissed, on the ground that the proper parties had not been called as defenders.[6] But a statute may impose liability for *ultra vires* expenditure on those who made the payment: if so, the fact that they acted merely ministerially will not save them.[7]

[1] *Beattie* v. *Lord Ebury*, 1874, L.R. 7 H.L. 102; *Rashdall* v. *Ford*, 1866, L.R. 2 Eq. 750; *Mahony* v. *East Holyford Mining Co.*, 1875, L.R. 7 H.L. 869; Buckley, *Companies Act*, 10th ed., 642.

[2] *Maxton* v. *Brown*, 1839, 1 D. 367.

[3] *Towers* v. *African Tug Co.* [1904], 1 Ch. 558.

[4] *Hirsche* v. *Sims* [1894], A.C. 654.

[5] *Cowan & Mackenzie* v. *Law*, 1872, 10 M. 578; *Stirling County Council* v. *Magistrates of Falkirk*, 1912, S.C. 1281.

[6] *Thomson* v. *Lindsay*, 1825, 4 S. 239. But in England it has been held that directors who authorised *ultra vires* expenditure were not liable, those who signed the cheques were (*Young* v. *Naval, etc., Co-operative Society* [1905], 1 K.B. 687; *Cullerne* v. *London Surburban, etc., Building Society*, 1890, 25 Q.B.D. 485).

[7] *County Auditor of Lanark* v. *Lambie*, 1905, 7 F. 1049 (Local Government (Scotland) Act, 1889).

CHAPTER VII

CONTRACTUAL POWERS OF TRADE UNIONS

Definition of Trade Union. A trade union is defined as "any combination whether temporary or permanent, the principal objects of which are under its constitution statutory objects. Provided that any combination which is for the time being registered as a trade union shall be deemed to be a trade union as defined by this Act so long as it continues to be so registered."[1] "Statutory objects" are defined as meaning "the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members."[2] "The fact that a combination has under its constitution objects or powers other than statutory objects shall not prevent a combination being a trade union for the purposes of the Trade Union Acts, 1871 to 1906, so long as the combination is a trade union as defined by this Act."[3]

Illegality at Common Law.—In the eighteenth century, when trade unions were first brought under the notice of the Scotch Courts, in the form of combinations of workmen binding themselves not to work under a certain rate of wages, there was no difficulty in holding that such combinations were illegal as being "of dangerous tendency, subversive of peace and order." They were liable to be interdicted at the instance of the procurator-fiscal,[4] and could not recover by action subscriptions which their members had agreed to pay.[5] And there can be no doubt that the Courts would have held, had the question arisen, that bodies of this kind could not at common law have enforced their contracts with third parties. Thus Lord Kinnear has pointed out that a trade union is legalised by the Trade Union Act, 1871, and that its title to sue must be based on that Act.[6] "Anterior to the

[1] Trade Union Act, 1913 (2 & 3 Geo. V. c. 30), sec. 2. On Trade Union law generally see Slesser and Bullen, *Trade Union Law*, 3rd ed. (1927); Sophian, *Trade Union Law and Practice*, 1927. A particular body is a trade union, with the incidental result that it cannot lawfully be registered as a company under the Companies Acts (Trade Union Act, 1871, sec. 5; Companies Act, 1908, sec. 294), and if in fact so registered is an illegal body, with no title to sue (*Jenkinson* v. *Edinburgh Aerated Water Association*, 1903, 5 F. 1159, on which, however, see Stiebel, *Company Law*, 2nd ed., 16, and opinion of Lord Hunter, Ordinary, in *Performing Right Society* v. *Magistrates of Edinburgh*, 1922, S.C. 165) if it is in fact registered as such, and so long as it continues to be so registered. If it is not registered and the question whether it is a trade union is raised before the Registrar of Friendly Societies on an application for registration, or before the Court of Session in an appeal against the Registrar's decision, or as an objection to its title to sue, the question is no longer, as it was under the provisions of the Trade Union Act, 1876, whether some of its rules are in restraint of trade (*Jenkinson, cit. supra*), but whether its principal objects are statutory objects. *Performing Right Society* v. *Magistrates of Edinburgh*, 1922, S.C. 163, approved in a similar English case (*Performing Rights Society* v. *London Theatre of Varieties* [1924], A.C. 1), a question to be decided upon the construction of the rules.

[2] Trade Union Act, 1913, sec. 2 (2). [3] *Ibid.*, sec. 1 (1).

[4] *Procurator-Fiscal* v. *Woolcombers in Aberdeen*, 1762, M. 1961.

[5] *Barr* v. *Carr*, 1766, M. 9564.

[6] *Wilkie* v. *King*, 1911, S.C. 1310.

Act, this association would have been an illegal one, in the sense that it would not have been recognised." [1]

The illegality of a trade union at common law rested on the principle that contracts in restraint of trade are contrary to public policy and therefore *pacta illicita*. But a body established merely as a mutual benefit society may be registered as a trade union (though it would not fall within the statutory definition given above), and in that case no taint of illegality would attach to it. And even if some of the rules do restrict the members in their work or business the society is not necessarily illegal. It is a question for the Court, on a consideration of the objects of the society and of its rules, whether these are unduly in restraint of trade or not. But it would appear that a power to the executive of the union to order the members to cease work in certain events would make it an illegal association at common law.[2] If a trade union is not illegal at common law, its contracts, whether with third parties or with its members, are valid if *intra vires*. So a member of such a union may enforce payment of the benefits provided by the rules.[3]

Provisions of Trade Union Act, 1871.—In the ordinary case, where the objects and rules of the union make it a body illegal at common law, its contractual powers depend on the provisions of the Trade Union Act, 1871 (34 & 35 Vict. c. 31). That Act, and the Trade Union Act, 1913, make provision for the registration of trade unions, but its main provisions with reference to the enforceability of contracts apply whether the union is registered or not. The general effect of these provisions has been stated to be that the taint of illegality arising from the fact that the objects of the union are in restraint of trade is removed, but the question whether any particular contract can be enforced by action is now regulated by positive statutory enactments.[4]

The enabling provisions of the Trade Union Act, 1871, are contained in sec. 3, as qualified by sec. 4. Sec. 3 provides: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." [5] Sec. 4: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, (1) any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed; (2) any agreement for the payment by any person of any subscription or penalty to a trade

[1] Per Lord Neaves in *M'Kernan* v. *United Operative Masons' Association*, 1874, 1 R. 453.

[2] In the cases which have occurred in Scotland it has been held, without serious argument, that the trade union in question was illegal at common law. The English authorities, which do not lay down any definite rule, are collected and discussed in *Swaine* v. *Wilson*, 1889, 24 Q.B.D. 252; *Gozney* v. *Bristol Trade, etc., Association* [1909], 1 K.B. 901; *Osborne* v. *Amalgamated Society of Railway Servants* [1911], 1 Ch. 540 (where the union was held to be lawful), and *Russell* v. *Amalgamated Society of Carpenters* [1912], A.C. 421 (where it was held to be illegal). It has not been decided whether a body which satisfies the definition of a trade union in the Trade Union Act, 1913, *i.e.*, a body whose principal objects are statutory objects, can in any case be a legal body at common law.

[3] *Swaine* v. *Wilson, supra*; *Gozney, supra*.

[4] *M'Kernan* v. *United Operative Masons' Association*, 1874, 1 R. 453 (opinion of Lord Justice-Clerk Moncreiff, p. 459).

[5] From this the English courts have inferred that an agreement is valid, though it may not be directly enforceable, if made between a trade union and its members, even although its terms may be such as to render it a *pactum illicitum*, as in undue restraint of trade, if made between private individuals. *Evans* v. *Heathcote* [1918], 1 K.B. 418.

union ; (3) any agreement for the application of the funds of a trade union —(*a*) to provide benefits to members ; or (*b*) to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union ; or (*c*) to discharge any fine imposed upon any person by sentence of a court of justice ; or (4) any agreement made between one trade union and another ; or (5) any bond to secure the performance of any of the above-mentioned agreements. But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

Limitations of Contractual Powers.—The contractual position of a trade union, under these statutory provisions, may be considered in reference to (1) the purpose to which a union may apply its funds ; (2) contracts between a union and third parties ; (3) contracts between a union and its members.

(1) **Expenditure of Funds.**—The prior law on this subject has been abrogated by sec. 1 of the Trade Union Act, 1913, which provides, subject to the provisions of the Act as to the furtherance of political objects,[1] that a trade union shall have power to apply the funds of the union for any lawful objects or purposes for the time being authorised under its constitution. The question whether a particular application of the funds is or is not *intra vires* must now therefore be solved on a construction of the constitution of the particular union.[2]

(2) **Agreements with Third Parties.**—The effect of a contract between a trade union and a third party is but slightly illustrated by decision. But as the Trade Union Act, 1871, removes the taint of illegality arising from the objects of the union being in restraint of trade, it is clear that there can be now no general objection to the enforcement of such contracts. Thus, dealing with the effect of sec. 3 of the Act, in cases to which sec. 4 was not applicable, Fletcher Moulton, L.J., said : " In such a case as that which is now before us (where no illegality is suggested other than that the objects and rules of the society are in restraint of trade) the position of a trade union is the same as that of any other association of the like kind for purposes lawful at common law, so far as the validity of any agreement or trust is concerned." [3] On the other hand, the doctrine of *ultra vires*, as explained in the preceding chapter, would render unenforceable a contract involving the entry into any sphere of activity which is outside the objects of the union as specified in the rules.

A contract for the purchase or lease of land may be a doubtful point. By sec. 7 of the Trade Union Act, 1871, it is declared to be lawful for a registered trade union to purchase or take upon lease, in the name of its trustees, any land not exceeding one acre, and to sell, exchange, mortgage, or let the same ; and it has been inferred in an English case [4] that, in cases to which this section did not apply, a trade union had no power to hold land in property or on lease. But it may be submitted that since a trade union, under the Act of 1871, is a perfectly lawful body there seems no legal ground on which, whether it is registered or not, its contract for the purchase or

[1] See, as to political objects, Trade Union Act, 1913, sec. 3 to 6. Trade Disputes and Trade Union Act, 1927 (17 & 18 Geo. V. c. 22), sec. 4.

[2] *Carter* v. *United Society of Boilermakers*, 1915, 32 Times L.R. 40 ; *M'Ardle* v. *United Society of Boilermakers*, 1915, 1 S.L.T. 437 (O.H., Lord Hunter).

[3] *Osborne* v. *Amalgamated Society of Railway Servants* [1911], 1 Ch. 540.

[4] *Carrier* v. *Price* [1891], 3 Ch. 159 (North, J.).

lease of land can be impeached, unless the land is to be used for *ultra vires* purposes.

(3) **Agreements with Members.** Agreements between a trade union and its members may or may not fall within one of the cases to which sec. 4 [1] of the Trade Union Act, 1871, applies. If they do not, they are legal and enforceable subject to the principle of *ultra vires*.[2] Thus where the rules of a union, which admittedly would have been an unlawful combination at common law as in restraint of trade, contained a provision for the payment of benefits to the dependants of members who had become insane, it was held that as the particular contract was not one of those coming within the provisions of sec. 4, it afforded a good ground of action at the instance of the dependant.[3]

If an agreement between a union and its members does fall under the provisions of sec. 4 of the Trade Union Act, 1871, it is placed by that section in a position entirely anomalous in contract. It is not an unlawful agreement, but it is provided by the statute, in effect, that no Court shall entertain any legal proceeding instituted with the object of directly enforcing it or recovering damages for the breach of it.[4] So when the rules of a union provide for the payment, in certain circumstances, of benefits to members, these benefits cannot be recovered, either by an action for payment, or by a claim of damages based on allegations that the union has improperly or irregularly rejected the pursuer's claim.[5] The obstacle to the success of the action in both cases is the same, that if the case is considered at common law it is an action on a contract by an illegal body, of which the Court can take no cognisance: if the provisions of the Trade Union Act, 1871, are appealed to, the agreement is indeed lawful, but the Court has no power to give the remedy asked. In the case where a payment to a member has been actually made, and circumstances have arisen under which, by the rules of the union, the member is liable to repay it, the Scotch and English Courts have arrived at different conclusions. The First Division, deeming that the agreement to repay was a contract entirely separate from the agreement to pay, and as such was not in any way affected by the provisions of sec. 4 of the Trade Union Act, 1871, held that they had jurisdiction to enforce it;[6] the Court of Appeal, on the other hand, considering the one agreement merely the counterpart of the other, held that neither could be the subject of an action.[7] As has been already noticed, a provision in the rules of a trade union for payments to dependants of members does not fall under the head of an agreement to provide benefits to members, and may be enforced by action.[8]

Fines. It would seem that in the event of the imposition of a fine the member of a union has no legal redress. As the fine is unenforceable under sub-sec. 2 of sec. 4 the action, if there are no averments of any attempt to enforce the fine indirectly, is excluded on the ground that it asks for a bare declarator on a matter in which the pursuer has no patrimonial interest;[9]

[1] Quoted *supra*, p. 121.
[2] *Wilkie* v. *King*, 1911, S.C. 1310; *Love* v. *Amalgamated Society of Printers*, 1912, S.C. 1078.
[3] *Love* v. *Amalgamated Society of Printers*, *supra*.
[4] See sec. 4, quoted *supra*.
[5] *M'Kernan* v. *United Operative Masons' Association*, 1874, 1 R. 453; *Shanks* v. *United Operative Masons' Association*, 1874, 1 R. 823; payment of a burial allowance is a benefit to the member, and cannot be sued for. *M'Laren* v. *National Dock Labourers*, 1918, S.C. 834.
[6] *Wilkie* v. *King*, 1911, S.C. 1310.
[7] *Baker* v. *Ingall* [1912], 3 K.B. 106.
[8] *Love* v. *Amalgamated Society of Printers*, 1912, S.C. 1078.
[9] *Drennan* v. *Associated Ironmoulders*, 1921, S.C. 151.

where it was averred that the union proposed to enforce the fine by deduction from a deposit which the member had made, the Court regarded an interdict as a proceeding instituted with the object of directly enforcing the agreement in respect of which the fine had been imposed.[1]

Indirect Results. While agreements between a trade union and its members may not be enforceable by action, they are not inoperative for all legal purposes. It has been laid down that a payment made under an agreement unenforceable under the provisions of sec. 4 could not, if made, be recovered.[2] It may be suggested, though with doubt, that a party in debt to the union could plead compensation on a payment due to him under the rules, though that payment could not be sued for. When the secretary of a body found to be in fact a trade union and at common law illegal had rendered to a member an account shewing the benefit due to him, it was decided that although a direct action for the benefit in question could not be entertained, the member could sue on an account stated.[3] Where a rule provided for payments to the union of a percentage on all contracts undertaken by its members, and the amount due in a particular instance had been referred to arbitration, it was found that there was no objection to the enforcement of the decree-arbitral.[4] It is settled that the member of a union, though he has no action for benefits provided to him under the rules, has a sufficient interest to interdict any misappropriation of the funds, and that an action with this object is not an action directly enforcing any agreement to pay benefits.[5]

Expulsion of Member. The Court may decide whether the member of a union satisfies the conditions of membership.[6] If the member of a union is expelled, the question whether he can obtain any redress from the Court, on proof that the grounds or method of expulsion were not justified by the rules, is one not free from doubt. An argument sanctioned by various opinions is that as a decree restoring a party to his position as a member of a union, or interdicting his expulsion, necessarily places him in a position to claim the benefits provided by the rules, the Court has no jurisdiction to entertain the case, because it amounts to a proceeding with the object of directly enforcing these benefits, and is therefore excluded by sub-sec. 3 of sec. 4.[7] This argument, however, seems definitely overruled by *Amalgamated Society of Carpenters* v. *Braithwaite*,[8] where the reply was sustained that there was a distinction between declaring a right and enforcing the obligations involved by that right, and that an order to restore to membership with unenforceable rights was in no way an order to enforce these rights. The Court decided that it had jurisdiction to entertain an action for injunction against expulsion threatened on the ground that a member had contravened a rule regarding working on co-partnership terms, and decide whether what the persons had admittedly done amounted to a contravention. Such an action

[1] *Rae* v. *Plate Glass Merchants' Association*, 1919, S.C. 426.

[2] Per Fletcher Moulton, L.J., in *Osborne* v. *Amalgamated Society of Railway Servants* [1911], 1 Ch. 540.

[3] *Evans* v. *Heathcote* [1918], 1 K.B. 418.

[4] *Edinburgh Master Plumbers' Association* v. *Munro*, 1928, S.C. 565.

[5] *Amalgamated Society of Railway Servants* v. *Motherwell Branch*, 1880, 7 R. 867; *Yorkshire Miners' Association* v. *Howden* [1905], A.C. 256; *M'Dowall* v. *M'Ghee*, 1913, 2 S.L.T. 238; *Wilson* v. *Scottish Typographical Association*, 1912, S.C. 534.

[6] *Johnston* v. *Aberdeen Plumbers*, 1921, S.C. 62.

[7] *Rigby* v. *Connol*, 1880, 14 Ch. D. 482; *Chamberlain's Wharf* v. *Smith* [1900], 2 Ch. 605; *Aitken* v. *Associated Carpenters*, 1885, 12 R. 1206; *Smith* v. *Scottish Typographical Association*, 1919, S.C. 43 (opinion of Lord Mackenzie).

[8] [1922], 2 A.C. 440.

was not instituted with the object of directly enforcing sub sec. 1 of sec. 1. In *Smith* v. *Scottish Typographical Association* [1] a member had been expelled for failure to obey a rule regarding the days on which work should be done. On averments that the rule did not apply to him he brought an action for reduction of the resolution of expulsion and interdict against its being enforced. The Court refused to entertain the action, on the ground that it was instituted with the object of directly enforcing sub-sec. 1 of sec. 4, but it seems very doubtful whether this decision can be reconciled with *Amalgamated Carpenters* v. *Braithwaite*. In *Aitken* v. *Associated Carpenters and Joiners of Scotland* [2] the pursuer had been expelled from the union. He brought an action concluding for the reduction of the resolution expelling him, for declarator that he was still a member, and for damages. He averred that his expulsion was not justified by the rules. The action was dismissed on the general ground, as set forth in the interlocutor, "that no action lies at the instance of a member of said society for enforcing a claim to membership, or for reducing a resolution to expel such member." The reasoning on which this result was arrived at was partly that as a member of a union had no patrimonial interest in his membership he had no title to sue for the reduction of his expulsion [3] —an argument which has no direct bearing on sec. 4—partly on the ground that the action involved directly enforcing the agreement to provide benefits to members. It is submitted that such an interlocutor would not now be pronounced. It is clearly inconsistent with the decisions which have sustained the right of a member to interdict the improper application of the union funds.[4] For if he has no interest to object to his expulsion, involving complete deprivation of any benefits from the funds, he can have no interest to object to the minor injury of the improper application of these funds. And it has since been held in England that the Court has jurisdiction to entertain an action by a member for reinstatement, on allegations that he had been expelled illegally, and in revenge for his having taken legal action against the policy of the union officials,[5] or on the ground that the rule on which the union proceeded contained no power of expulsion,[6] or that it did not apply to the acts which the member was admitted or proved to have done.[7]

[1] 1919, S.C. 43.
[2] 1885, 12 R. 1206.
[3] As to this ground of judgment see *supra*, p. 10.
[4] *Supra*, p. 124, note 5.
[5] *Osborne* v. *Amalgamated Society of Railway Servants* [1911], 1 Ch. 540. The case of *Aitken* v. *Associated Carpenters and Joiners of Scotland* (1885, 12 R. 1206) was apparently not cited.
[6] *Kelly* v. *Operative Printers*, 1915, 113 L.T., 1055.
[7] *Amalgamated Society of Carpenters* v. *Braithwaite* [1922], 2 A.C. 440

CHAPTER VIII

AGENCY

The principles of the law of agency claim a place in a treatise on the general law of contract, in so far as they form a leading exception to the general rule that only the parties to a contract are affected thereby. Omitting, then, as outside the scope of this work, the law with regard to the constitution of the contract of agency, or to the liabilities of principal and agent *inter se*, it is necessary to consider the respective rights and liabilities arising on contracts made by the agent with a third party.

A convenient arrangement is to deal first with the law when the agent, in contracting, is acting within the scope of his authority; then with the case where he either exceeds it, or acts without any antecedent authority at all.

(1) Agent Acting with Authority

Proof of Authority.—The question whether an agent has actual authority to enter into a particular contract is one of fact—the onus of proof resting, generally, on the party who asserts it. Thus when *A.* signed his name on a sheet of paper impressed with a sixpenny stamp, and gave it to *B.* to be filled up as a guarantee, it was held that the party relying on the guarantee had to prove that the particular terms which *B.* had used in filling it up were authorised by *A.*[1]

Fraud by Agent.—An agent is acting within the scope of his authority if his act falls within its actual limits, although his motive may make his conduct fraudulent in a question between himself and his principal, or though he may misapply the money or property with which he is supplied. With the agent's motive a third party is not concerned; his duty, at the highest, is to consider whether the act falls within the terms of the mandate. As a partner in a firm which has been dissolved and is in course of being wound up, retains his authority to sign the firm name, it was held that a bank, which had granted a consignation receipt expressed to be payable to a firm, and had paid it on the firm signature of a partner after the firm was dissolved, was under no liability to the clients to whom the money belonged, and who suffered loss owing to the partner's misappropriation of it.[2] So if an underwriter undertakes a risk which is within the authority given to him by the syndicate for which he acts, the syndicate will be bound, although the agent was acting fraudulently with a view to private interests of his own, unless they can prove that the insured was cognisant of the agent's fraudulent intent.[3] And if an agent has authority to borrow it is immaterial, in a question as to the

[1] *Wylie & Lochhead* v. *Hornsby*, 1889, 16 R. 907. See *Wood* v. *Clydesdale Bank*, 1914, S.C. 397 (payment to person falsely pretending to be creditor's agent).

[2] *Dickson* v. *National Bank*, 1916, S.C. 589; affd. 1917, S.C. (H.L.) 50. Knowledge by the bank agent that a fraud was intended would, it is conceived, have inferred liability on the bank. *Allan's Exr.* v. *Union Bank*, 1909, S.C. 206.

[3] *Hambro* v. *Burnand* [1904], 2 K.B. 10.

liability of the principal, that he has misapplied the money ;[1] or, in the case of money borrowed by directors of a company, that it has been applied to *ultra vires* purposes.[2]

Methods in which Agent may Contract. An agent, on contracting, may act either expressly as agent for a principal who is named or otherwise identified ; or as agent for a principal who is undisclosed ; or nominally as principal without disclosing the fact of his agency. But, speaking generally, the position of the principal on the contract is not affected by the method in which the agent contracts. Assuming that he has given the agent authority, the principal is a party to the contract, has a title to sue upon it, and is liable in the obligations it entails, whether the fact of the agency was originally disclosed or not.[3]

Terms excluding Principal from Contract. Even when the name of the principal is disclosed, his position as a party to the contract may be excluded. Thus where a broker sold on behalf of *A.* on a contract note which contained the provision, " The contract shall confer and impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slip," it was held, though not without doubt, that *A.*, though named as principal, was not a party to the contract and had no title to sue upon it, because he had not signed either the contract note or a confirmation slip.[4] When the agent contracts ostensibly on his own behalf it is competent to prove that he was in reality acting for a principal, in spite of the general rule that the terms of a written contract cannot be varied by extrinsic evidence. Extrinsic evidence, it is held, may be adduced to add a party to a contract, though not to discharge any liability which appears *ex facie* of the contract.[5] Where, however, the contract is in writing, and the agent who signs it contracts in terms which amount to an assertion that the signatory is the only party concerned, proof of the existence of the principal is excluded, because his introduction would amount to a direct contradiction of the terms of the writing. This does not cover the case where the signatory is described in the body of the contract as holding a definite contractual position, *e.g.*, as " the charterer " in a charter party. Such a description does not exclude the possibility that he holds that position as an agent.[6] But it is probably the law that if the contract relates to a particular thing, and involves

[1] *Crawv. Commercial Bank*, 1840, 3 D. 193 ; *Union Bank* v. *Makin*, 1873, 11 M. 499 ; *North of Scotland Banking Co.* v. *Behn, Möller & Co.*, 1881, 8 R. 423 ; *Bryant, Powis & Bryant* v. *Quebec Bank* [1893], A.C. 170 ; *Corporation Agencies* v. *Home Bank of Canada* [1927], A.C. 318 ; *Reckitt* v. *Barnett, Pembroke & Slater* [1928], 2 K.B. 244 ; revd. 1928, 107 L.T. 361.

[2] *Paterson's Trs.* v. *Caledonian Heritable Security Co.*, 1885, 13 R. 369. The same rule applies where trustees have power to borrow ; the lender is not bound to inquire as to the purpose for which the power is exercised (*Buchanan* v. *Glasgow University*, 1909, S.C. 47).

[3] Bell, *Com.*, i. 536.

[4] *Ransohoff & Wissler* v. *Burrell*, 1897, 25 R. 284 ; see also *Montgomerie* v. *United Kingdom, etc., Steamship Association* [1891], 1 Q.B. 370 ; *Lamont, Nisbett & Co.* v. *Hamilton*, 1907, S.C. 628.

[5] Bell, *Com.*, i. 537. In England this is generally treated as an anomalous exception to a general rule—*Keighley, Maxsted & Co.* v. *Durant* [1901], A.C. 240 ; but see opinion of Lord Lindley, at p. 261 ; *Calder* v. *Dobell*, 1871, L.R. 6 C.P. 486. It is suggested in the notes to Lord M'Laren's edition of Bell's *Commentaries* (i. 540, founding on Pothier, *Obligations*, sec. 447) that the true theory is that the liability of an undisclosed principal is of the nature of an accessory or cautionary obligation to the liability of the agent, and therefore that extrinsic evidence of the existence of the principal is admitted, not to contradict the writing, but to prove a separate contract. But this would imply that the liability of principal and agent is joint and several, whereas it is conclusively shewn by the cases on election (*infra*, p. 140) that it is merely alternative. See opinion of Lord Ashmore (Ordinary) in *Graham* v. *Stirling*, 1922, S.C. 90, at p. 98.

[6] *Drughorn Ltd.* v. *Rederi Transatlantic* [1919], A.C. 203.

obligations which no one but its owner can render, the description of the signatory as owner, proprietor, or other equivalent term excludes proof of the existence of an undisclosed principal.[1] Other exceptions to the general rule are that no person is liable as drawer, endorser, or acceptor of a bill of exchange or promissory note who has not signed it as such,[2] though the signature may be by some other person who has his authority to sign ;[3] and, in England, that only the actual parties to a deed are bound by, or have rights under it, a rule which finds no place in the law of Scotland.[4]

Undisclosed Principal, Liability.—When the contract contains no such exceptional terms the liability of the principal is not affected by the fact that the party who dealt with the agent originally trusted entirely to the agent's credit, while he was unaware whether there was a principal or not, or who the principal was. To whom was credit given ? is not the guiding rule in questions of principal and agent. Thus, in a leading case, *A.* bought goods in the capacity of agent for a principal whose name he did not disclose. He was debited by the seller. On *A.*'s bankruptcy it was held that the principal, who had in fact authorised the purchase, was liable for the price.[5] Even in the stronger case when the agent acts ostensibly as principal, and is believed by the party with whom he deals to be so, the liability of the principal, when discovered, is in the general case undoubted. "It is, we think, too firmly established to be now questioned that where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal though in fact he was not. . . . It is established law that if on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected god-send."[6] So when a proprietor conveyed his estate to a trustee and continued to carry on a farm on terms which made him agent or manager for the trustee, it was held that the latter was liable for goods supplied to the proprietor, though the party supplying them knew nothing about the trust, and relied solely on the proprietor's credit.[7] When *A.* and *B.* entered into a joint adventure for the purchase of grain, the seller, though he had sold to *A.* alone and had known nothing of *B.'s* connection with the matter, was entitled to sue *B.* for the price.[8]

Undisclosed Principal: Title to Sue. So also a principal, even in cases where the agent has contracted in his own name, may sue on the contract.[9] But this right implies that the other party, in dealing with the agent as principal, did not rely on his special fitness for the particular contract. An undisclosed principal, it is submitted, can only sue on the contract if the

[1] *Humble* v. *Hunter*, 1848, 12 Q.B. 310 ; *Formby Bros.* v. *Formby*, 1910, 102 L.T. 116 ; *Argonaut* v. *Hani* [1918], 2 K.B. 247.

[2] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), secs. 23, 89.

[3] *Ibid.*, sec. 91.

[4] Pollock, *Contract*, 9th ed., 106.

[5] *Thomson* v. *Davenport*, 1829, 9 B. & C. 78 ; 2 Smith's *L.C.*, 12th ed., 355. The decision in *Young* v. *Smart* (1831, 10 S. 130) seems inconsistent with this, and seems to involve that a third party may elect between the liability of the agent and the principal before he knows who the principal is, which is contrary both to theory and authority.

[6] Per Blackburn, J., in *Armstrong* v. *Stokes*, 1872, L.R. 7 Q.B. 598, at p. 603.

[7] *Macphail & Son* v. *Maclean's Tr.*, 1887, 15 R. 47.

[8] *Lockhart* v. *Moodie*, 1877, 4 R. 859.

[9] See *Bennet* v. *Inveresk Paper Co.*, 1891, 18 R. 975, where this, in the case where all parties are resident in Scotland, is treated as elementary law.

contract is assignable.[1] And so where a banker, at the request of his customer, but ostensibly on his own behalf, made inquiries of another bank as to the solvency of a third party, and received an assurance of his solvency, it was held that the customer could not found on that assurance as a guarantee, because it must be held to have been given only to the banker who asked for it, and in reliance on his discretion.[2]

Custom of Trade.—The rights and liabilities of a principal are not affected by a rule or custom, in a particular trade, that brokers deal with each other as principals. Such a custom may make the broker liable; it does not affect the position of the principal. Thus, on the London Stock Exchange, when the jobber deals with the broker as a principal, the broker's client is nevertheless liable to the jobber in the event of the bankruptcy of the broker.[3] This, however, does not hold unless the broker, in dealing with the jobber, is carrying out the actual instructions of his client. If he combines orders from several clients he is really dealing as principal, and does not create a relation which will give the jobber the right to sue any one of the clients,[4] except on proof of a custom of the exchange.[5]

Principal and Sub-Agent.—Where a party employed as an agent to enter into a particular contract, or to do some particular work, delegates his duties, as by employing a broker or sub-agent, the question whether the principal is liable to the party so employed depends upon whether, in the circumstances, the agent had implied authority so to delegate his duties.[6] If the principal, being aware that the agent has employed a third party, does not repudiate his action, he will in general be liable. Thus where a law agent employed a London solicitor to carry on an appeal to the House of Lords, and the client was aware of the fact, and took the law agent's obligation to keep him free of all expense, it was held that he was liable for the London solicitor's account, whether he had actually authorised his employment or not.[7] If an agent, employed to buy or sell goods on commission, carries out his employer's object by making a new contract with a third party in different terms, he does not create any privity of contract between that third party and the principal, and therefore, if the third party, in a case of sale, receives the price of the goods, he may set it off against a debt due to him by the agent, even although he was aware to whom the goods which he sold belonged.[8]

Payment to Agent by Principal.—When a principal is sued for a debt resulting from a contract which he has authorised his agent to make, *e.g.*, for the price of goods bought by the agent, it is not in general a good defence that he has paid the debt to the agent. A man who instructs his agent to make a contract on his behalf from which liability may result is bound to see that that liability is discharged, and, if he chooses to trust to his agent,

[1] Bell, *Com.*, i. 527, note; *Smith* v. *Wheatcroft*, 1878, 9 Ch. D. 223; *Mabon* v. *Christie*, 1844, 6 D. 619. As to assignability, see Chap. XXIV.

[2] *Salton* v. *Clydesdale Bank*, 1898, 1 F. 110.

[3] *Levitt* v. *Hamblet* [1901], 2 K.B. 53; *Anderson* v. *Beard* [1900], 2 Q.B. 260. In *Mackenzie & Aitken* v. *Robertson* (1886, 13 R. 494) Lord President Inglis (p. 499) expressed the opinion that stockbrokers, dealing with each other as agents for undisclosed principals, could have no right to sue the clients. But the opinion was *obiter* in a case where the question was not raised.

[4] *Beckhuson* v. *Hamblet* [1901], 2 K.B. 73.

[5] *Scott* v. *Godfrey* [1901], 2 K.B. 726.

[6] *Robertson* v. *Beatson, M'Leod & Co.*, 1908, S.C. 921; cf. *De Bussche* v. *Alt*, 1878, 8 Ch. D. 286; *Black* v. *Cornelius*, 1879, 6 R. 581; *Knox & Robb* v. *Scottish Garden Suburb Co.*, 1913, S.C. 872.

[7] *Robertson* v. *Foulds*, 1860, 22 D. 714.

[8] *New Zealand Land Co.* v. *Watson*, 1881, 7 Q.B.D. 374. Cf. *Stewart, Brown & Co.* v. *Biggart & Fulton*, 1893, 21 R. 293.

must bear the loss if his trust prove misplaced. This is clear law if the agent was authorised to disclose, and did disclose, the name of the party for whom he is acting ;[1] and even where the agent, without disclosing the principal's name, contracts expressly as agent.[2] It is not so clear in cases where the agent acts ostensibly as principal. It has been argued and the argument has some judicial support—that the creditor, seeing that to him the liability of the undisclosed principal is an unexpected and fortuitous advantage, must take that advantage subject to all defences which would be available to the principal if the question were between him and the agent.[3] But the balance of authority in England is to the effect that a party who has authorised an agent to contract for him is bound to see that the liabilities arising from the contract are met, even in the case where the agent has been authorised to contract in his own name.[4] In any case, payment to the agent may be a good defence if it has been induced by the conduct of the creditor—that is to say, if the creditor has induced the principal to believe that he has been paid, and therefore that the true claim rests with the agent. But this will not be easily established. It is not enough that goods were sold to the agent on credit,[5] or that, after the period of credit had expired, bills,[6] or partial payments,[7] were accepted from the agent. Serious delay in claiming payment may be sufficient,[8] if the delay has in fact induced the principal to pay to the agent ; but if the principal has settled with the agent for goods bought at once, he cannot, on being subsequently sued by the seller for the price, rely in defence upon the seller's delay in suing, because he has not in fact suffered prejudice from that delay.[9] In *Clark & Macdonald* v. *Schultze* a client authorised his local agent to employ an Edinburgh firm to conduct an appeal in the Court of Session. He paid £20 to the local agent towards the expenses, and the latter misapplied the money. It was held that the client could not take credit for the £20 in a question with the Edinburgh firm, because he was liable to pay their account, and the mere fact that they had asked the local agent to send them some money on account, and that the £20 had been paid by the client on their letter being shewn to him, did not amount to a representation on their part that the client was in safety to pay to the local agent.[10]

Payments to Agent.—When a principal sues for a debt arising out of a contract made by an agent, the debtor may maintain either that he has paid the agent, or that he is entitled to plead compensation in respect of a debt which the agent owes to him. These pleas raise different considerations. If

[1] *Jobson* v. *Ford*, 1815, Hume, 354 ; *Clark & Macdonald* v. *Schultze*, 1902, 4 F. 448. As to cases of election to trust to the credit of the agent, see *infra*, p. 142.

[2] *Davison* v. *Donaldson*, 1882, 9 Q.B.D. 623 ; *Irvine* v. *Watson*, 1880, 5 Q.B.D. 414 ; *The "Huntsman"* [1894], P. 214 ; *Lamont, Nisbett & Co.* v. *Hamilton*, 1907, S.C. 628, per Lord President Dunedin ; *Stewart* v. *Hall*, 1813, 2 Dow 29.

[3] *Armstrong* v. *Stokes*, 1872, L.R. 7 Q.B. 598 ; *Thomson* v. *Davenport*, 1829, 2 Smith's *L.C.*, 12th ed., 355, per Lord Tenterden, C.J. ; *Bennett* v. *Inveresk Paper Co.*, 1891, 18 R. 975, per Lord M'Laren, p. 983.

[4] *Irvine* v. *Watson*, 1880, 5 Q.B.D. 414 ; *Davison* v. *Donaldson*, 1882, 9 Q.B.D. 623. As to the authority of *Armstrong* v. *Stokes*, *supra*, see Pollock, *Contract*, 9th ed., p. 111 ; Smith, *Mercantile Law*, 12th ed., p. 192.

[5] *Irvine* v. *Watson*, *supra*.

[6] *The "Huntsman"* [1894], P. 214. But see *Stevenson* v. *Campbell* (1836, 14 S. 562), a special case, decided apparently on the ground of election.

[7] *Williams* v. *Newlands*, 1861, 23 D. 1355 ; *M'Intosh* v. *Ainslie*, 1872, 10 M. 304.

[8] *Campbell* v. *Shearer*, 1833, 11 S. 600 ; *Carswell* v. *Scott & Stephenson*, 1839, 1 D. 1215 ; *Hunter* v. *Falconer*, 1835, 13 S. 252.

[9] *Davison* v. *Donaldson*, 1882, 9 Q.B.D. 6 3 ; approved by Lord Dunedin in *Lamont, Nisbett & Co.* v. *Hamilton*, 1907, S.C. 628.

[10] *Clark & Macdonald* v. *Schultze*, 1902, 4 F. 448.

the defence is actual payment to the agent, it is unquestionably valid if the agent was in fact authorised to receive payment, whether the agency was disclosed or not. If the agent was not so authorised, the debtor, even although he knew that he was dealing with an agent, is in safety to pay him if the nature of the agent's business was such as to infer an ostensible authority to receive payment, although in the particular instance no such authority was given. Thus a solicitor has ostensible authority to receive from a stockbroker the price of shares which he has been employed to sell,[1] or the sum sued for in an action which he has been employed to conduct,[2] though not to receive the principal sum due under a bond or other security.[3] Mere possession by an agent of a document of debt, such as a promissory note granted by a corporate body, with authority to draw the interest, does not imply any actual or ostensible authority to receive the capital, and payment to the agent—the debtors being aware of the existence of the principal—is made at the debtor's risk.[4] In mercantile agency, it would appear that if the agent is in possession of the goods which he sells, payment to him will be good in a question with the principal, unless the purchaser had notice of the agent's actual want of authority, whereas if the agent acts merely as a broker or intermediary without possession, no payment to him can be sustained unless he was in fact authorised to receive it.[5] When the purchaser has notice that the agent who sells has a lien over the price it is to him that payment should be made;[6] and, in the case of an auctioneer, who has a lien for his charges and commission, payment to the exposer is not justifiable.[7]

Compensation with Debt Due by Agent.—While in certain circumstances a man dealing with an agent may be entitled to assume that the agent has authority to receive payment, he has no right to assume that the agent has any authority to extinguish a debt arising out of his agency contract by setting against it a debt which he owes in his private capacity. Therefore a party who contracts with one whom he knows to be an agent (whether the name of the principal is disclosed or not) is bound to regard himself as debtor to the principal, and cannot plead compensation on a debt due to him by the agent on another account.[8] So a stockbroker, selling shares on the instructions of another broker whom he knows to be acting on behalf of a client, is bound to account for the price to the client, and cannot set it off against a debt due to him by the stockbroker who employed him.[9] But this rule does not apply if the agency was not disclosed and not known. In

[1] *Pearson* v. *Scott*, 1878, 9 Ch. D. 198.

[2] *Smith* v. *North British Rly. Co.*, 1850, 12 D. 795; Begg, *Law Agents*, 2nd ed., 98; English authorities in Bowstead, *Agency*, 7th ed., p. 99.

[3] *Peden* v. *Graham*, 1907, 15 S.L.T. 143, following *Withington* v. *Tate*, 1869, L.R. 4 Ch. 288; *Richardson* v. *M'Geoch's Trs.*, 1898, 1 F. 145; *Bowie's Trs.* v. *Watson*, 1913, S.C. 326.

[4] *Clyde Trs.* v. *Duncan*, 1851, 13 D. 518; affd. 1853, 15 D. (H.L.) 36.

[5] Smith, *Mercantile Law*, 12th ed., p. 194; Leake, *Contracts*, 7th ed., p. 356; *International Sponge Importers* v. *Watt*, 1911, S.C. (H.L.) 57.

[6] Bell, *Com.*, i. 529, Lord M'Laren's note.

[7] *Robinson* v. *Rutter*, 1855, 4 E. & B. 954; *Grice* v. *Kenrick*, 1870, L.R. 5 Q.B. 340.

[8] *Liddell* v. *Young*, 1852, 14 D. 647; *Lavaggi* v. *Pirie*, 1872, 10 M. 312; *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740. Compensation in such a case may be justified by a custom of trade, such as the custom of Lloyds that an underwriter, on the bankruptcy of the broker, may set off a sum due on the loss against a general balance for premiums due by the broker (*Stewart* v. *Aberdein*, 1838, 4 M. & W. 211), but only if the custom is known to the principal (the insurer)—*Sweeting* v. *Pearce*, 1861, 9 C.B. (N.S.) 534; and see Marine Insurance Act, 1906, sec. 53; Arnould, *Marine Insurance*, 11th ed., i. sec. 129.

[9] *Matthews* v. *Auld & Guild*, 1874, 1 R. 1224; *Mackenzie & Aitken* v. *Robertson*, 1886, 13 R. 494; *Crossley* v. *Magniac* [1893], 1 Ch. 594.

that case the purchaser of goods from one who ostensibly sells as principal, and is believed to be selling on his own account, may set off the price against a debt due to him by the actual seller, unless he had notice from which a reasonable man would infer that the seller was acting on behalf of an undisclosed principal.[1] His belief in the matter must be affirmative; and therefore when *A.* bought goods from *B.*, knowing that *B.* sometimes sold on his own account and sometimes as an agent, and in evidence admitted that he had no opinion, one way or the other, as to which character *B.* was filling in the particular case, it was held that he could not set off against the price a debt due by *B.* in a question with a party who was in fact *B.'s* principal.[2] From the opinions in *Cooke* v. *Eshelby*, as interpreted by the Court in a later decision in Scotland,[3] it would appear that the right of a buyer to set off a debt due by the agent in a question with an undisclosed principal is founded on the law of personal bar or estoppel, and therefore that the buyer must shew that by the conduct of the principal he was induced to believe that the agent was really selling on his own account. But in ordinary cases the principal, by giving authority to the agent to sell or contract independently, does induce the other party to believe that the agent is principal. It would seem to be the law that if the buyer of goods has notice, before the transaction is completed by the delivery of the goods, of the existence of a principal until then undisclosed, he cannot set off the price against a debt due by the agent. Thus *A.* ordered coals from *B.*, who acted both as coal merchant and coal agent. On previous occasions *B.* had supplied *A.* with coals as a merchant. On the occasion in dispute the invoice of the coals bore that they were supplied by the pursuers, a colliery company. It was held that *A.* could not refuse payment of the price on a plea of compensation on a debt due by *B.*, though the order had been given with a view to the extinction of that debt, and though B. had stated (but without any authority) that such an arrangement was within his power.[4] And the right to set off a debt by the agent is in all cases subject to the condition that the debt in question must have been contracted before notice of the existence of the principal.[5]

Position of Agent. The rights and liabilities of an agent, in respect of a contract which he has entered into with the authority of his principal, have raised many questions which are not free from difficulty. Most cases have related to his liability. As a rule, cases on the question whether an

[1] Bell, *Com.*, ii. 125; *Baxter* v. *Bell*, 1800, M., App. *voce* Compensation, No. 4; *Smith* v. *Anderson*, 1847, 9 D. 702; *Miller* v. *M'Nair*, 1852, 14 D. 955; *George* v. *Clagett*, 1797, 2 Smith's *L.C.*, 12th ed., 130, and notes; *Montague* v. *Forwood* [1893], 2 Q.B. 350. If the agent has a lien over the goods, the purchaser may set off the price by a debt due by the agent, even although he is aware of the existence of the principal (*Hudson* v. *Granger*, 1821, 5 B. & Ald. 27; *Warner* v. *M'Kay*, 1836, 1 M. & W. 591).

[2] *Cooke* v. *Eshelby*, 1887, 12 App. C. 271.

[3] *Wester Moffat Colliery Co.* v. *Jeffrey*, 1911, S.C. 346.

[4] *Wester Moffat Colliery Co.* v. *Jeffrey*, *supra*. In this case and in a similar English decision which was cited (*Cornish* v. *Abington*, 1859, 4 H. & N. 549), it is difficult to see why, if the agent originally sold as principal, and was authorised to do so by the seller, the buyer's right of compensation should be adversely affected by subsequent notice, through the invoice, of the seller's existence. The buyer's obligation to pay the price, and therefore the right of compensation with the debt due by the agent, arose it is submitted, on the conclusion of the contract and before the goods were delivered. See *Lucaggi* v. *Pirie*, 1872, 10 M. 312. In an English case (*Greer* v. *Downs Supply Co.* [1927], 2 K.B. 28) presenting very similar features, it was decided that the purchaser, if he honestly believed that the seller who supplied the goods was selling on his own behalf, could avail himself of a right of set-off, although from the form of the invoice he had constructive notice of the existence of a principal. *Wester Moffat Colliery Co.* was cited, but did not elicit any judicial comment.

[5] *Kaltenbach* v. *Lewis*, 1885, 10 App. Cas. 617. Cf. *Mildred* v. *Maspons*, 1883, 8 App. Cas. 874.

agent is liable in a contract involve the answer to the question whether he can sue upon it; the right to sue and liability to be sued are correlative. But this is not necessarily so. An agent may contract in terms which will give him the right to sue without involving him in any liability; conversely, though more rarely, he may accept liability without having the right to sue.[1] Thus the agent for a bank has a title to sue on a bond expressly made payable to him and his successors in office;[2] the minister of a foreign Government may sue, without any liability to be sued, on a contract made on behalf of his Government.[3] In *Levy* v. *Thomson*[4] an agent ordered a ship. He expressly disclaimed any liability for the price. The shipbuilder undertook to pay liquidate damages for non-timeous delivery to the agent. It was held that the agent had a title to sue on this agreement, though he was under no liability. If a particular term in a contract is inserted exclusively in the interests of the agent—if, for instance, it is provided that the other party shall pay him his commission—the agent may have a title to sue though he may incur no liability.[5] These cases are, however, exceptional; in the ordinary case authorities on the liability of an agent may be taken as authorities on his title to sue, and *vice versa*.

Contracts Ostensibly as Principal.—If the agent contracts ostensibly as principal, and the fact that he is merely an agent is not known to the other party, he is necessarily a party to the contract, and his liability is not affected by the subsequent disclosure of the existence of the principal.[6] He has a title to sue on the contract; and the technical objection, that when an agent sued for damages for breach of the contract he was suing for a loss which he had not personally sustained, has been taken and overruled.[7] Proof that the other party was aware that he was dealing with an agent will as a general rule exclude personal liability, at least if the principal is known.[8] But if the contract is in writing, and is *ex facie* an unqualified undertaking by the agent, proof that he was really an agent, and known to be so, must be from the terms of the contract itself. Extrinsic evidence of these facts is not admissible.[9] In *Stewart* v. *Shamessy*,[10] *A.*, who had been appointed sole manager for two companies—one for making cycles, the other for making tyres—on separate agreements, under each of which he was entitled to appoint travellers, appointed *B.* as representative of both companies, on a monthly salary and a commission on sales. The letter making the appoint-

[1] *Malcolm* v. *West Lothian Rly. Co.*, 1835, 13 S. 887.

[2] *Bonar* v. *Liddell*, 1841, 3 D. 830.

[3] *Clydebank Engineering, etc., Co.* v. *Castaneda*, 1901, 4 F. 319; revd. 1902, 4 F. (H.L.) 31.

[4] 1883, 10 R. 1134. In *Elbinger Actien Gesellschaft* v. *Claye* (1873, L.R. 8 Q.B. 313), Lord Blackburn (then Blackburn, J.) said (p. 317): "A man cannot make a contract in such a way as to take the benefit of it, unless also he takes the responsibility of it." This appears to mean that a contract providing for such a result would be one which the Courts would not enforce. This may be the law of England; if so, it is a remarkable instance of judicial legislation. The cases cited shew that it is not the law of Scotland; and see opinion of Lord M'Laren in *Bennett* v. *Inveresk Paper Co.*, 1891, 18 R. 975. As to conditions of sale giving auctioneer the right to sue for the price without any liability, see *Macdonald, Fraser & Co.* v. *Macfarlane*, 1899, 16 Sh. Ct. Rep. 265.

[5] *Affréteurs Réunis* v. *Walford* [1919], A.C. 801; and see *infra*, p. 236, note 4.

[6] Bell, *Com.*, i. 540; Story, *Agency*, sec. 266.

[7] *Craig & Co.* v. *Blackater*, 1923, S.C. 472.

[8] *Nabonie* v. *Scott*, 1815, Hume, 353; *Struther's Patent Diamond Co.* v. *Clydesdale Bank*, 1886, 13 R. 434; *Bank of Scotland* v. *Rorie*, 1908, 16 S.L.T. 21 (O.H., Lord Mackenzie). For circumstances inferring the liability of the agent, see *Sorley's Trs.* v. *Grahame*, 1832, 10 S. 319.

[9] Bell, *Com.*, i. 527, Lord M'Laren's note; *Edinburgh and Glasgow Bank* v. *Steele*, 1853, 25 Sc. Jur. 245; *Higgins* v. *Senior*, 1841, 8 M. & W. 834; *Repetto* v. *Millar's Karri Co.* [1901], 2 K.B. 306; *Lipton* v. *Ford* [1917], 2 K.B. 647; cases in following notes.

[10] 1900, 2 F. 1288.

ment was written on paper headed by the name and address of one of the companies, but did not expressly state that *A.* was acting as an agent, and was signed by him without qualification. It was held that *A.* had presumably undertaken personal liability, and that there was nothing in the circumstances, nor in the fact that the letter was written on the company's paper, to negative that presumption.[1] The following passage from Smith's *Leading Cases* was quoted with approval by Lord Kinnear: "When a person signs a contract in his own name without qualification he is *primâ facie* to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from other parts of the document that he did not intend to bind himself as principal."[2] In *Lindsay* v. *Craig*[3] a chartered accountant, sending a receipt for the price of certain shares which he had sold verbally, added the words—"the transfer for which will be sent to you for signature in due course." There was nothing in the writing to indicate that the accountant was not selling for his own behoof. He was found liable to furnish the shares, and proof of his averments that he had informed the purchaser that he was acting on behalf of a particular third party was refused. A similar decision was given when a firm of law agents entered into missives of sale ostensibly on their own behalf. Proof that they were known to be acting as agents, so far as it consisted of parole evidence and correspondence preceding the missives, was rejected as inadmissible, proof by correspondence following the missives, though admissible, was, in the opinion of the Lord Ordinary, insufficient.[4] The general rule covers the case of a bought and sold note, signed without any indication of agency.[5] But an order for goods to be supplied to another is a sufficient indication of agency, and does not lay the party who gives the order under any liability for the price. Thus where a firm of ship-brokers and owners gave an order "Please supply the s.s. *Sylvia* with the following stores," it was held that this was an order on behalf of the owners of the *Sylvia*. As they were discoverable by inspection of the Shipping Register, it amounted to an order for a disclosed principal, and did not involve any liability on the firm merely because it was signed in the firm's name without any qualification.[6]

Contracts on Behalf of Estate.—If a party contracts in the capacity of owner of a particular estate, he contracts as principal, and not as agent, and incurs personal liability, even although he is in reality acting on behalf of third parties who have the beneficial interest. Thus trustees are personally bound

[1] It was a specialty, unfavourable to the agent's case, that in offering a weekly salary, without stating the proportions in which each company should pay it, he had exceeded his authority. But it is conceived that this point, though noticed in the judgments, was not essential to the result arrived at.

[2] Without venturing to question the law so laid down, which has the additional sanction of Lord Parmoor's approval (*Universal Steam Navigation Co.* v. *M'Kelvie* [1923], A.C. 492), it may be doubted whether it would apply to the case where the manager of a farm or estate, who had been in the habit of ordering goods for which his employer had regularly paid, chanced to give an order in writing in unqualified terms, and directing the goods to be sent to himself. If the order were verbal he would incur no liability (*Nabonie* v. *Scott*, 1815, Hume, 353). Would he be liable because the order was in writing, and parole evidence of the intention of the parties therefore inadmissible? One is reluctant to believe that the law would arrive at a conclusion so much at variance with the common understanding of mankind. See *Affleck* v. *Williamson*, 1776, M. App. *v.* Writ, No. 1; *Chanter* v. *Borthwick*, 1848, 10 D. 1544 (opinion of Lord Moncrieff, at p. 1565).

[3] 1919, S.C. 139.

[4] *Gibb* v. *Cunningham & Robertson*, 1925, S.L.T. 608 (O.H., Lord Constable).

[5] *Müller & Co.* v. *Weber & Schaer*, 1901, 3 F. 401; *Higgins* v. *Senior*, 1841, 8 M. & W.

[6] *Armour* v. *Duff*, 1912, S.C. 120.

for debts incurred on behalf of the trust, unless it is clear that the other party was content to rely on the credit of the trust estate.[1] So also a trustee in bankruptcy, in whom the bankrupt's estate is vested, is personally liable, both on contracts made by himself,[2] and in adopting and carrying out contracts made by the bankrupt.[3] On the other hand, the liquidator of a company is merely an administrator, and cannot, as a rule, be made personally liable, unless from the terms of the agreement it can be inferred that he bound his own credit.[4] It is conceived that a judicial factor or *curator bonis* incurs no personal liability on ordinary contracts—a point apparently undecided in Scotland.[5]

Contracts for Named Principal.—If an agent contracts avowedly on behalf of a named principal the general rule is that he incurs no liability. "Every agent avowedly contracting for a disclosed principal is presumed to bind his principal and not himself, unless the contrary is proved by the party maintaining the liability of the agent."[6] Thus a law agent in Scotland employing a solicitor in England, and disclosing his client's name, is not liable for the English solicitor's account.[7] An auctioneer, when the name of the exposer is made known, is not liable in damages for withdrawing the article from the sale.[8] In two early cases it was held—in the first case on the authority of the civil law,[9] in the later on evidence of the law of England [10]—that a mercantile factor, selling expressly on behalf of a disclosed principal, undertook no obligation to deliver the goods. And the agent for a bank is not personally liable on transactions in the course of banking business, in the absence of averments that he has exceeded his authority.[11] A director is not personally liable on contracts made on behalf of the company.[12]

Cases where Agent Liable.—But while the non-liability of the agent on contracts made ostensibly on behalf of a named principal is a general rule it is not an absolute one. It is, it would appear, for the Court to decide in each case whether the agent has incurred liability. It is by no means clear,

[1] M'Laren, *Wills and Succession*, 3rd ed., ii. 1233; *Cullen* v. *Baillie*, 1846, 8 D. 511, per Lord Fullerton, at p. 522 (affd. *Manson* v. *Baillie*, 1855, 2 Macq. 80); *Brown* v. *Sutherland*, 1875, 2 R. 615, per Lord Gifford. The law agent of the trust is presumed to give his services in reliance on the trust funds, of the limits of which he has notice, and has no claim, without express guarantee, against the trustee (*Ferme, Ferme & Williamson* v. *Stephenson's Tr.*, 1905, 7 F. 902).

[2] Goudy, *Bankruptcy*, 3rd ed., 375; *Jeffrey* v. *Brown*, 1824, 2 Sh. App. 349; *Mackessack* v. *Molleson*, 1886, 13 R. 445.

[3] *Gibson* v. *Kirkland*, 1833, 6 W. & S. 340; *Dundas* v. *Morison*, 1857, 20 D. 225. Suing on a contract does not necessarily infer that the trustee adopts it (*Sturrock* v. *Robertson's Tr.*, 1913, S.C. 582).

[4] *Gray's Trs.* v. *Benhar Coal Co.*, 1881, 9 R. 225 (see opinion of Lord Shand); *Lanarkshire County Council* v. *Brown*, 1905, 12 S.L.T. 700 (Sheriff Court, rates); *Graham* v. *Edge*, 1888, 20 Q.B.D. 683 (rent). As to judicial receivers, see *Owen* v. *Cronk* [1895], 1 Q.B. 265; *Burt, Bolton & Hayward* v. *Bull* [1895], 1 Q.B. 276, as explained in *Plumpton* v. *Burkinshaw* [1908], 2 K.B. 572; *Moss Steamship Co.* v. *Whinney* [1912], A.C. 254; *Parsons* v. *Sovereign Bank of Canada* [1913], A.C. 160.

[5] See *Plumpton* v. *Burkinshaw* [1908], 2 K.B. 572. But a factor, etc., is personally liable for calls on shares in a company if his name appears on the register, although as judicial factor (*Lumsden* v. *Peddie*, 1866, 5 M. 34).

[6] Per consulted judges in *Millar* v. *Mitchell*, 1860, 22 D. 833, 845; Bell, *Com.*, i. 536, 539; Story, *Agency*, sec. 261.

[7] *Livesey* v. *Purdom & Son*, 1894, 21 R. 911. As to one agent in Scotland employing another, see Law Agents Act, 1873 (36 & 37 Vict. c. 63), sec. 21.

[8] *Fenwick* v. *Macdonald, Fraser & Co.*, 1904, 6 F. 850. But the terms of sale may involve personal liability (*Woolfe* v. *Horne*, 1877, 2 Q.B.D. 355; *Rainbow* v. *Hoskins* [1904], 2 K.B. 322). The latter case has been doubted in *M'Manus* v. *Fortescue* [1907], 2 K.B. 1.

[9] *Rankin* v. *Mollison*, 1738, M. 4064.

[10] *Brown* v. *Macdougall*, 1802, M. App. *v.* Factor, No. 1.

[11] *King* v. *Shirra*, 1827, 5 S. 231; *Russel & Aitken* v. *M'Furlane*, 1837, 15 S. 989.

[12] *Supra*, p. 117.

on the authorities, what is the question to which the Court is to apply its mind. It is sometimes said, very loosely, that it is to discover the intention of the parties.[1] But in practically all disputed cases there is no common intention; the party contracting with the agent regards him as bound; the agent does not intend to assume liability. Nor would it seem sufficient to concentrate attention on the intention either of the agent or of the other contracting party. To hold that the agent is liable if credit is given to him—a doctrine laid down in Story on *Agency*[2]—would reduce every case to a question of the credibility of the person with whom the agent dealt—as it may be assumed that he will not sue the agent unless he is prepared to say that he gave credit to him. The true question would appear to be, assuming the other party believed that the agent was pledging his own credit. Was there anything in what the agent said or did to justify him in entertaining this belief? It would seem that the Court may arrive at the conclusion, on the construction of a written contract, or on the evidence of the actings of parties in a verbal one, that the agent intended to make himself a party to the contract, and therefore to incur liability, even although the contract was signed or made distinctly as agent for a disclosed principal, and no definite undertaking by the agent can be indicated.[3] But such cases, where the decision turns on the impression produced on the judicial mind by the study of a particular document or particular facts, are of little use as authorities.

Signature "as Agent."—Reserving for the time being cases where the agent deals on behalf of a foreign principal and cases on bills and promissory notes, it may be regarded as established law that a signature "as agent for," or "on account of," a principal, excludes personal liability even where in the body of the contract the person so signing is described in terms which would *primâ facie* imply that he was contracting on his own behalf. So where *A.* was described as the charterer on the body of a charter-party, but signed it expressly as agent, it was held that he was not personally liable.[4] And a statement that a claim will be paid by a particular party, contained in a contract signed by that party expressly as agent for another, does not involve any personal liability.[5] But the mere addition to the signature of such words as "agent," "broker," "director," may admit of being read as the signatory's designation, and will then not be enough to negative the inference of personal contract which the terms of the writing may allow.[6] When the signature is unqualified the fact that the substantial obligations are expressly undertaken as agent is at least as effectual as a qualified signature,[7] but a mere heading "for and on behalf of" *A.*, on a sale note in which *A.* was not mentioned and *B.'s* signature was unqualified, was considered to be insufficient to exclude *B.'s* liability, there being the specialty that the

[1] See opinions in *Millar* v. *Mitchell*, 1860, 22 D. 833.

[2] Sec. 279 *seq.*

[3] *Lennard* v. *Robinson*, 1855, 5 El. & Bl. 125 (charter-party, signed by *A.* "by authority of and as agent for *B.*"); *Woodside* v. *Cuthbertson*, 1848, 10 D. 604; *Carswell* v. *Scott & Stephenson*, 1839, 1 D. 1215; *Graham* v. *Tait*, 1885, 12 R. 588 (verbal contracts, reported without opinions or authorities); *Tanner* v. *Christian*, 1855, 4 E. & B. 591; *Thomson* v. *Dudgeon*, 1851, 13 D. 1029; 1854, 1 Macq. 714.

[4] *Universal Steam Navigation Co.* v. *M'Kelvie* [1923], A.C. 492, overruling *Lennard* v. *Robinson*, 1855, 5 E. & B. 125, and approving *Gadd* v. *Houghton*, 1876, 1 Ex. D. 357.

[5] *Stone & Rolfe* v. *Kimber Coal Co.*, 1925, S.C. 277; revd. 1926, S.C. (H.L.) 45.

[6] *Brown* v. *Sutherland*, 1875, 2 R. 615; *Hutcheson* v. *Eaton*, 1884, 13 Q.B.D. 861; *Brebner* v. *Henderson*, 1925, S.C. 643. Such a reading is at least very difficult in the case of the word "agent"—not usually employed as a designation. See Lord Sumner in *Universal Steam Navigation Co.* v. *M'Kelvie* [1923], A.C. 492.

[7] *Millar* v. *Mitchell*, 1860, 22 D. 823; *Gadd* v. *Houghton*, 1876, 1 Ex. D. 357.

heading was explicable as inserted to meet emergency regulations which demanded the name of the party for whom goods were bought.[1]

Bills of Exchange.—The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), provides (sec. 26): "(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not personally liable thereon: but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."[2] This section applies to promissory notes, the maker of the note being equivalent to the acceptor of a bill, and the first indorser being equivalent to the drawer (sec. 89). The drawer or indorser of a bill may insert a stipulation negativing his own liability thereon (sec 16); an acceptor may qualify his acceptance (sec. 19). If no express words negativing personal liability are used, that result will not be easily implied. Thus bills expressed to be "for behoof of *A.*"[3] or containing the words "for which I hold *A.* responsible,"[4] or "value in account with *A.*,"[5] have been held to make the party who signed them personally liable, though a note signed by three directors of a company and countersigned by the secretary, and bearing to be granted "for value received on account of" the company, was not construed as inferring the personal liability of the directors.[6] Where the manager of a mine signed in his own name a promissory note, in the form "*A.*" (the owner of the mine) "promises to pay," it was held he was not personally liable; but the report bears that the decision proceeded on the "universal practice" of the mine.[7] The mere fact that the bill bears to be addressed to a party in a representative capacity does not limit his liability.[8] Both the express words of the section above quoted and prior decisions deny any limiting effect to such words appended to a signature as "agent," "trustee," "director."[9] In cases relating to the liability of directors on promissory notes it has been held that no liability attached where the signature was "for" the company,[10] or was preceded by the impressed signature of the company,[11] but that the directors were not saved merely by the company's seal being affixed to the instrument.[12] If a bill is issued on behalf of a company without the full name of the company, with the word "limited" as the last word, being mentioned therein, the parties so issuing the bill are personally liable thereon.[13]

Liability when Principal cannot be Sued. There is no absolute rule that

[1] *Brandt & Co.* v. *Morris* [1917], 2 K.B. 784.
[2] See *M'Meekin* v. *Easton*, 1889, 16 R. 363.
[3] *Webster* v. *M'Calman*, 1848, 10 D. 1133; *M'Meekin* v. *Easton*, 1889, 16 R. 363.
[4] *The "Elmville"* [1904], P. 319.
[5] *Chiene* v. *Western Bank*, 1848, 10 D. 1523.
[6] *Lindus* v. *Melrose*, 1858, 3 H. & N. 177.
[7] *Affleck* v. *Williamson*, 1776, M. App. *v.* Writ, No. 1.
[8] *Brown* v. *Sutherland*, 1875, 2 R. 615; *Eaton* v. *Macgregor's Exrs.*, 1837, 15 S. 1012.
[9] *Chiene* v. *Western Bank*, *supra* (bill accepted "*A.*, factor for *B.*"); *Brown* v. *Sutherland*, *supra* (per Lord Gifford); *Elliott* v. *Bax Ironside* [1925], 2 K.B. 301 ("indorsation of bill," X Co., *A.* and *B.* directors); *Brebner* v. *Henderson*, 1925, S.C. 643 (promissory note, not expressed to be on behalf of the company, and signed "*A.*, director" and "*B.*, secretary").
[10] *Alexander* v. *Sizer*, 1869, L.R. 4 Ex. 102.
[11] *Chapman* v. *Smethurst* [1909], 1 K.B. 927.
[12] *Dutton* v. *Marsh*, 1871, L.R. 6 Q.B. 361.
[13] Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), sec. 63, subsec. (3).

an agent incurs personal liability merely on the ground that the principal whom he names, and by whose authority he acts, cannot be sued on the contract. Thus parties acting for a corporation, or the directors of a company, are not necessarily personally bound if they enter into contracts *ultra vires* of the corporation or company.[1] The agent for the Crown,[2] or for a foreign Government,[3] incurs no personal liability unless he otherwise undertakes it, though no action may lie against the principal. The case where an agent contracts on behalf of an unincorporated body which cannot be sued is considered in a later page.[4]

Custom of Trade. The custom of a particular trade may impose personal liability on an agent, even when he contracts expressly in that capacity.[5] And, doubtless on the ground of custom of trade, it is a rule of law that the master of a ship binds his own credit as well as that of his employers, in the absence of any agreement to the contrary.[6]

Unnamed Principal.—An agent, in contracting, may disclose the fact that he is acting as agent, but without mentioning the principal's name. The effect, on the agent's position in the contract, is a question on which there is little authority in Scotland. In a somewhat special case, a firm of law agents, who had procured a delay of diligence against their client by stating that they had received authority from a friend of his (unnamed), to make an offer of payment, were found liable in the payment offered when the friend in question refused to carry out the transaction.[7] According to the most recent English authority, in cases other than bought and sold notes, if an agent offers to buy he will be liable for the price, and if he sells unascertained goods he will be liable in damages for non-delivery, on the principle that it is not to be assumed that the other party was prepared to enter into such contracts solely on the credit of an unknown man. When, however, an agent, contracting as such, but without disclosing his principal, sells a specific article, the purchaser must be assumed to look for delivery to the undisclosed principal and not to the agent.[8] In bought and sold notes where a broker expresses himself as dealing as "broker" or "for my principals," he is not liable on the contract, or entitled to sue upon it, although such liability may be imposed on proof of a custom in the particular trade.[9] An auctioneer, who presumably acts as an agent, is so far a party to the contract that he is bound to deliver the specific article he sells.[10] And opinions have been given, though it was not necessary to decide, that when the name of the owner of the article exposed is not stated the auctioneer incurs personal liability on any warranty as to its quality.[11] When he sells unascertained

[1] *Supra*, p. 117.
[2] *Infra*, p. 160.
[3] *Twycross* v. *Dreyfus*, 1877, 5 Ch. D. 605.
[4] *Infra*, p. 154.
[5] So law agents are personally liable for charges which, by the custom of the profession, are usually paid by them, such as an account for printing (*Neill* v. *Hopkirk*, 1850, 12 D. 618), the expenses of a witness (*M'Donald* v. *Meldrum*, 1839, 1 D. 677), the fees of an advocate's clerk (*Fortune's Exrs.* v. *Smith*, 1864, 2 M. 1005); and see Begg, *Law Agents*, 2nd ed., 289.
[6] Bell, *Prin.*, sec. 450; Story, *Agency*, sec. 294; *Meier* v. *Kuchenmeister*, 1881, 8 R. 643, per Lord Young; *The "Ripon City"* [1897], P. 226; *Priestley* v. *Fernie*, 1865, 3 H. & C. 977.
[7] *Dores* v. *Horne & Rose*, 1842, 4 D. 673.
[8] *Benton* v. *Campbell, Parker & Co.* [1925], 2 K.B. 410.
[9] Smith, *Mercantile Law*, 12th ed., 212; *Fleet* v. *Murton*, 1871, L.R. 7 Q.B. 126; *Hutchinson* v. *Tatham*, 1873, L.R. 8 C.P. 482; *Imperial Bank* v. *London and St. Katherine Docks Co.*, 1877, 5 Ch. D. 195; *Pike* v. *Ongley*, 1887, 18 Q.B.D. 708. The terms of the contract may exclude the custom (*Barrow* v. *Dyster*, 1884, 13 Q.B.D. 635), where all disputes under the contract were referred to the brokers as arbiters, and it was held that proof of a custom that brokers undertook liability could not be received, as it would involve making the brokers arbiters in their own cause.
[10] *Woolfe* v. *Horne*, 1877, 2 Q.B.D. 355.
[11] *Ferrier* v. *Dods*, 1865, 3 M. 561.

goods he is probably to be regarded as a party to the contract;[1] in the case of a specific article, while he undertakes to deliver it, he does not give any warranty of title, and will not be liable if it turns out that the party for whom he sold had no right to the article, and the purchaser is in consequence evicted.[2] Refusal by a party, who averred that he was acting merely as an agent, to give the principal's name was considered as an element inferring personal liability.[3]

Foreign Principal. So far it has been assumed that the agent has been contracting on behalf of a principal resident in this country; it has now to be considered whether the fact that the principal is a foreigner, not subject to the jurisdiction of the Courts of Great Britain, makes any difference in the rights or liabilities of principal or agent. It is not a point on which any confident opinion can be expressed. After some early and inconclusive cases[4] the question of the liability of the agent, in the case where he contracts expressly on behalf of a principal, and that principal is a foreigner, was considered in *Millar* v. *Mitchell*.[5] Goods were sold by the defenders, expressly as agents for a foreign principal, whose name was disclosed. They were not timeously delivered, and the action was raised by the purchasers against the agents, concluding for damages. By joint minute the letters constituting the contract were admitted, and further probation was renounced. The pursuers relied on an alleged presumption that an agent incurred personal liability when he contracted on behalf of a foreign principal. It was held that there was no such general presumption: that in each case it was a question for a jury, or for the Court acting as a jury, to determine the intention of the parties: that in that question the position of the principal, who might be a well-known merchant or a "wandering Arab," was material; that the onus might lie on the agent, in the case where he acted as buyer, to disprove liability for the price: that where he acted as seller, and gave the name of his principal, the presumption was that he incurred no personal liability; and therefore that, in the absence of any proof beyond the terms of the contract, the defenders, as agents, were not personally liable. In a subsequent case the agent was held liable, but it was a case where the principal was not disclosed, and the agent would have been liable whether his principal was a foreigner or not.[6] The question as to the rights of a foreigner as an undisclosed principal was raised in *Bennett* v. *Inveresk Paper Co.*[7] Paper was ordered by *A.*, who acted ostensibly as principal, but was dealing on the instructions of *B.*, who was resident in New South Wales. *B.* sued the sellers for damages in respect of an alleged failure in quality, and was met by the defence that as a foreign principal no privity of contract existed between him and the defenders, and therefore that he had no title to sue. It was held in very general terms that the question of title to sue was not affected by the fact that the pursuer was a foreigner; that the ordinary rules of agency applied: and therefore that *B.*, as he was in fact the principal in

[1] *Franklyn* v. *Lamond*, 1847, 4 C.B. 637. But see comments on this case by Sadler, J., in *Benton* v. *Campbell, Parker & Co.*, *infra*.

[2] *Wood* v. *Baxter*, 1883, 49 L.T. 45; *Benton* v. *Campbell, Parker & Co.* [1925], 2 K.B. 410.

[3] *Gibb* v. *Cunningham & Robertson*, 1925, S.L.T. 608 (O.H., Lord Constable).

[4] *Hood* v. *Cochrane*, 16th January 1818, F.C.; *De Tastet* v. *M'Queen*, 1824, 2 S. 747; *M'Queen* v. *De Tastet*, 1824, 2 S. 750; *Burgess* v. *Buck*, 1829, 7 S. 824 (opinion of Lord Pitmilly).

[5] 1860, 22 D. 833.

[6] *Athya* v. *Buchanan*, 1872, 45 Sc. Jur. 16; 10 S.L.R. 18.

[7] 1891, 18 R. 975. See also opinion of Lord Kyllachy in *Delaurier* v. *Wyllie*, 1889, 17 R. 167, at p. 191.

the contract, was entitled to sue upon it. Any attempt to generalise on these cases is checked by the opinions given in a subsequent case—*Girvin, Roper & Co.* v. *Monteith*.[1] There an undisclosed foreign principal, for whom goods had been bought, was sued for damages for failure to pay the price. Under a provision in the contract the case fell to be decided by the law of England, and it was held, on evidence as to that law, that a foreign principal was not liable upon a contract unless he had expressly or impliedly authorised the agent to pledge his credit, and that such authority could not be inferred from the mere fact that he had authorised the agent to buy for him, intending that the agent should buy in his own name. The Lord Ordinary (Stormonth Darling) was of opinion, founding on *Bennett* v. *Inveresk Paper Co.*,[2] that the law of Scotland differed in this particular, and would, in the circumstances of the case, have imposed liability on the principal. In the Inner House Lord M'Laren, in whose opinion the other judges concurred, was inclined to the view that there was no distinction between the laws of England and Scotland, and that in *Bennett* v. *Inveresk Paper Co.*, authority to pledge the principal's [3] credit (and therefore to make him a party to the contract and entitled to sue upon it) was inferred from the course of dealing.

Alternative Liability of Principal and Agent.—From the preceding pages it will be seen that there are many cases in which an agent may enter into a contract on terms which will impose the liability to fulfil it both on himself and on his principal. But the liability is not cumulative, or joint and several, but alternative; the other party may hold either principal or agent liable, not both.[4] At some period or other he must elect his debtor; and his election, once fully made, is final, and cannot be withdrawn, even although the party elected as debtor fails to satisfy the debt.[5]

Election. "There cannot be election until there is knowledge of the right to elect;" [6] and therefore, in cases where the name of the principal is undisclosed, no question of election can arise until his existence and identity are discovered.[7] When the name of the principal is disclosed at the time when the contract is made, but its terms are such as to impose liability on the agent, Lord M'Laren, speaking of a case of sale, has stated that if "the seller knew who the principal was from the beginning, the election is held to be made at the time of making the contract, because the creditor is bound to elect whom he is to take as his debtor as soon as he comes to know who is the principal to whom the goods are sold."[8] But this, it is submitted, is a mistaken statement of the law. The authorities referred to[9] illustrate only the negative side of the question—that there is no election if the principal is not known—and, as it was put by an English judge, "there is nothing to prevent the seller from insisting upon having both principal and agent liable to him at the same time, with the additional advantage of knowing

[1] 1895, 23 R. 129.

[2] 1891, 18 R. 975.

[3] As to the law of England on the rights and liabilities of parties where an agent contracts on behalf of a foreign principal, see Leake, *Contracts*, 7th ed., 349; Pollock, *Contract*, 9th ed., 105; Bowstead, *Agency*, 7th ed., 388; *Miller, Gibb & Co.* v. *Smith & Tyzer* [1917], 2 K.B. 141; *Brandt* v. *Morris* [1917], 2 K.B. 784.

[4] See opinion of Lord Chancellor Halsbury, *Morel* v. *Earl of Westmoreland* [1904], A.C. 11, at p. 14.

[5] *Scarf* v. *Jardine*, 1882, 7 App. Cas. 345; *Cross* v. *Mathews*, 1904, 91 L.T. 500.

[6] Per Lord Blackburn, *Kendall* v. *Hamilton*, 1879, 4 App. Cas. 504, 542.

[7] *Thomson* v. *Davenport*, 1829, 9 B. & C. 78; 2 Smith's *L.C.*, 12th ed., 355; *Kerr* v. *Employers' Liability Insurance Co.*, 1899, 2 F. 17 (opinion of Lord Kyllachy, Ordinary).

[8] *Bennett* v. *Inveresk Paper Co.*, 1891, 18 R. 975, 983.

[9] *Addison* v. *Gandasequi*, 1812, 2 Smith's *L.C.*, 12th ed., 348; *Paterson* v. *Gandasequi*, 1812, 2 Smith's *L.C.*, 12th ed., 341.

the principal's name at the time."[1] In the case from which this passage is cited a sale note bore that the contract was with the agent, and it was argued unsuccessfully that by taking the sale note in this form, in the knowledge of the principal, the seller had elected to take the agent as his debtor; and held that, on the bankruptcy of the agent, he might have recourse against the principal. So it is conceived that even when the principal is known at the time of entering into the contract, the creditor may hold his election in suspense, and may have recourse against either party until he is precluded by some act which will infer that he has chosen to rely on the credit of one or other.[2]

Apart from cases involving a formal claim, such as an action or a claim for ranking in bankruptcy, it has been laid down that it is a jury question whether the actings of a creditor amount to a conclusive election to take either principal or agent as his debtor.[3] The fact that a seller of goods has debited one or other in his books is strong evidence of election,[4] but not conclusive, since it has been held that where an agent had been in the practice of ordering and paying for goods, the mere fact that in a particular case the seller entered the name of the principal as buyer, and sent an invoice to him, did not preclude the argument that the other facts of the case amounted to an election to take the agent as debtor.[5] A demand for payment from the agent, and threats of legal proceedings against him, do not necessarily amount to election.[6] But where a horse was sold by an agent (auctioneer), and returned as unsound to the principal, it was inferred that the buyer had elected the principal as his debtor in the matter and could not sue the agent for damages.[7] And where an insurance broker had effected policies on the order of a ship's husband, had taken his bill for the premium, and had arranged with him that, in the event of the bill not being met at maturity, the policies might be cancelled and the return premium applied to meet the debt, it was decided that as the insurance broker must be taken to have known that to cancel a policy was outwith the authority of a ship's husband, he had elected to treat the ship's husband as a principal, and—on the assumption that the owner was originally also liable—had liberated him.[8] The cases as to delay in making a claim upon the principal, and thereby inducing him to settle with the agent, have been noticed already.[9]

Action, Decree, as Election. Where an action based on an alternative liability is brought against either or both of the parties liable, and decree is taken against one of them, it is settled law, at least in England, that an election to take as debtor the party against whom decree has been taken is imported, and therefore that even if the decree produces nothing action against the other party is precluded.[10] The equivalent act of ranking and

[1] *Calder* v. *Dobell*, 1871, L.R. 6 C.P. 486, per Willes, J. 494.

[2] *Calder* v. *Dobell, supra*; *Lamont, Nisbett & Co.* v. *Hamilton*, 1907, S.C. 628 (opinion of Lord Stormonth Darling, Ordinary).

[3] *Calder* v. *Dobell*, 1871, L.R. 6 C.P. 486; *Geddes* v. *Dunfermline District Committee*, 1927, S.C. 797, a question under the Workmen's Compensation Act.

[4] *Young* v. *Smart*, 1831, 10 S. 130; *Paterson* v. *Gandasequi*, 1812, 2 Smith's *L.C.*, 12th ed., 341.

[5] *Stevenson* v. *Campbell & Maclean*, 1836, 14 S. 562. The material facts were, that a copy of the invoice was sent to the agent, that a long period of credit (twelve months) was not followed by any immediate demand for payment from the principal, and that after the period of credit had expired the agent's bill was taken for the price.

[6] *Calder* v. *Dobell, supra*; *The "Huntsman"* [1894], P. 214.

[7] *Ferrier* v. *Dods*, 1865, 3 M. 561.

[8] *Lamont, Nisbett & Co.* v. *Hamilton*, 1907, S.C. 628.

[9] *Ante*, p. 129.

[10] *Meier* v. *Kuchenmeister*, 1881, 8 R. 642; *Priestley* v. *Fernie*, 1865, 3 H. & C. 977; *Kendall* v. *Hamilton*, 1879, 4 App. Cas. 504; *Morel* v. *Earl of Westmoreland* [1904], A.C. 11; *French* v. *Howie* [1906], 2 K.B. 674; *Moore* v. *Flanagan* [1920], 1 K.B. 919.

accepting a dividend in sequestration or in a trust deed for creditors has the same effect.[1] The decree, or ranking, is the crucial point; a mere action or claim is not necessarily a conclusive election.[2] In *Morel* v. *Earl of Westmoreland*, goods for the household were ordered by a wife. In an action directed against both husband and wife the latter did not appear, and judgment was entered against her. It was held on the facts of the case that the husband and wife had not undertaken any joint liability; and that, on the assumption that they were originally alternatively liable, the judgment against the wife (though nothing was recovered from her) was an election to take her as the debtor, which barred any further claim against the husband. In *Meier* v. *Kuchenmeister*,[3] furnishings were supplied to the order of the captain of a ship. He drew a bill on his owners, which they refused to accept. An action against the captain in the German Courts was dismissed, on the ground that, by German law, it was brought too late. The creditor then brought an action against the owner in the Scotch Courts, based on the ground that the furnishings had been ordered by the captain as his agent. The defence was election to treat the captain as debtor, as evinced by the action against him. The rule that a decree against either principal or agent discharged the other was recognised, but held inapplicable, as no decree against the captain had been obtained in the German Courts.

It has been questioned whether the rule that decree against one party alternatively liable precludes action against the other, though recognised in the opinions in *Meier* v. *Kuchenmeister*,[4] is applicable to Scotland:[5] and in *Lockhart* v. *Moodie*,[6] when the facts would have supported a plea founded on the rule, it was not even suggested. It was, however, recognised in Roman law in the case of the *exercitor* of a ship.[7] And no doubts as to its applicability to Scotland were raised in *Craig & Co.* v. *Blackater*.[8] There *A.* had ordered two boilers for a ship. He was sued for the price, and raised a counteraction claiming damages for the defective character of the boilers. In the course of the action it transpired that *A.* was acting as agent for a company of which he was managing director. The Lord Ordinary granted decree against *A.* in the action for the price. In the counteraction he expressed himself in favour of *A.*'s case on the merits, but held that he was precluded from awarding damages on the ground that *A.*, as an individual, had suffered no loss. In the Inner House one ground of decision was that when the seller took decree against *A.* in the knowledge that he was acting as an agent, he had elected to treat him as the contracting party, and had thereby invested him with all the rights as well as the liabilities arising under the contract.

Cases of Joint and Several Liability.—The principle that a decree against one debtor involves a discharge of the other applies only in cases where the liability was originally alternative. It does not apply to the case of liability originally joint and several.[9] So as the liability of a wrongdoer and of his

[1] *Scarf* v. *Jardine*, 1882, 7 App. Cas. 345. Not if the claim against the other party is expressly reserved (*Black* v. *Girdwood*, 1885, 13 R. 243).

[2] *Meier* v. *Kuchenmeister*, *supra*; *Curtis* v. *Williamson*, 1874, L.R. 10 Q.B. 57.

[3] 1881, 8 R. 642.

[4] *Supra*.

[5] *Black* v. *Girdwood*, 1885, 13 R. 243, a case of partnership.

[6] 1877, 4 R. 859.

[7] *Dig.*, xiv. i. 1, 24. *Haec actio ex persona magisti in exercitorem dabitur, et ideo, si cum utro eorum actum est, cum altero agi non potest.*

[8] 1923, S.C. 472.

[9] *Morton's Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72; *Smith* v. *Patrick*, 1901, 3 F. (H.L.) 14 (opinion of Lord M'Laren, at p. 25); Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 20), sec. 52.

employer is not alternative, but joint and several, decree against the wrongdoer, if unsatisfied, is not a bar to action against the employer.[1] Nor does it cover the case where agent and principal incur independent obligations for the same debt. So where the promoters of a railway company granted a promissory note for money advanced for the expenses of obtaining a private Act, and the Act made the expenses a debt due by the company, it was held that a decree against the company was not a bar to an action against the promoters, on the ground that the company's obligation rested on the obligation imposed by the statute the obligation of the promoters on the promissory note which they had signed.[2]

(2) Agent Acting without Authority.

An agent may enter into a contract without having any authority from his principal. The principal may then become a party to the contract, both in a question of title to sue and in a question of liability, if he either ratifies the agent's act, or is, in the circumstances, barred from maintaining that the agent had no authority.

Ratification ; Limits. — Ratification is only possible under certain conditions. The agent, in contracting, must have acted expressly as an agent. If he contracted ostensibly as principal, even although he may have intended the contract to be for the behoof of a particular party, that party, if he has given the agent no antecedent authority, cannot sue upon the contract, and cannot be made liable to perform its obligations on proof that he has in fact ratified the agent's unauthorised act.[3] In *Keighley, Maxsted & Co.* v. *Durant*, *A.* authorised *B.* to buy corn for him, with a limit as to price. Failing to find sellers at that price, *B.* bought at a higher price, intending his purchase to be a joint speculation on his own behalf and *A.'s*. He informed *A.* of what he had done, and *A.* agreed. *B.* failed to take delivery, and the seller sued *A*. It was held he was not a party to the contract and was not liable under it, the judgment proceeding partly on the prior authorities, partly on the general ground that the law will not give effect to unexpressed intentions.

If the agent contracts expressly as an agent, the contract may be ratified by a principal who is not named in the contract if he is identified as the representative of an interest on behalf of which the contract was made. Thus a policy of marine insurance, made expressly on behalf of anyone to whom the subject may appertain, may probably be sued on by a party who had not authorised it, but has an insurable interest in the subject,[4] but not unless there is proof that the advantage or interest of the pursuer was contemplated by the insurer at the date of the contract.[5] Where it is doubtful to whom an estate descends, and contracts are made in relation to it by an

[1] *Steven* v. *Broady, Norman & Co.*, 1928, S.C. 351.

[2] *Scott* v. *Lord Ebury*, 1867, L.R. 2 C.P. 255.

[3] *Keighley, Maxsted & Co.* v. *Durant* [1901], A.C. 240. Presumably the Scotch Courts would follow this decision. But in *Barnetson* v. *Petersen* (1902, 5 F. 86) it was held that the owner of a ship was liable to pay for the services of a ship-broker who had been employed by the charterers. If this decision proceeded on ratification by the owners (through the captain of the ship), and it is difficult to see on what other ground it could be founded, it is inconsistent with *Keighley*, which was not cited.

[4] *Lucena* v. *Crawfurd*, 1808, 3 B. & P. 75. But this has been doubted by Lord Atkinson in *Boston Fruit Co.* v. *British, etc., Marine Insurance Co., infra*, at p. 343.

[5] *Boston Fruit Co.* v. *British, etc., Marine Insurance Co.* [1906], A.C. 336 ; *Watson* v. *Swann*, 1862, 11 C.B. (N.S.) 756.

agent who is *de facto* the manager, these may be ratified by the heir when ascertained.[1] But where a lease was granted by a person who was in possession without a valid title, and where, therefore, the lessor acted both ostensibly and in reality on his own behalf, it was held that the true owner could not enforce the lease, either by ratification of his predecessor's act or in virtue of an express assignation from him.[2]

Contracts by Promoters. – Ratification is only possible, even in cases where the contract is expressly made on behalf of a named principal, if that principal was in existence and able to enter into the contract at the time when it was made. It has been laid down, apparently as a self-evident proposition, that "ratification can only be by a person ascertained at the time of the act done."[3] Therefore, if, before the formation of a company, contracts are made on its behalf by the promoters, the company cannot ratify these contracts, and cannot be made liable upon them even where goods under the contract are supplied, or services rendered, after its formation, on the ground that at the date of the contract the company was not able to enter into it.[4] Nor can the company sue upon the contracts made by the promoters. Thus where machinery was ordered on behalf of a company about to be formed, was supplied to the company and paid for out of its funds, it was held that the company had no title to sue in an action of damages for the defective character of the machinery.[5]

While a company cannot ratify a contract made before its formation, there is nothing to prevent such a contract being assigned to the company after its formation. But to make this possible, the contract must be assignable—a question discussed in another chapter.[6] And the company, when formed, may enter into a new contract on the same terms as that already made on its behalf. No difficulty arises if the directors, advised as to the state of the law, enter into a new contract expressly. But while it is recognised in the cases already cited that a new contract, with the company as a contracting party, may be inferred from the actings of the parties after the company was formed, it would seem to be the law that no such contract can be inferred if the directors and the other party were acting in the belief that the prior contract had been successfully ratified.[7] Thus such facts as the supply of goods under the contract to the company ;[8] payment for goods by the company ;[9] advances of money to be repaid out of the calls on the shares ;[10] or payment of rent on premises let,[11] do not, if they are done in the belief that the original contract was binding on the company, infer a new contract. But if the terms of the original contract are varied after the company has come into existence, as by an agreement between the company and a vendor that debentures should be taken in payment instead of cash, a new contract may be inferred, although all parties may have been acting

[1] *Lyell* v. *Kennedy*, 1889, 14 App. Cas. 437.
[2] *Weir* v. *Dunlop & Co.*, 1861, 23 D. 1293 ; *Reid's Tr.* v. *Watson's Trs.*, 1896, 23 R. 636.
[3] Per Willes, J., in *Kelner* v. *Baxter*, 1866, L.R. 2 C.P. 174.
[4] *Tinnevelly Sugar Refining Co.* v. *Mirrlees*, 1894, 21 R. 1009 ; *Kelner* v. *Baxter*, 1866, L.R. 2 C.P. 174 ; *In re Northumberland Avenue Hotel Co.*, 1886, 33 Ch. D. 16 ; *In re Empress Engineering Co.*, 1880, 16 Ch. D. 125.
[5] *Tinnevelly Sugar Refining Co.* v. *Mirrlees*, *supra*.
[6] *Infra*, Chap. XXIV.
[7] *Tinnevelly Sugar Refining Co.* v. *Mirrlees*, *supra* ; *In re Northumberland Hotel Co.*, *supra*.
[8] *Kelner* v. *Baxter*, 1866, L.R. 2. C.P. 174.
[9] *Tinnevelly Sugar Refining Co.* v. *Mirrlees*, 1894, 21 R. 1009.
[10] *Scott* v. *Lord Ebury*, 1867, L.R. 2 C.P. 255.
[11] *In re Northumberland Avenue Hotel Co.*, 1886, 33 Ch. D. 16.

under the erroneous belief that the original contract had been validly ratified.[1]

If goods have been supplied, or services rendered, to a company in reliance on a contract made on its behalf by the promoters before its formation, it would appear that no claim for payment in the nature of a *quantum meruit* can be enforced against the company.[2]

Facts excluding Ratification. A contract made by an agent without authority cannot be ratified after a material change in the circumstances. Thus a policy of fire insurance, effected by an agent without authority, cannot be ratified so as to entitle the principal to sue upon it after a fire has occurred.[3] An exception to this rule is admitted in the case of marine insurance.[4] And it has been held that where an offer has been made to an agent, and he, without authority, has accepted it, his acceptance may be ratified by the principal even after the offer has been withdrawn[5]—an application of the maxim *omnis ratihabitio retrotrahitur et mandato aequiparatur*, which has been doubted on the ground that it involves the assumption that one party to a contract is bound while the other is free.[6]

Where the validity and effect of a particular act depends on its being done within a specified time, and it is in fact done by an agent within that time, but done without authority, the principal cannot by a subsequent ratification make the agent's act valid, to the prejudice of any third party. So a notice to quit, given by an agent without authority, cannot be ratified.[7] Where a party professing to act on behalf of the seller of goods stopped them *in transitu*, and they were afterwards claimed by the purchaser's trustee in bankruptcy, it was held that the stoppage, in fact unauthorised, could not be founded on by the seller on the plea that he had ratified it.[8] Where an agent had authority to object to the renewal of a licence before the Licensing Court, and, unsuccessful there, without any authority appealed to the Licensing Appeal Court, it was held that the subsequent ratification of his appeal, being given after the day for appealing had expired, and indeed after the case was decided, did not obviate the objection that the agent had no *locus standi*.[9] And where, by the terms of a partnership, *A.* had the option to purchase certain property on the death of the other partner, provided that he gave notice within three months of the death, and notice was in fact given by the solicitor for *A.*, who was insane and could give no authority, it was decided that the notice could not be ratified by a person subsequently appointed to manage *A.*'s estate.[10]

To make ratification effectual, the agent's contract must be one which is within the principal's contractual powers. So if a contract be *ultra vires* of a company, it does not become binding because it is entered into by an agent or by the directors, and subsequently ratified by the company.[11]

[1] *Howard* v. *Patent Ivory Co.*, 1888, 38 Ch. D. 156 (Kay, J.).

[2] *In re English and Colonial Produce Co.* [1906], 2 Ch. 435. Question, whether the Scotch Courts would not apply the maxim *nemo debet locupletari aliena jacturâ*. See *infra*, Chap. XVIII.

[3] *Grove* v. *Mathews* [1910], 2 K.B. 401.

[4] Marine Insurance Act, 1906 (6 Edw. VII. c. 41), sec. 86.

[5] *Bolton Partners* v. *Lambert*, 1888, 41 Ch. D. 295; *In re Portuguese Consolidated Copper Mines*, 1890, 45 Ch. D. 16. Application for shares accepted at informal meeting is binding if subsequently ratified.

[6] *Fleming* v. *Bank of New Zealand* [1900], A.C. 577, at p. 587; *Goodall* v. *Bilsland*, 1909, S.C. 1152, at p. 1183; and see Fry, *Specific Performance*, 6th ed., App. A.

[7] *Mann* v. *Walters*, 1830, 10 B. & C. 626.

[8] *Bird* v. *Brown*, 1850, 4 Ex. 786.

[9] *Goodall* v. *Bilsland*, 1909, S.C. 1152.

[10] *Dibbins* v. *Dibbins* [1896], 2 Ch. 348.

[11] *Ante*, p. 111.

Implied Ratification.—Ratification, where competent, may either be express or inferred from the actings of the parties. Where the relationship of principal and agent actually exists, but the particular act done by the agent is not authorised, mere silence on the part of the principal, in the knowledge of what the agent has done, will generally be held to infer ratification. Thus if the shareholders of a company are notified of a contract made by the directors, and take no objection to it, any plea founded on a defect in the directors' authority will be obviated.[1] Where *A.* was aware that *B.* had ordered goods for him, and took no steps in the matter, it was held that he was liable for the price, on the goods being lost in transit, though the purchase was beyond the authority given to *B.*[2] Where an agent for a landlord entered into a lease, and sent it to the landlord for his signature, and he kept it for a year and then disclaimed the agent's authority, the lease was found to be binding.[3] But where *A.* sent his clerk to recover a debt of £30 due to him by *B.*, and *B.*, paying the money, induced the clerk to give him an I.O.U. for £30 in *A.'s* name, it was held that *A.* might dispute the validity of the I.O.U. though he did not return the £30, on the ground that he was entitled to take it as payment of his debt.[4] The inference in favour of ratification will be stronger if goods have been supplied, or services rendered, to the principal.[5] But "there is no general equitable doctrine that because you have got the benefit of a man's work therefore you are bound to pay for it."[6] Such a state of facts may admit of the explanation that the agent was employed to do a particular piece of work for a contract price, and that the employer was entitled to assume that if others did the agent's work for him they did it in reliance upon his credit.[7] And ratification will not be implied unless the party alleged to have ratified had a choice in the matter. And so where an agent, without authority, ordered repairs on a ship, the owner was not liable for payment merely because he received and used the ship as repaired.[8] As a general rule, it is conceived that an action by the principal to enforce the agent's contract would amount to ratification of it: but where a trustee in bankruptcy sued for a sum, his right to which depended on a particular contract between the bankrupt and *B.*, it was held that he had not thereby adopted that contract so as to make himself personally liable to *B.* for the obligations which it imposed on the bankrupt.[9]

Conditions of Ratification.—The principal is not bound by acts which would ordinarily infer ratification, unless they are done with knowledge, or means of knowledge, of the nature of the contract into which the agent has entered on his behalf[10]—unless his words or conduct can be construed as evincing an intention to ratify the agent's act, no matter what it was.[11]

It is laid down that ratification cannot be partial, and therefore that

[1] See *ante*, p. 114.
[2] *Pierson* v. *Balfour*, 1st December 1912, F.C.; *Lombe* v. *Scott*, 9 1779, M. 5627.
[3] *Ballantine* v. *Stevenson*, 1881, 8 R. 959.
[4] *Woodrow* v. *Wright*, 1861, 24 D. 31.
[5] *Brown* v. *Dickson*, 1711, M. 6018; *Barnetson* v. *Petersen*, 1902, 5 F. 86; and see the cases already cited on the possibility of ratification by a company of contracts made before its formation, *supra*, p. 144.
[6] Per Fletcher Moulton, L.J., *In re English and Colonial Produce Co.* [1906], 2 Ch. 435, 443.
[7] *Robertson* v. *Beatson, M'Leod & Co.*, 1908, S.C. 921; *Mortimer* v. *Hamilton*, 1868, 7 M. 158; contrast *Smith* v. *Scott & Best*, 1881, 18 S.L.R. 355.
[8] *Foreman* v. *The "Liddesdale"* [1900], A.C. 190.
[9] *Sturrock* v. *Robertson's Tr.*, 1913, S.C. 582.
[10] See *Spackman* v. *Evans*, 1868, L.R. 3 H.L. 171, and other cases in *Company Law*, p. 115; *Ross, Skolfield & Co.* v. *State Line Co.*, 1875, 3 R. 134, per Lord Gifford, at p. 143.
[11] *Marsh* v. *Joseph* [1897], 1 Ch. 213.

ratification of any part of the agent's contract implies ratification of the whole.[1] But if an agent, without authority, orders goods, and the principal accepts part of the consignment, is he necessarily liable for the price of the whole? The analogy of the rule applied in the law of sale to the case where a larger quantity is sent than was ordered, *i.e.*, that the buyer may keep what he ordered and reject the rest, would seem to suggest a negative answer.[2]

It has been held that it is no bar to ratification by a principal whose name has been used without his consent that the object of the party using it was fraudulent, *i.e.*, that the agent used the name of the principal because he could not get credit on his own.[3]

Ostensible Authority of Agent.—In cases where the unauthorised act of an agent has not been ratified, the principal may nevertheless be liable on the ground that the particular act was within the apparent or ostensible authority of the agent. In other words, the principal may be barred from maintaining that the apparent or ostensible authority was not the actual authority.[4]

Prior Authority Revoked.—The case for personal bar may rest on the ground that the agent had at one time authority to enter into the contract or act in question, and that, although the authority was in fact withdrawn, notice of the withdrawal was not given. It may be stated as a general rule that a party who has dealt with an agent who once had authority is entitled to rely on the existence of that authority until he has notice or knowledge that it is withdrawn.[5] So if a man has authorised—either expressly or by recognising prior transactions—his wife,[6] a member of his family,[7] or a servant,[8] to buy goods on his credit from a tradesman, he cannot escape liability on the plea that the authority has been privately revoked. And where a partner withdraws from a firm, he continues liable on contracts entered into by the firm after his retirement, in a question with anyone who had dealt with the firm in the knowledge that he was a partner, had not received notice that he had retired, and had no private knowledge of that fact.[9]

Theory of Ostensible Authority.—Apart from cases turning on want of notice of the termination of an agent's authority, a principal may be bound because the agent's act was within his ostensible though not within his actual authority. In this branch of law, in which any general theory is difficult to find or apply, and where cases are often decided on the very vague ground that where one of two innocent parties must suffer for the fraud of a third, the loss should fall on the party who made the fraud possible, a distinction may be drawn between cases where the agent has been entrusted with the

[1] Bell, *Com.*, i. 513, note; Leake, *Contracts*, 7th ed., 325.

[2] Sale of Goods Act, 1893, sec. 30. Cp. *Smith* v. *Napier*, 1804, Hume, 338.

[3] *In re Tiedemann and Ledermann* [1899], 2 Q.B. 66.

[4] The term "implied authority" is sometimes used. But more properly implied authority means actual authority inferred from the facts of the case. Apparent or ostensible authority imports that as between principal and agent there is no authority, but that the principal may be barred from establishing that fact in a question with a third party. See opinion of Lord Ivory, *Earl of Galloway* v. *Grant*, 1857, 19 D. 865.

[5] Bell, *Prin.*, sec. 288; *North of Scotland Banking Co.* v. *Behn, Moller & Co.*, 1881, 8 R. 423.

[6] Fraser, *Husband and Wife*, 2nd ed., i. 623; contrast *Debenham* v. *Mellon*, 1880, 6 App. Cas. 24.

[7] *Knox* v. *Hay*, 1813, Hume, 351; *Ferguson & Lillie* v. *Stephen*, 1864, 2 M. 804.

[8] *Oliver* v. *Grieve*, 1792, Hume, 319; *Dewar* v. *Nairne*, 1804, Hume, 340.

[9] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 36; Bell, *Prin.*, sec. 382; *Mann* v. *Sinclair*, 1879, 6 R. 1078.

possession of property, or of documents indicative of ownership of property, and the question is whether rights over that property derived from the agent can be maintained against the principal, and cases where the agent contracts without being in possession of property, and the contention is that the principal is liable on the contract. In dealing with the former class of cases it is not proposed to discuss the general question whether a party taking property from one whom he mistakenly believes to be the owner can maintain his title in competition with the true owner, but the more limited question whether a party taking property from one who, to his knowledge, is acting as an agent, acquires a title to it on the ground that the agent was acting within his ostensible though not within his real authority.

Factors Acts.—In mercantile agency, what was in the main the common law[1] has been enacted by the Factors Act, 1889 (52 & 53 Vict. c. 45), extended to Scotland by the Factors Act, 1890 (53 & 54 Vict. c. 40), consolidating and repealing earlier statutes. The leading provisions of the Act, so far as relating to the ostensible authority of agents, are the following: Sec. 2 (1): "Where a mercantile agent[2] is, with the consent of the owner,[3] in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent,[4] shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same;[5] provided that the person taking under the disposition acts in good faith,[6] and has not at the time of the disposition notice that the person making the disposition has not authority to make the same." Sec. 2 (2): "Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined." Sec. 4: "Where a mercantile agent pledges goods as security for a debt or liability due from the pledger to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledger at the time of the pledge."[7]

Possession of Documents inferring Title.—In cases where the provisions of the Factors Act are not applicable, it would appear that the mere possession by an agent of documents generally regarded as indicative of ownership infers no ostensible authority to dispose of the property they represent, but that if,

[1] See Bell, *Com.*, i. 518 *et seq.*; *Pochin & Co.* v. *Robinows & Marjoribanks*, 1869, 7 M. 622; *Vickers* v. *Hertz*, 1871, 9 M. (H.L.) 63.

[2] Defined, sec. 1: "A mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." See *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332; *Cole* v. *North-Western Bank*, 1875, L.R. 10 C.P. 354; *Gillman, Spence & Co.* v. *Carbutt*, 1889, 61 L.T. 281; *Weiner* v. *Harris* [1910], 1 K.B. 285 (overruling *Hastings* v. *Pearson* [1893], 1 Q.B. 62); *Farquharson* v. *King* [1902], A.C. 25; *Loather* v. *Harris* [1927], 1 K.B. 393.

[3] Consent of the owner is to be presumed in the absence of any evidence to the contrary (sec. 2 (4)).

[4] *De Gorter* v. *Attenborough*, 1904, 21 T.L.R. 19.

[5] *Oppenheimer* v. *Attenborough* [1908], 1 K.B. 221 (the Act applies even when the custom of the particular trade is that agents, though in possession of goods, have no authority to pledge them).

[6] *Oppenheimer* v. *Fraser* [1907], 2 K.B. 50; *Turner* v. *Sampson*, 1911, 27 T.L.R. 200. See *infra*, p. 151.

[7] *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332; *Kaltenbach* v. *Lewis*, 1885, 10 App. Cas. 617.

in addition to possession, the agent has an actual but limited authority to dispose of the property, a disposition, though outwith his actual authority, will be binding on the principal.[1] So where an agent who was placed in possession of share certificates with blank transfers, with authority to pledge them for not less than a specified sum, pledged them for less and misappropriated the money, the pledgee was held to have a good title in a question with the owner.[2] On the other hand where an agent for a bondholder had the bond in his possession, and fraudulently transferred it, with a discharge to which he had forged the bondholder's name, to a purchaser of the subjects covered by the bond, it was decided that, as the agent had no authority of any kind to dispose of the bond, the purchaser could not refuse to return it to the bondholder.[3] But possession of property by an agent, with actual authority to pledge it, does not involve ostensible authority to subject it to a lien for a general balance due by him to the pledgee; and therefore where a bank advanced money to a stockbroker on the security of shares which were transferred, in the knowledge that the shares belonged to the stockbroker's clients, it was held that, while the security was good for sums expressly advanced, no general lien could be asserted for the balance due on the stockbroker's account.[4] The mere possession of moveable property by an agent, such as a carrier or forwarding agent, who is not a mercantile agent within the meaning of the Factors Act, 1889, does not involve any ostensible authority to dispose of it.[5]

Negotiable Instruments. When the subjects dealt with are negotiable instruments, and the person disposing of them is engaged in a business in which he may, in the ordinary course of trade, have authority to dispose of them though they do not belong to him, anyone dealing with him is entitled to assume that he has the authority of the owners to sell or pledge them, and will obtain a good title unless he has notice of the actual limits of the authority of the seller or pledger. Thus a bank taking negotiable securities from a stockbroker, with express or implied notice that they belong to the stockbroker's clients, is entitled to assume that in pledging them the stockbroker has the authority of the clients.[6] This rule holds even if the pledge is in security of a debt already due by the stockbroker,[7] or though the securities belonging to different clients are pledged *en bloc* for one advance,[8] but does not extend to the case where the bank's claim is founded on a general lien for a balance due on the stockbroker's account.[9] So, also, where a stockbroker who had sold shares for clients received the buyer's cheque, and paid it in to his own overdrawn account, it was held that the bank, though aware that the money had been derived from a transaction

[1] *Brocklesby* v. *Temperance Building Society* [1895], A.C. 173; *Fry* v. *Smellie*, 3 [1912] K.B. 282; *Bowie's Trs.* v. *Watson*, 1913, S.C. 326. The same principle applies to a signature on stamped paper; if given to an agent as custodier, with no actual authority to fill it up as a bill or promissory note, the signer is not liable to a holder in due course (*Smith* v. *Prosser* [1907], 2 K.B. 735); but if he gives the agent authority to fill it up for a certain sum, and this sum is exceeded, the signer is liable (*Lloyd's Bank* v. *Cooke* [1907], 1 K.B. 794).

[2] *Fry* v. *Smellie*, *supra*.

[3] *Bowie's Trs.* v. *Watson*, *supra*.

[4] *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740.

[5] *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332; *Mitchell* v. *Heys*, 1894, 21 R. 600.

[6] *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740; *London Joint Stock Bank* v. *Simmons* [1892], A.C. 201, explaining *Earl of Sheffield* v. *London Joint Stock Bank*, 1888, 13 App. Cas. 333, as a case depending on notice of limitation of authority.

[7] *Foster* v. *Pearson*, 1835, 1 C.M. & R. 849; approved in *London Joint Stock Bank* v. *Simmons*, *supra*. Cp. *Thomson* v. *Clydesdale Bank*, *infra*.

[8] *London Joint Stock Bank* v. *Simmons*, *supra*.

[9] *National Bank* v. *Dickie's Tr.*, *supra*; *Cuthbert* v. *Roberts* [1909], 2 Ch. 226.

on behalf of clients, was entitled to assume that the stockbroker had his clients' authority to deal with it as he had done.[1]

General and Limited Agents.—In cases where the agent enters into an unauthorised contract without having the principal's property in his possession, the question whether he has any ostensible authority depends primarily on the character of the agency. There is a somewhat indefinite distinction between general agents, *i.e.*, those who belong to some recognised branch of agency, and are employed to transact all the principal's business of a particular kind, and special agents—those who are employed for some special or isolated occasion. Third parties dealing with agents of the former class, which includes partners of a firm, mercantile agents, masters of a ship, and solicitors, are entitled to assume that the agent has the authority which agents of his class usually possess; dealing with agents of the latter class, they are put on their inquiry as to the actual authority.[2] The same general distinction has been expressed by Lord Young:[3] "When you have a particular agent employed by a principal to perform a particular piece of business for him, he must act within the instructions given for the particular occasion, and does not bind his principal if he acts otherwise. If you have a general agent employed generally in his master's or his principal's affairs, or in a particular department, he is assumed to have all the authority which is necessary to enable him to serve his master as such general agent, or general agent in a particular department." Of the principle thus expressed the cases cited below may serve as illustrations.[4]

[1] *Thomson* v. *Clydesdale Bank*, 1891, 18 R. 751; affd. 1893, 20 R. (H.L.) 59.

[2] Bell, *Prin.*, sec. 219 *et seq.*; Smith, *Mercantile Law*, 12th ed., 180.

[3] *Morrison* v. *Statter*, 1885, 12 R. 1152, at p. 1154.

[4] *Partner.*—"Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners . . ." (Partnership Act, 1890, sec. 5). So a partner in a trading firm has ostensible authority to borrow money—*Dewar* v. *Miller*, 1766, M. 14569 (linen merchant); *Cameron* v. *Young*, 1871, 9 M. 786 (farmer); *Bryan* v. *Butters*, 1892, 19 R. 490 (contractors); *Paterson Brothers* v. *Gladstone*, 1891, 18 R. 403 (builders): to draw or accept bills of exchange—*Blair Iron Co.* v. *Allison*, 1855, 1 Paterson's Appeals, 609; 18 D. (H.L.) 19: to accede to a composition contract—*Mains & M'Glashan* v. *Black*, 1895, 22 R. 329: to buy goods in which the firm deals—*Logy* v. *Durham*, 1697, M. 14566: to hire servants or labour—*Ciceri* v. *Hunter*, 1904, 12 S.L.T. 293; *Beckham* v. *Drake*, 1841, 9 M. & W. 79: not generally to grant a cautionary obligation—*M'Nair* v. *Gray, Hunter & Spiers*, 1803, Hume, 753; *Blair* v. *Bryson*, 1835, 13 S. 901; *Shiell's Trs.* v. *Scottish Property, etc., Society*, 1884, 12 R. (H.L.) 14; per Lord Blackburn, at p. 23: or to refer a question to arbitration—*Lumsden* v. *Gordon*, 1728, M. 14567; Chitty, *Contracts*, 16th ed., 305: or to accept shares in satisfaction of a debt—*Niemann* v. *Niemann*, 1889, 43 Ch. D. 198: as to taking a lease, see *Cooke's Circus Building Co.* v. *Welding*, 1894, 21 R. 339; *Clements* v. *Norris*, 1878, 8 Ch. D. 129; and see Lindley, *Partnership*, 9th ed., 186, and, as to ostensible authority of partner in a firm of law agents—*Walker* v. *Smith*, 1906, 8 F. 619; *Rhodes* v. *Moules* [1895], 1 Ch. 236. *Manager of a business* has no ostensible authority to borrow money—*Ross, Skolfield & Co.* v. *State Line Co.*, 1875, 3 R. 134; *Sinclair, Moorhead & Co.* v. *Wallace*, 1880, 7 R. 874; *Jacobs* v. *Morris* [1902], 1 Ch. 816, even in the case of the manager of a branch of a bank—*Bank of Scotland* v. *Watson*, 1806, M. App. *v.* Mandate, No. 3; revd. 1813, 1 Dow, 40; and see *Normand* v. *Macartney*, 1823, 2 S. 452; *Craw* v. *Commercial Bank*, 1840, 3 D. 193; *National Bank* v. *Martin*, 1848, 11 D. 1; Bell's *Prin.*, sec. 231: if manager of a shop, hotel, etc., has ostensible authority to receive payment of accounts, and to order goods suitable to the particular business—*Muirhead* v. *Douglas*, 1609, M. 6020; *Bruce* v. *Beat*, 1765, M. 4056; *Gemmell* v. *Annandale*, 1899, 36 S.L.R. 658, and see *infra*, p. 152: has not generally ostensible authority to draw or accept bills—*Turnbull* v. *M'Kie*, 1822, 1 S. 353; *Swinburne* v. *Western Bank*, 1856, 18 D. 1025; *Ross, Skolfield & Co.* v. *State Line Co.*, 1875, 3 R. 134, per Lord Young (Ordinary): but this may be implied from the nature of the business—*Edmunds* v. *Bushell*, 1865, L.R. 1 Q.B. 97: not to make obligatory representations as to credit of a third party—*Hockey* v. *Clydesdale Bank*, 1898, 1 F. 119 (bank agent). A *commercial traveller* has authority to accept orders for goods in his employer's line—*Milne* v. *Harris*, 1803, M. 8493; *Barry, Ostlere & Shepherd* v. *Edinburgh Cork Importing Co.*, 1909, S.C. 1113: as to

Acts in Agent's Own Interests. The ostensible authority of an agent, wide or narrow as the case may be, is limited to acts done professedly in the course of the business in which he is employed as agent, and cannot be appealed to by a party who knows that the agent is acting in his own interests and not for behoof of his principal. So an action to enforce an obligation to deliver iron, signed by a manager who had power to grant such an obligation, was held irrelevant in the absence of averments that the obligation in question was granted for onerous causes.[1] An authority to grant obligations for onerous causes does not import any ostensible authority to grant them gratuitously. In *Walker* v. *Smith*,[2] the partner of a firm of law agents borrowed money, which, as the lender knew, was for his own private use. He gave heritable security, and, as the title to the subjects which he conveyed did not stand in his own name, he entered into an obligation, to which he signed the firm name, to clear the record and exhibit a valid progress of titles. On his bankruptcy, it appeared that the heritable subjects were affected by a prior claim, and the lender sued the firm on the obligation to clear the record. Assuming that it was within the ostensible authority of a partner in a firm of law agents to grant such an obligation on behalf of a client for whom the firm were borrowing money, it was held that as the obligation was granted, to the knowledge of the party who received it, for a private debt of the partner, and not in the course of the partnership business, it was not binding on the firm unless it was actually authorised.

Notice of Limits of Agent's Authority.—It is clear that a party dealing with an agent, and knowing that the agent is exceeding his authority, cannot make the principal liable on the ground that the contract in question was within the agent's ostensible authority.[3] Even where actual knowledge is

a stockbroker's clerk or runner, see *Spooner* v. *Browning* [1898], 1 Q.B. 528; *Robb* v. *Gow*, 1905, 8 F. 90. *Law agent* has no ostensible authority to refer his client's case to arbitration—*Livingstone* v. *Johnson*, 1830, 8 S. 594; *Black* v. *Laidlaw*, 1844, 6 D. 1254: or to bind his client to a contract, *e.g.*, a lease—*Danish Dairy Co.* v. *Gillespie*, 1922, S.C. 656: as to his authority to receive payments, see *supra*, p. 131. *Auctioneer* has no ostensible authority to warrant—*Payne* v. *Lord Leconfield*, 1882, 51 L.J. Q.B. 642: or to sell below a reserve price—*M'Manus* v. *Fortescue* [1907], 2 K.B. 1. *Factor* on estate has no ostensible authority to grant leases—*Ballantine* v. *Stevenson*, 1881, 8 R. 959: or servitudes—*Macgregor* v. *Balfour*, 1899, 2 F. 345: if he has authority to grant a lease, he has ostensible authority to modify its terms *Grant* v. *Sinclair*, 1861, 23 D. 796: if factor or manager of mineral works, has no ostensible authority to grant a feu—*Steuart* v. *Johnston*, 1857, 19 D. 1071. *Servant*, such as housekeeper, coachman, has no ostensible authority to order goods on his master's credit, unless there has been a course of dealing recognised by the master—*Inches* v. *Elder*, 1793, Hume, 322; *Mortimer* v. *Hamilton*, 1868, 7 M. 158; *Wright* v. *Glyn* [1902], 1 K.B. 745. *Secretary of a company* is a mere servant, has no ostensible authority to certify that shares have been lodged with the company—*George Whitchurch Ltd.* v. *Cavanagh* [1902], A.C. 117: or to bind the company by issuing new share certificates—*Ruben* v. *Great Fingall, etc., Co.* [1906], A.C. 439; or to any contract—*Houghton & Co.* v. *Nothard, Lowe & Wills* [1928], A.C. 1. *Insurance broker* has no ostensible authority to cancel a policy—*Xenos* v. *Wickham*, 1867, L.R. 2. H.L. 296; *Lamont, Nisbett & Co.* v. *Hamilton*, 1907, S.C. 628: as to effecting re-insurance, see *Ferguson, Lamont & Co.* v. *Hutchison*, 1888, 4 Sh. Ct. Rep. 155. *Stationmaster*, having actual authority to employ doctor for one visit in the event of railway servant being injured, has no ostensible authority to arrange for further attendance on the same case—*Montgomery* v. *North British Rly. Co.*, 1878, 5 R. 796. *Architect* has authority to alter details of construction, but not to authorise the substitution of one material for another—*Forrest* v. *Scottish County Investment Co.*, 1915, S.C. 115; affd. 1916, S.C. (H.L.) 28; and see English cases collected in Bowstead, *Agency*, 7th ed., 94.

[1] *Colvin* v. *Dixon*, 1867, 5 M. 603; *Hamilton* v. *Dixon*, 1873, 1 R. 72.

[2] 1906, 8 F. 619.

[3] *North of Scotland Banking Co.* v. *Behn, Möller & Co.*, 1881, 8 R. 423 (knowledge of bank agent binding on the bank); *Smith* v. *North British Rly. Co.*, 1850, 12 D. 795; *Russo-Chinese Bank* v. *Li Yau Sam* [1910], A.C. 174; *City of Glasgow Bank* v. *Moore*, 1881, 19 S.L.R. 86. See also, as to acts in the internal management of a company, *supra*, p. 115.

not proved, the circumstances may be such as to involve the duty of inquiry, and the party dealing with the agent may be precluded from any claim against the principal on the ground that his failure to make the investigation, which a reasonable (and honest) man would have made in the circumstances, has given occasion to the agent's fraud.[1] In *Paterson Brothers* v. *Gladstone* the partner of a firm of builders, who had no actual authority to borrow money for the firm, signed the firm name to a promissory note, and used the proceeds for his own purposes. The rate of interest was 40 per cent. The Court had no doubt that borrowing money was within the ostensible authority of the partner, but held that a lender on such terms was bound to inquire as to the actual authority, and must bear the loss if he did not. And if when goods are bought from one who has no authority to sell them the Court comes to the conclusion that the buyer made no inquiries because he suspected that there was something wrong, he will obtain no better title than the agent had to give him.[2]

Illegal Act by Agent.—It would appear that an agent has never any ostensible authority to do an act forbidden by law. So where the managing partner of a business gave his workmen orders on a particular shop in part payment of their wages, in contravention of the Truck Act, 1831 (1 & 2 Will. IV. c. 37), and had in fact no authority to do so, it was held that the shopkeeper could not recover his account from the other partners, on the plea that the orders were within the ostensible authority of the partner who gave them.[3]

Agent in Charge of Business.—Up to this point the question of the liability of the principal on contracts falling within the ostensible authority of the agent has been considered in reference to cases where the party with whom the agent contracted was aware that he was dealing with an agent, and relied on his authority to bind the principal whom he purported to represent. They have been cases in which the pursuer has been able to found his case upon personal bar or estoppel; to maintain that the principal was barred from disputing the authority of the agent in a question with one who had dealt in reliance on it. And in general this is an essential feature of the pursuer's case. But it is probably the law that if an agent is placed in apparently complete and uncontrolled management of a business, the principal is liable on all contracts which fall within the ordinary conduct of that business, even although he has given private instructions that these particular contracts are not to be entered into, and although the other party may have known nothing of the existence of the principal, and may have dealt in reliance on the credit of the agent, or generally, on the credit of the business.[4] "It is no doubt true that if a person whose name may be unknown to third parties carries on a business by means of another, whom he allows to be held out as his general agent, the principal cannot plead any private stipulations between him and his agent in bar of his liability."[5] So a principal has been

[1] *Paterson Brothers* v. *Gladstone*, 1891, 18 R. 403; *Hayman* v. *American Cotton Co.*, 1907, 45 S.L.R. 207; *Earl of Sheffield* v. *London Joint Stock Bank*, 1888, 13 App. Cas. 333.

[2] *Jones* v. *Gordon*, 1877, 2 App. Cas. 616; *Nelson* v. *Easdale Slate Quarries Co.*, 1910, 1 S.L.T. 21 (O.H. Lord Salvesen); *Heap* v. *Motorist's Advisory Agency* [1923], 1 K.B. 577; *Reckitt* v. *Barnett, Pembroke, & Slater*, 1928, 107 L.T. 361; where it is pointed out that a party pleading ostensible authority must shew that he in fact relied on the existence of authority.

[3] *Finlayson* v. *Braidbar Quarry Co.*, 1864, 2 M. 1297.

[4] *Edmunds* v. *Bushell*, 1865, L.R. 1 Q.B. 97; *Watteau* v. *Fenwick* [1893], 1 Q.B. 346. Cp. *Eaglesham* v. *Grant*, 1875, 2 R. 960; *Stewart* v. *Buchanan*, 1903, 6 F. 15.

[5] Per Lord Neaves, *Eaglesham* v. *Grant*, 1875, 2 R. 960, at p. 968.

held liable where the manager of a business signed bills of exchange in the firm name ;[1] where the manager of a public house ordered spirits.[2] In both cases the manager was acting in contravention of his instructions ; in neither was the plaintiff aware of the existence of the principal.

Doubts have been expressed as to these cases,[3] and a decision apparently inconsistent with them has been given.[4] Nor is it easy to see on what principle, either of contract or personal bar, a man can be held liable to fulfil a contract for which he has given no authority, and in which his credit was not relied on.[5]

Liability on Principle of Recompense. —There is another ground on which a principal may incur liability through the unauthorised act of his agent—that he has thereby obtained a gratuitous advantage. Liability on the ground may be asserted when the agent's act is not within his ostensible authority, and whether it is merely mistaken or fraudulent. The theory is, not that the principal is liable to implement the obligations undertaken by the agent, but that, on general principles of equity, he is liable to pay for an advantage for which he has given no consideration, and which he has obtained at the expense of a third party. The principle rests on the maxim *nemo debet locupletari aliena jactura*, and will be more fully considered in a later chapter.[6] It finds an early illustration, in its application to the law of agency, in a case in which it was held that a father, who was able to repudiate a contract by which his wife had apprenticed their son, as beyond her authority, was nevertheless indebted in that proportion of the apprentice-fee or premium which represented the aliment of the son, which he would otherwise have been bound to furnish.[7]

On this doctrine it is established that where an agent obtains money, either by the unauthorised use of his principal's credit, or by resort to forgery, and uses it for the purposes of the principal, or to meet obligations for which the principal is liable, the mere fact that he gave the agent no actual or ostensible authority to use his credit, or that he was not cognisant of the agent's fraud, will not enable the principal to keep the advantage which he has thus gratuitously obtained. He will be liable to the party from whom the money was obtained in so far as he has been enriched thereby.[8] And it is immaterial that the obligations discharged were imposed upon the principal by the antecedent fraud of the agent.[9]

Liability of Agent. —If an agent contracts without authority in circumstances which preclude the enforcement of the contract against the principal,

[1] *Edmunds* v. *Bushell, supra* ; approved in *Eaglesham* v. *Grant, supra.*

[2] *Watteau* v. *Fenwick, supra.* [3] Lindley, *Partnership*, 8th ed., 156.

[4] *Kinahan* v. *Parry* [1911], 1 K.B. 459. The opinions in the Court of Appeal are, unfortunately, not given.

[5] The importance of these cases seems lessened by the decision of the House of Lords in *Lloyd* v. *Grace, Smith & Co.* [1912], A.C. 716. It was there held that a principal is liable in damages for the fraudulent acts of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. So, in cases of the class of *Edmunds* v. *Bushell* and *Watteau* v. *Fenwick*, if the agent's act is a fraud on the party with whom he dealt, the principal, if not liable on the contract, will be liable in damages ; and such cases are peculiarly favourable to the application of the argument that where one of two innocent parties must suffer for the fraudulent act of a third, he who made the fraud possible should bear the loss. See opinion of Lord Shaw in *Lloyd* v. *Grace, Smith & Co.*

[6] *Infra*, Chap. XVIII. [7] *Arnot* v. *Stevenson*, 1698, M. 6017.

[8] *British Linen Co.* v. *Alexander*, 1853, 13 D. 277 ; *Traill* v. *Smith's Trs.*, 1876, 3 R. 770 ; *Clydesdale Bank* v. *Paul*, 1877, 4 R. 626 ; *New Mining, etc., Syndicate* v. *Chalmers & Hunter*, 1912, S.C. 126 ; *Bannatyne* v. *M'Iver* [1906], 1 K.B. 103 ; *Reversion Fund and Insurance Co.* v. *Maison Cosway* [1913], 1 K.B. 364.

[9] *Clydesdale Bank* v. *Paul*, 1877, 4 R. 626 ; *Reid* v. *Rigby* [1894], 2 Q.B. 40.

there are various grounds upon which the other party to the contract may found a claim against the agent. If he contracts without stating that he is acting as an agent he is liable as a party to the contract, and his liability is not excluded by the fact that the other party to the contract supposed him to be an agent, and, on that supposition, relied on the credit of the person whom he erroneously supposed to be the principal. On discovering the true facts he is entitled to sue the party with whom he actually contracted.[1] Again, if the agent contracts expressly as an agent, and is aware of his want of authority, he is liable in damages on principles of delict.[2] If, on the other hand, he acted in the mistaken belief that he had authority, no wrong has been committed, and any remedy sought must be rested on contractual grounds. These vary, according as the want of authority is due to the inability of the principal to give it, or to the fact that, though able to give authority, he has not done so. In the former case the defect in authority may be due to the fact that the nominal principal is a body non-existent in fact, or not recognised as a possible contractual party in law. The chief, if not the only case, of contracts on behalf of a non-existent body is when contracts are made on behalf of a company which is as yet unincorporated. Then, as the non-existent company cannot be bound, and is unable, when formed, to ratify the agent's act,[3] the agent is held to be a party to the contract, and subject to the obligations which it entails. In the latter case, when an agent contracts on behalf of some unincorporated body which cannot be a contractual party, he may be held personally liable as a party to the contract, though its terms may be such as would not ordinarily infer any intention to undertake personal liability, on the ground that the only alternative is to hold that the obligation is entirely nugatory. Thus where *A.*, *B.*, and *C.* signed a promissory note "in the name and on behalf of" a particular congregation, it was held that as a congregation could not be bound by a promissory note, *A.*, *B.*, and *C.* were personally liable as contracting parties.[4] The ground of the decision, as explained in the opinion of Lord Young, was that the creditor in the note must have assumed that he was getting an obligation binding on somebody; the debtors must be supposed to have undertaken liability in the hope that the members of the congregation, though not legally bound, would feel morally bound to relieve them.

Agents for Clubs.—In the case of a club, which is not registered as a company or otherwise incorporated, the members as such are not liable for the club debts, and the actual contracting parties, or those who authorise them, incur personal liability.[5] The argument that a party who supplies goods to a club without knowing to whom he is to look for payment does not expect any contractual obligation has been put forward and rejected.[6]

[1] *Gardiner* v. *Heading* [1928], 2 K.B. 284. [2] Story, *Agency*, sec. 264.

[3] *Supra*, p. 144; *Kelner* v. *Baxter*, 1866, L.R. 2 C.P. 174.

[4] *M'Meekin* v. *Easton*, 1889, 16 R. 363; *Wallace* v. *Robertson*, 1838, 16 S. 1065; *Furnivall* v. *Coombes*, 1843, 5 M. & G. 736. None of these cases were cited in *Bank of Scotland* v. *Pursell*, 1914, 1 S.L.T. 48, when the L.O. (Hunter) held that a member of the deacon's court of a church, present at a meeting at which an overdraft was authorised, incurred no personal liability. According to English law, if in such circumstances the contract would infer personal liability, an express and absolute disclaimer is ineffectual, but a limitation of liability will receive effect (*Furnivall* v. *Coombes*, *supra*, as explained in *Williams* v. *Hathaway*, 1877, 6 Ch. D. 544, 549). Would the Scotch Courts uphold such an invasion of freedom of contract?

[5] *Thomson* v. *Victoria Eighty Club*, 1905, 43 S.L.R. 628; *Flemyng* v. *Hector*, 1836, 2 M. & W. 172; *Todd* v. *Emly*, 1841, 7 M. & W. 427; *Wise* v. *Perpetual Trustee Co.* [1903], A.C. 139; *Overton* v. *Hewitt*, 1886, 3 T.L.R. 246; *Steele* v. *Gourley & Davis*, 1887, 3 T.L.R. 772.

[6] *Steele* v. *Gourley & Davis*, *supra*.

When goods were ordered, or cheques drawn, by the commanding officer of a regiment of volunteers, it has been treated as a question of fact, in each case, whether the tradesman or bank contracted in reliance on the Government grants, or whether he was entitled to assume that the commanding officer was pledging his own credit.[1]

Implied Warranty of Authority.—Where the defect in the agent's authority is due to the fact that the principal, though able to give authority, has not done so, it is established that the agent is not liable on the contract,[2] unless its terms be such as would make him a party to it, even if he had his principal's authority. But by what amounts to a legal fiction, it will be implied that he contracts that he has authority, and he will therefore be liable in damages for breach of that contract if it turns out that he has none.[3] So, as his liability is for breach of contract, and not for delict or negligence, it is immaterial whether the agent had, or had not, the means of discovering that the authority which he professed to have was in fact non-existent. Accordingly, this ground of liability has been enforced in cases of merely accidental mistake, as where an auctioneer sold a horse which was not for sale;[4] or a broker, instructed to apply for shares in a particular company, by mistake applied for shares in another company with a similar name;[5] in cases where an agent has misread his authority, as where an agent granted a lease which he had no actual authority to grant;[6] in cases where directors of a company have issued debentures in excess of statutory limits;[7] and in cases where, without the agent's knowledge, an actual authority has been determined by the death or insanity of the principal.[8]

Implied Warranty apart from Agency.—It may be noted, though it is perhaps scarcely relevant to the law of principal and agent, that the rule that the assertion of authority implies a contract that the authority exists is of general application. The contention that it was limited to the case where an agent purported to enter into a contract on behalf of a principal was rejected by the Courts in England,[9] and it is there established that it is a general rule of law, applicable to all cases where *A.*, by representing as a matter of fact that he possesses a certain authority, has induced *B.* to act to his prejudice. The general principle has been expressed very broadly by the Lord Chancellor (Halsbury): "It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the party doing it, and which act turns out to be injurious to the rights of a third party, the party doing it is entitled to an indemnity from the party requesting it to be done."[10] So a solicitor warrants that he has the authority of the client for whom he

[1] *National Bank* v. *Shaw*, 1913, S.C. 133; *Jones* v. *Hope*, 1880, 3 Times L.R. 24, note; *Samuel Brothers* v. *Whetherly* [1908], 1 K.B. 184.

[2] Bell, *Com.*, i. 543, note; *Collen* v. *Wright*, *infra*; *Lewis* v. *Nicholson*, 1852, 18 Q.B. 503.

[3] Bell, *Com.*, i. 543, note; Pothier, *Obligations*, sec. 75; Pollock, *Contract*, 9th ed., 114; Leake, *Contracts*, 7th ed., 361; *Collen* v. *Wright*, 1857, 8 E. & B. 647 (generally referred to as the leading case); *Lewis* v. *Nicholson*, 1852, 18 Q.B. 503; *Meek* v. *Wendt*, 1888, 21 Q.B.D. 126; *Edwards* v. *Porter* [1923], 2 K.B. 538.

[4] *Anderson* v. *Croall*, 1903, 6 F. 153.

[5] *In re National Coffee Palace Co.*, 1883, 24 Ch. D. 367.

[6] *Collen* v. *Wright*, *supra*.

[7] *Firbank's Exrs.* v. *Humphreys*, 1886, 18 Q.B.D. 54.

[8] *Yonge* v. *Toynbee* [1910], 1 K.B. 215, practically overruling *Smout* v. *Ilbery*, 1842, 10 M. & W. 1.

[9] *Starkey* v. *Bank of England* [1903], A.C. 114.

[10] *Sheffield Corporation* v. *Barclay* [1905], A.C. 392, at p. 397.

proposes to act, and will be liable in expenses to the other party if it turns out that he has not.[1] A company which has issued new share certificates on a forged transfer, and is in consequence compelled to recognise the rights both of a third party, to whom the shares have been transferred, and of the original shareholder, whose name has been forged, has a right to indemnity from the stockbroker, or security holder, who, himself deceived, has induced them to act on the forged transfer.[2]

Limits of Law of Implied Warranty. The rule that an agent contracts that he has the authority of his principal is not without limitations. It does not apply if the other party to the contract was aware of the limitations of the agent's authority, and took his signature on the chance that the principal might ratify it.[3] Where, at a sale by auction, it was stated that the articles were exposed subject to a reserve price, and the auctioneer, by mistake, sold an article for less, it was held that he had not warranted his authority to sell below the reserve price, and was therefore not liable to the successful bidder.[4] And where a ship-broker entered into a contract "by telegraphic authority," the phrase was held to indicate, on proof of a custom of trade to that effect, that he did not engage that his interpretation of the telegram was correct. He was therefore not liable when it proved to be mistaken.[5] It has been held in England that where a contract is made expressly on behalf of the Crown, the party who makes it cannot be held liable on the ground that he has warranted that he has authority to make it.[6] And, generally, the representation on which an agent may be held liable must be a representation of fact, not merely of law. So if an agent, having a written authority, submits it to the considered judgment of a party with whom he proposes to contract, and that party, deeming it sufficient, completes the contract, he will have no remedy against the agent should it afterwards be established that the particular contract is not covered by the authority.[7] And it is conceived that where directors contract on behalf of a company, and *ex facie* bind it to something which it has no power to do, then, as the means of discovering the powers of a company are open to all, the representation is merely one of law, and the directors are not personally liable.[8]

In *Salvesen* v. *Rederi Aktiebolaget Nordstjernan*[9] the Court of Session held that the rules explained in the preceding paragraphs extended to the case where an agent, mistakenly, represented to his principal that he had

[1] *Yonge* v. *Toynbee* [1910], 1 K.B. 215; *Simmons* v. *Liberal Opinion Ltd.* [1911], 1 K.B. 966. In *Livingstone* v. *Johnson* (1830, 8 S. 594) a law agent, who had, without authority, engaged his client in a reference, was held liable not only for the expenses incurred by the other party, but to implement the award. But *quære* if this is consistent with the modern doctrine that the agent, in such cases, is not liable as a party to the contract, but only as engaging that he has authority.

[2] *Starkey* v. *Bank of England* [1903], A.C. 114; *Sheffield Corporation* v. *Barclay* [1905], A.C. 392; *Bank of England* v. *Cutler* [1908], 2 K.B. 208. The circumstances must amount to a request, express or implied from the facts, to do the act which results in loss. If *A.* introduces *B.* to *C.*, merely as a person desirous to do business, and without requesting *C.* to do a particular act for *B.*, and *C.* is involved in loss owing to *B.'s* fraud, *A.*, if in good faith, is not liable (*Bank of England* v. *Cutler*, 1909, 25 T.L.R. 509).

[3] *Halbot* v. *Lens* [1901], 1 Ch. 344.

[4] *M'Manus* v. *Fortescue* [1907], 2 K.B. 1.

[5] *Lilly* v. *Smales* [1892], 1 Q.B. 456. See also *Svart* v. *Haigh*, 1893, 9 T.L.R. 488 (H.L.).

[6] *Dunn* v. *Macdonald* [1897], 1 Q.B. 555. And see *infra*, p. 160.

[7] See opinion of Mellish, L.J., *Beattie* v. *Lord Ebury*, 1872, L.R. 7 Ch. 777, at p. 800 (1874, L.R. 7 H.L. 102).

[8] *Supra*, p. 118.

[9] 1903, 6 F. 64; 1905, 7 F. (H.L.) 101. See also *Cassabouglou* v. *Gibb*, 1883, 11 Q.B.D. 797.

completed a contract on his behalf with a third party, and that the agent was therefore liable to the principal for the loss of the profit he would have gained if the contract had in fact been completed. In the House of Lords this judgment was altered, and it was held that the agent, though liable for any expense into which his mistaken statement might have led the principal, was not liable for loss of profit, on the ground that he was not acting, and had not represented that he was acting, for the third party who was alleged to have contracted.

Measure of Damages. The measure of the damages for which an agent who has assumed authority when he has none may be liable depends on the nature of the representations he has made. In all cases where the rule of *Collen* v. *Wright* [1] applies he is liable for any loss which actings in reliance on his representation may have occasioned.[2] In the case where he represents to a third party that he has authority to bind his principal to a contract, he is further liable for the loss of the profit which that third party would have gained if the representation had been true. So where an auctioneer, without authority, sold a horse, it was held that the purchaser was entitled to recover the difference between the price and the ascertained value of the horse.[3] Where an agent, without authority, applied for shares in a company on behalf of a principal, it was held, in the liquidation of the company, that the damages to be recovered from the agent were to be measured by considering the benefit which the company would have obtained if the principal had been actually bound to take the shares, and that, in that question, the solvency of the alleged principal, and the chance which the company had of allotting the shares to other parties, were relevant considerations.[4] So where an agent had contracted ostensibly on behalf of a company, and the party with whom he had contracted claimed damages from him, averring that the company had given no authority and also that it had no assets, the case was dismissed as irrelevant, on the ground that, on his own statement, the pursuer had suffered no loss. As the company had no assets he could recover nothing from it, and had therefore sustained no loss by the fact that it was not bound.[5]

Agent's Title to Sue. Where an agent contracts nominally on behalf of a named principal, has in fact no authority from the party named, and is really contracting on his own account, he cannot sue on the contract.[6] The other party, who has contracted in reliance on the credit of the supposed principal, is not to be forced into a contract with the agent which he did not intend to make. So where *A.* sold goods "on account of" *B.*, Lord Rutherfurd Clark, holding on the facts that he was selling his own goods, was of opinion that he could not enforce the contract, on the ground that the buyer did not intend to make any contract except with *B.*, and if that contract was not made he was necessarily free.[7] But if the other party to the contract, after he has learned that the agent had really no principal,

[1] See *supra*, p. 155, note 3.

[2] *Starkey* v. *Bank of England* [1903], A.C. 114, and other cases cited, *supra*, p. 155; *Randall* v. *Trimen*, 1856, 18 C.B. 786 (costs in unsuccessful action against principal).

[3] *Anderson* v. *Croall*, 1903, 6 F. 153. The case shews the artificiality of the rule of *Collen* v. *Wright*. The purchaser recovered substantial damages. What had he lost? The chance of buying a horse which was not for sale.

[4] *In re National Coffee Palace Co.*, 1883, 24 Ch. D. 367.

[5] *Irving* v. *Burns*, 1915, S.C. 260.

[6] *Bickerton* v. *Burrell*, 1816, 5 M. & S. 383; *Rayner* v. *Grote*, 1846, 15 M. & W. 359; Pollock, *Contract*, 9th ed., 112.

[7] *Stewart, Brown & Co.* v. *Biggart & Fulton*, 1893, 21 R. 293. The case was decided adversely to Lord Rutherfurd Clark's opinion, but on other grounds.

accepts a partial fulfilment of the contract (for instance, by accepting part of goods sold), the contract will be fully binding on him.[1] And if the agent is sued for damages he is entitled, provided that the contract is one not involving *delectus personæ*, to meet the claim by tendering performance himself.[2]

These rules do not extend to the case where a contract is made nominally as agent, but without naming the principal, and the fact is that the agent himself is the real contracting party. Then he has a title to sue.[3] In *Schmaltz* v. *Avery* the ground of judgment was that it was not to be supposed that the other party was willing to contract with all the world except the agent. A later case carried the law further. By a charter-party in February, *A.*, contracting as agent for owners, and without naming the ship, contracted to carry a cargo for *B.* at certain fixed rates of freight. He was not in fact acting for anyone. In May he chartered a ship from *B.* at lower rates of freight, and in this ship the goods were carried, and paid for under the bills of lading, at the lower rates of freight specified in the May charter-party. In an action by *A.* against *B.* for the difference between the freight paid and the amount due at the rates in the February charter, Pickford, J., accepted the evidence of *B.* that he would not have contracted had he known that *A.* was not acting for owners, but speculating on a possible fall in freights, but held, nevertheless, on the authority of *Schmaltz* v. *Avery*, that *A.* was entitled to enforce the provisions of the original charter-party.[4]

In the case where a contract is made by an agent ostensibly on behalf of a non-existent principal (*e.g.*, a company not yet formed), Sir F. Pollock expresses the opinion that as the nominal agent is liable as a party to the contract, he is also entitled to enforce it.[5]

[1] *Rayner* v. *Grote*, 1846, 15 M. & W. 359.
[2] *Stewart, Brown & Co.* v. *Biggart & Fulton, supra*, per Lord Rutherfurd Clark, at p. 301.
[3] *Schmaltz* v. *Avery*, 1851, 16 Q.B. 655; *Harper* v. *Vigers Brothers* [1909], 2 K.B. 549; *Carr* v. *Jackson*, 1852, 7 Ex. 382.
[4] *Harper* v. *Vigers Brothers* [1909], 2 K.B. 549.
[5] *Contract*, 9th ed., 117; and see *ante*, p. 154.

CHAPTER IX

THE CROWN AS PARTY TO CONTRACTS

Liability on Contract.—The general power of the Crown, through the agency of a Crown official or department of State, to incur obligations by contract, has not been the subject of express decision in Scotland, but there would seem little doubt that the authority of the English decisions, so far as they relate to questions of substance and not merely of procedure, is recognised.[1] On English authority it is established as a general proposition that the Crown may be made liable on contract, or for damages for breach of contract.[2] But in cases where the obligation is to pay money it is, however expressed, to be read as an obligation to pay if funds are provided by Parliament for the particular purpose; consequently, if no such funds are provided, no breach of contract is involved in non-payment.[3] And, as no officer of the Crown has any authority to make any payment, except as authorised by Parliament, the liability of the Crown for damages must be under the same qualification.[4] In *Amphitrite* v. *The King*,[5] Rowlatt, J., held that the Crown cannot contract so as to limit the action of the executive in the future, and therefore that an agreement made, during war, between a Government department and the owner of a neutral ship, under which the ship was guaranteed against delay in clearance in British ports, was not binding.

Contracts with Crown Servants.—The Crown, in employing any servant, military or civil, does not, unless some particular statute is applicable to the case, enter into any contract on which the servant can found with regard to the duration of the service. No Crown official has any implied authority to engage subordinates so that they are guaranteed employment for any definite time.[6] The same rule holds with regard to the pay,[7] or pension,[8] of any member of the combative services, which cannot be recovered by any legal proceedings. In *Mulvenna* v. *The Admiralty*,[9] Lord Blackburn was of

[1] *Smith* v. *Lord Advocate*, 1897, 25 R. 112; opinion of Lord Kincairney (Ordinary), at p. 122; *Wick Harbour Trs.* v. *The Admiralty*, 1921, 2 S.L.T. 109 (O.H., Lord Sands); *Mulvenna* v. *The Admiralty*, 1926, S.C. 842, opinion of Lord Blackburn. In *Macgregor* v. *Lord Advocate*, 1921, S.C. 847, the Lord Justice-Clerk (Scott Dickson) expressed the opinion that at the Union in 1707 the English constitutional law as to the position of the Crown became law in Scotland. If this be so there is an exception in the case where the question is affected by the terms of a Scots Act. The *Crown* v. *Magistrates of Inverness*, 1856, 18 D. 366.

[2] *The Bankers' Case*, 1700, 14 Howe, State Trials, 1; *Thomas* v. *The Queen*, 1874, L.R. 10 Q.B. 31; *Windsor and Annapolis Rly.* v. *The Queen*, 1886, 11 App. Cas. 607. See Anson, *Law of the Constitution*, vol. ii. 209, and, on the whole subject, Robertson, *Civil Proceedings by and against the Crown* (1908).

[3] *Churchward* v. *The Queen*, 1865, L.R. 1 Q.B. 173; *Attorney General* v. *Great Southern Rly.* [1925], A.C. 754, where it was pointed out that departmental liability was unknown in the law.

[4] *Auckland Harbour Board* v. *The King* [1924], A.C. 318.

[5] [1921], 3 K.B. 500.

[6] *De Dohse* v. *Regina*, 1886, 3 T.L.R. 114; *Shenton* v. *Smith* [1895], A.C. 229; *Dunn* v. *Regina* [1896], 1 Q.B. 116; *Mulvenna* v. *The Admiralty*, 1926, S.C. 842. As to the terms of a statute from which a binding engagement may be inferred, see *Gould* v. *Stuart* [1896], A.C. 575; *Leaman* v. *The King* [1920], 3 K.B. 663.

[7] *Smith* v. *Lord Advocate*, 1897, 25 R. 112; *Leaman* v. *The King* [1920], 3 K.B. 663.

[8] *Mackie* v. *Lord Advocate*, 1898, 25 R. 769.

[9] 1926, S.C. 842. It may be doubted whether Lord Blackburn's opinion was not expressed too widely. In *Cooper* v. *Regina*, 1880, 14 Ch. D. 311, the question whether a civil servant could claim a pension by petition of right was held to depend on the terms of the statute by which it was conferred.

opinion that in every contract between the Crown and any public servant it was an implied condition that the servant had no right to remuneration which could be enforced in a court of justice, and consequently that as such remuneration formed no enforceable debt it could not be arrested.

Procedure.—With regard to procedure a claim against the Crown may, in Scotland, be prosecuted by an action directed against the Lord Advocate as representing any public department or any person acting on behalf thereof.[1] As the Crown is not subject to the jurisdiction of inferior courts the action must be raised in the Court of Session.[2] In England, the claim may be asserted by a petition of right, under procedure regulated by the Petition of Right Act, 1860.[3] In the event of success in either form of process it would seem doubtful if the claimant has any further means of redress if the satisfaction of his claim should be refused or delayed. It would seem clear that the course of Government cannot be paralysed by the arrestment of its revenues by a private creditor, and that its property cannot be poinded or adjudged.[4] The competency of a petition, under sec. 91 of the Court of Session Act, 1868,[5] for an order for the specific performance of a statutory duty, when directed against an officer of the Crown, has been considered but not determined,[6] but in any event would be limited to the case where the unsatisfied claim rested on a statute. Whether, in the event of the claimant being a debtor of the Crown or of the particular department, he could plead compensation, is a question on which there is no authority in Scotland.[7] If a Government department proposed to build in violation of a servitude affecting their property, or in disregard of statutory regulations, it has been suggested that an interdict in the Court of Session might be competent, but with no indication of the method by which the interdict could be enforced.[8]

Liability of Crown Official.—While it is recognised that an official of the Crown, in entering into Government contracts, may express himself so as to incur personal liability, the general presumption is that anyone dealing with an official in his public capacity does so on the footing that he acts on behalf of the State, and subject to the constitutional limits of his authority.[9] So a Crown official engaging a subordinate as a general rule incurs no personal liability.[10] And the principle of the law of agency that an agent warrants that he has the authority of the party on whose behalf he purports to contract does not apply where that party is a department of State.[11]

[1] Crown Suits (Scotland) Act, 1857 (20 & 21 Vict. c. 44).

[2] *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050.

[3] 23 & 24 Vict. c. 34. See Chitty, *Prerogatives of the Crown*, p. 340 (1820); Robertson, *Civil Proceedings by and against the Crown* (1908). There is no instance of a petition of right in the Scotch Courts, and, although it is not expressly stated that the Act of 1860 is not applicable to Scotland, its provisions refer only to the English Courts.

[4] *Secretary of State* v. *Wynne* [1905], 2 K.B. 845 (distress).

[5] 31 & 32 Vict. c. 100.

[6] *Carlton Hotel Co.* v. *Lord Advocate*, 1921, S.C. 237.

[7] For English cases see Robertson, *Civil Proceedings by and against the Crown*, p. 565. In a question of income tax, Rowlatt, J., decided that there would be no set-off against the Crown, but on grounds scarcely applicable to Scots Law; *Attorney General* v. *Guy Motors* [1928], 2 K.B. 78.

[8] *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, per Lords Wellwood and Kyllachy.

[9] *Dunn* v. *Macdonald* [1897], 1 Q.B. 555; *Commercial Cable Co.* v. *Government of Newfoundland* [1916], 2 A.C. 610; *Kenny* v. *Cosgrove* [1926], I.R. 517.

[10] *Dunn* v. *Macdonald*, *supra*. This is not in accordance with *Douglas* v. *Earl of Dunmore*, 1800, M. App. *v.* Bill No. 11, which was not cited. A colonial governor drew a bill of exchange on the Lords of the Treasury. Acceptance was refused, and the drawer was held liable on the bill, though he pleaded that it was drawn in the public service.

[11] *Kenny* v. *Cosgrove*, *supra*.

CHAPTER X

WRITING AS REQUISITE TO CONTRACT

General Rule.—As a general rule, the law of Scotland regards a contract as fully binding when it is proved that the parties have arrived at an agreement, and imposes no special restriction as to the evidence by which the fact of agreement may be established. Parties may, indeed, put their agreement into writing, and in that case questions, discussed in subsequent chapters, may arise as to the introduction of extrinsic evidence either to prove the true nature of the original agreement or an alteration in its terms. But in the absence of any writing, the ordinary rule of contract is that verbal agreement is sufficient to bind the parties.[1]

Exceptions when Writing Required.—But this rule is far from universal. There are certain contracts which, at common law or by statute, must be entered into in writing. In such contracts proof or admission that the parties have arrived at an agreement is not sufficient to bind them to fulfil the obligations to which they have agreed. In the absence of writing either party has the right to resile, or rescind the contract, without, speaking generally, involving himself in any liability; his agreement is merely provisional. Obligations of this class are usually known as *obligationes literis*,[2] obligations or contracts in which the use of writing is a necessary solemnity and preliminary to engagement.

Again, there are other contracts in which, though the mere fact of agreement amounts to a binding obligation, yet the method of proving the fact that the obligation has been undertaken is limited. Parole proof is incompetent, and the fact of the obligation, if disputed, must be proved by the writ of the party alleged to have undertaken it or by eliciting an admission from him on a reference to his oath. In these cases, as contrasted with *obligationes literis*, writing is not required as a solemnity, merely as a method of proof.[3]

When there is no written record of the agreement it may not matter, in practical result, whether the contract is one which requires writing for its constitution, or merely one which requires it *in modo probationis*. But the two cases are quite distinct. In the former case writing is necessary for the formation of a complete and unqualified obligation; its necessity is part of the law of contract. In the latter case verbal agreement infers an unqualified

[1] Stair, iv. 43, 4; Ersk. iii. 2, 1. The law of England on the subjects dealt with in this chapter depends mainly on the construction of the Statute of Frauds (29 Car. II. c. 3) and sec. 4 of the Sale of Goods Act, 1893. Neither of these enactments is applicable to Scotland, and consequently the English law offers only a remote analogy in a Scotch case. See Pollock, *Contract*, 9th ed., 698; Leake, *Contracts*, 7th ed., 180.

[2] The use of the term *obligatio literis* in this sense is well established. It is used in quite a different sense in classical Roman law. See *Inst.*, iii. 21; Gaius, iii. 128-134.

[3] Mackenzie, *Inst.*, bk. ii., tit. ii. "Some obligations require writ to make them binding, whereas others require writ only by way of probation—that is to say, cannot be proven without writ, though they be valid and binding without it."

obligation, and the necessity of writing in proof of it is merely a rule of the law of evidence. And in many cases the application of the two rules leads to different practical results. Thus, when writing is required only *in modo probationis*, an admission by the defender of the fact of agreement, either on record or on a reference to his oath, is sufficient for the pursuer's case. The proof of the agreement is then complete, and the agreement is in itself binding. When, on the other hand, writing is required as a necessary step in the constitution of the contract, an admission of a verbal agreement will not help the pursuer's case. It amounts to no more than admission of an agreement from which the defender has the right to resile: it does not, in any way, preclude him from exercising that right.[1] So, if all that is alleged is a verbal agreement, and no actings have followed upon it, a reference to the defender's oath is incompetent.[2] It is incompetent because useless; it could but establish an obligation from which he is at liberty to resile.

Subject of Chapter.—In this chapter it is proposed to consider the law as to *obligationes literis*, contracts which cannot be constituted except in writing, leaving for the next the cases where writing is necessary merely as a method of proof.

Contracts of Imperfect Obligation.—A convenient term for the contracts with which this chapter is concerned may be borrowed from the law of England—contracts of imperfect obligation. It is true that judicial expressions may be found that in such cases verbal agreement infers no obligation. But the principle is—not that mere verbal agreement is insufficient to create an obligation, but that the obligation created is subject to the qualification that either party may with impunity refuse to implement it. It is an obligation subject to a resolutive condition: for, as will be shewn in the sequel, the right to resile exists only when nothing has followed on the agreement, and is lost by either party if he allows the other to act in reliance on it. A verbal agreement to sell land, for instance, may be enforced by the buyer if he can prove that, to the seller's knowledge, he has altered his position in reliance on the sale, and this rule implies that there was an obligation arising from the verbal agreement. In an action based on a bond of annuity it was found that the bond was not properly authenticated, and the pursuer proposed to add a plea that the bond had been validated *rei interventu*. It was objected that this was to substitute a new ground of action. The objection was repelled on the ground that the obligation sued on was the bond, and that proof of *rei interventus* was offered to bar the right to resile from an existing obligation—not to constitute a new one.[3]

Obligationes literis.—In this connection the contracts which fall to be considered are the following: Contracts relating to heritage: contracts of service for more than a year: contracts for the assignation of incorporeal rights; contracts of insurance; cautionary obligations; contracts of mandate; contracts for the sale or mortgage of a ship.

Obligations Relating to Heritage.—As the great majority of the cases have arisen from disputes regarding contracts relating to heritage, it is convenient to consider the principles of the law mainly in relation to them.

Sales.—Contracts relating to heritage include all forms of sale of land.

[1] See this distinction in *Buchanan* v. *Baird*, 1773, M. 8478; *Carlyle* v. *Ballantyne*, 1788, notes by Lord President Campbell, reported 19 D. 418, note; *Bryan* v. *Butters*, 1892, 19 R. 490; *Paterson* v. *Paterson*, 1897, 25 R. 144; *Jamieson* v. *Edinburgh Mutual Investment Society*, 1913, 2 S.L.T. 52.

[2] *Infra*, p. 175.

[3] *United Mutual Mining Insurance Co.* v. *Murray*, 1860, 22 D. 1185.

So, in a sale by auction, any merely verbal bid may be retracted; and a bid in writing, if that writing is improbative, is in the same position.[1] In *Shiell* v. *Guthrie's Trs.* a body of trustees sold a house by auction, and it was purchased by two of the beneficiaries. The pursuer, who was the only other person who had bid at the sale, concluded for reduction of the sale to the beneficiaries (on the plea that it was illegal for them to bid at a sale by their trustees) and declarator of sale to himself. The defenders were assoilzied, on the ground that the sale to them was not illegal; but opinions were given that, in any event, the pursuer was not entitled to declarator of sale to himself, because there was no written record of the bid on which he founded.

Servitudes.—The constitution of a servitude is an agreement relating to heritage, requiring writing, and, if merely verbal, giving either party the right to resile.[2] In the case of a negative servitude this is an absolute rule: in the case of a positive servitude it finds an actual exception in the case where a servitude is constituted by prescriptive enjoyment, an apparent exception where it is constituted by implied grant. The servitude then owes its being to a written contract, but to the implied, not the express, terms of that contract.[4]

Securities.—An agreement to lend money on heritable security is a contract relating to heritage, and either party may resile if the contract is merely verbal and nothing has followed upon it.[5]

Leases.—A lease for not more than a year does not require writing.[6] A lease for a longer period must be constituted by a probative writing on the part both of landlord and tenant.[7] If a lease for more than a year is averred, and the pursuer's case fails for want of the necessary writ, he cannot fall back on the assertion that he has at least a lease for a year. There are many cases where a man might take or grant a lease for a term of years when he would not agree to a lease for a year.[8]

Sale of Growing Crops or Trees.—It does not seem to be decided in Scotland whether a contract for the sale of growing crops or trees is a contract relating to heritage and therefore demands constitution in writing. Such subjects are undoubtedly heritable, and although they fall within the provisions of the Sale of Goods Act, 1893,[9] that statute does not deal with the method by which the contract of sale may be constituted. But in England it has been held that a contract for the sale of standing trees is not a "contract or sale of lands, or any interest in or concerning them" within the meaning of sec. 4 of the Statute of Frauds (29 Car. II. c. 3).[10]

[1] *Aberdein* v. *Stratton's Trs.*, 1867, 5 M. 726; *Shiell* v. *Guthrie's Trs.*, 1874, 1 R. 1083; *Jamieson* v. *Edinburgh Mutual, etc., Benefit Society*, 1913, 2 S.L.T. 52.

[2] *Kincaid* v. *Stirling*, 1750, M. 8403.

[3] *Inglis* v. *Clark*, 1901, 4 F. 288; *Wallace* v. *Nisbet*, 1904, 42 S.L.R. 1.

[4] As to the constitution of a servitude by implied grant, see *infra*, Chap. XVII., and Rankine, *Landownership*, 4th ed., 430.

[5] *Glassford* v. *Brown*, 1830, 9 S. 105; cp. *Gilchrist* v. *Whyte*, 1907, S.C. 984.

[6] Stair, ii. 9, 4; Ersk. iii. 2, 2; Bell, *Prin.*, sec. 1187.

[7] Stair, Erskine, and Bell, *ut supra*; *Sproul* v. *Wilson & Wallace*, 1809, Hume, 920; *Sinclair* v. *Waddell*, 1868, 41 Sc. Jur. 121; *Gowans' Trs.* v. *Carstairs*, 1862, 24 D. 1382; *Walker* v. *Flint*, 1803, 1 M. 417. But there may be a unilateral obligation to grant a lease (*Arbuthnot* v. *Campbell*, 1793, Hume, 785).

[8] *Fowlie* v. *M'Lean*, 1868, 6 M. 254; Bell, *Prin.*, sec. 1188. But where a tenant averred a verbal bargain for a five years' lease, and a separate agreement for an interim lease of one year, he was held entitled to a proof *prout de jure* of the latter averment (*Gibson* v. *Adams*, 1875, 3 R. 144).

[9] 56 & 57 Vict. c. 71, sec. 62. See *Cockburn's Tr.* v. *Bowe*, 1910, 2 S.L.T. 17; *Morison* v. *Lockhart*, 1912, S.C. 1017.

[10] *Marshall* v. *Green*, 1875, 1 C.P.D. 35.

Innominate Contracts.—In recent cases the Court, recognising that the law as to agreements relating to heritage reflects the feelings of a period when the ownership of land was regarded as the chief end of man, has refused to apply its rules to contracts of a complicated character where some right to heritage is incidentally involved. Thus the compromise of an action, though relating to heritage, does not require a probative writing.[1] In *Kinninmont* v. *Paxton*[2] parole proof was allowed of an arrangement whereby *A.* agreed to purchase from *B.* an engine and fittings in *B.'s* premises, and to take over the remainder of a lease. In *Moncrieff* v. *Seivewright*[3] proof before answer was allowed of a verbal contract, including the assignation of a lease, the sale of the stock and fittings in a shop, and of the goodwill of the business. In *Mungall* v. *Bowhill Colliery Co.*[4] there was averred a verbal contract under which two parties agreed that neither should purchase certain heritable subjects without giving the other an opportunity to join in the purchase. A plea that this was an agreement relating to heritage, and therefore not binding unless constituted in writing, was advanced but repelled, it being held that the essential feature of the contract was that neither should purchase without giving the other the option to join, and that it was immaterial that the subject of the proposed purchase happened to be heritable. Where a contract of three years' duration provided for the use of spaces on the walls of post offices for advertising purposes, the Court, holding that it was not a lease, in respect that it offered no possession of any specific subject, decided that probative writ was not necessary to its validity.[5] On the other hand an agreement not to oppose an application to the Dean of Guild for authority to extend buildings must be constituted in writing.[6] And when two persons, who had a lease of shootings for six years, averred that a third had agreed to take a share and pay his proportion of the rent and expenses, it was held that such an agreement could not be proved by parole evidence, and opinions were given that, as an agreement relating to heritage, it required writing for its constitution.[7]

Probative Writ.—That writing is necessary to a conveyance of heritable property, and that a bargain merely verbal leaves the right to resile, are rules of the common law which have been recognised from the earliest times.[8] But the common law did not prescribe any special form by which the writing might be authenticated. A series of statutes,[9] and the decisions following on them, have established that the writing must be authenticated in one or other of certain prescribed methods. A writing so authenticated is known as a probative writ.[10]

[1] *Love* v. *Marshall*, 1872, 10 M. 795, as explained by Lord Salvesen in *Torbat* v. *Torbat's Trs.*, 1906, 14 S.L.T. 830; *Anderson* v. *Dick*, 1901, 4 F. 68. See also *Rutherford* v. *Evans of Bowden*, 1748, M. 8443.

[2] 1892, 20 R. 128.

[3] 1896, 33 S.L.R. 456.

[4] 1904, 12 S.L.T. 80, 262.

[5] *United Kingdom Advertising Co.* v. *Glasgow Bagwash Co.*, 1926, S.C. 303.

[6] *M'Lean* v. *Richardson*, 1834, 12 S. 865.

[7] *Stewart & Craig* v. *Phillips*, 1882, 9 R. 501.

[8] Stair, i. 10, 9; Mackenzie, *Inst.*, ii., iii.; Ersk. iii. 2, 2; iv. 2, 20; Bell, *Prin.*, sec. 889; *Com.*, i. 345; Dickson, *Evidence*, secc. 549.

[9] Act 1540, c. 117; Act 1555, c. 29; Act 1579, c. 80; Act 1681, c. 5; Act 1696, c. 15; 19 & 20 Vict. c. 89; Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), secs. 38, 39.

[10] A detailed examination of the law as to authentication of writings would be out of place in a book on contract. See Menzies, *Conveyancing* (Sturrock's ed.), 92; Montgomery Bell, *Conveyancing*, 3rd ed., i. 28; Craigie, *Conveyancing, Moveable Rights*, 2nd ed., 49; Wood, *Conveyancing*, 66. Subject to these authorities it may be stated briefly that a writing is

Improbative Writing not Binding. A writing which lacks the proper forms of authentication is known as improbative, and it has long been settled, in the case of a contract relating to heritage on which no actings have followed, and where nothing is relied upon except the writings, that a writing if *ex facie* improbative is mere waste paper, and that the case must be decided as if there had been no writing at all.[1] It is equally well established that it does not matter that the party who proposes to resile admits that he has signed the improbative writing and delivered it. He is not thereby barred from pleading that the requisites of the law have not been complied with.[2] So, in *Park* v. *Mackenzie*,[2] a holograph offer to buy land was met by an acceptance duly signed before witnesses. The acceptor admitted his signature and that of the witnesses, but claimed, successfully, the right to resile, on the ground that the witnesses were not designed, and that the acceptance was therefore not probative. In *Goldston* v. *Young*[3] *A.* wrote out an offer and acceptance, which latter he signed. *B.* signed the offer. It was held that *A.* could still resile. The acceptance being holograph of *A.* was probative, but the offer, being written by *A.* and merely signed by *B.* without witnesses, was not. In all these cases it was pleaded that a party was personally barred from disputing an obligation which he had duly signed and delivered, but the plea was met by the reply that to admit it would amount to disregarding the statutory provisions with regard to the authentication of writings, and that the primary object of these provisions was not to prescribe for the authenticity of writs, but

probative if (1) it is in the handwriting of the granter (holograph) and signed by him ; or (2) if it is subscribed by the granter, with the words "adopted as holograph," these words being in his handwriting (but see, as to this form, *Harvey* v. *Smith*, 1904, 6 F. 511) ; or (3) it is subscribed before witnesses. The formalities necessary to a deed signed before witnesses have varied at different periods of the law. The high-water mark of formalism was reached under the Acts 1681, c. 5, and 1696, c. 15. Under these Acts, in deeds executed prior to 1st October 1874 (when the Conveyancing Act, 1874, came into operation), the following requirements had to be satisfied in order to make a writing probative. It must be signed by the granter on each page, and subscribed by him at the end ; the subscription must be authenticated by two witnesses, who must sign on the last page, and must see the granter sign or hear him acknowledge his signature ; the names and designations of the witnesses, the name and designation of the writer of the deed, and the number of pages must be recorded in a testing clause ; each page must be separately numbered. The last requisite was abolished by 19 & 20 Vict. c. 89. The Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), sec. 38 : "It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, instrument, or writing, or in the testing clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions, and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any Court, and need not be written by the witnesses themselves." Sec. 39 : "No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same. . . ." The whole subject is considered in *Waller* v. *Whitwell*, 1914, S.C. 560 ; revd. 1916, S.C. (H.L.), 75.

[1] Bell's *Prin.*, sec. 889 ; *Park* v. *Mackenzie*, 1764, M. 8449 ; *Goldston* v. *Young*, 1868, 7 M. 188 ; *Weir* v. *Robertson*, 1872, 10 M. 438 ; *Mitchell* v. *Scott's Trs.*, 1874, 2 R. 162 ; *Scottish Lands and Buildings Co.* v. *Shaw*, 1880, 7 R. 756 ; *Mowat* v. *Caledonian Banking Co.*, 1895, 23 R. 270 ; *Moncrieff* v. *Lawrie*, 1896, 23 R. 577 ; *Dowie* v. *Tennant*, 1891, 18 R. 986 (question of jurisdiction).

[2] *Park* v. *Mackenzie*, 1764, M. 8449 ; *Sheddan* v. *Crawford*, 1768, M. 8456 ; *Muir* v. *Wallace*, 1770, M. 8457 ; *M'Farlane* v. *Grieve*, 1790, M. 8459 ; *Barron* v. *Rose*, 1794, M. 8463.

[3] 1868, 7 M. 188. See also *Sinclair* v. *Caithness Flagstone Co.*, 1880, 7 R. 1117 ; affd. 1881, 8 R. (H.L.) 78.

to secure that contracts of a particular class should not be entered into without the care and deliberation which the statutory forms are calculated to induce.[1] But this ground of judgment has not been applied to the case of a writing *ex facie* probative, but open to the latent objection that the witnesses did not see the granter sign, or hear him acknowledge his signature. If this is the only objection, the party who has delivered the deed for onerous causes as his obligation cannot take advantage of the informality.[2]

Writ Probative of Both Parties. On the principle that a mutual contract must be binding on both parties or on neither, a contract relating to heritage is not complete unless it is constituted by a writing or writings probative of both parties.[3] So where the seller agreed, by probative missive, to sell certain houses, and the buyer, by an improbative writing, undertook to pay the price at entry, it was held that the buyer was still free to resile.[4] When an alteration in a lease was vouched by an improbative writing of the landlord and a probative acceptance by the tenant, it was held that as there was not probative writing on both sides, the tenant was not bound.[5] But in leases the acceptance of a probative offer by the landlord is sufficiently proved by the tenant's entering into possession, even when that act may not amount to *rei interventus*.[6]

Obligation to Sell. –It is recognised that it is possible to enter into a binding unilateral obligation to buy or sell land if required; in other words, that an option to sell or buy may be conferred. Such an obligation must be undertaken by a probative writing on the part of the party who undertakes it,[7] but may be binding without any written acceptance. "That the owner of heritage may become bound by a writing under his own hand to dispone it on payment of a price although there is no writing under the hand of the proposed disponee cannot well be disputed, because the cases that have been cited shew that anyone can place in the hands of another a valid obligation to dispone heritage upon payment of a certain price."[8] But though the competency of such an obligation is recognised, as a general rule a document expressed as an obligation to buy or sell will be construed merely as an offer requiring acceptance, and acceptance by probative writ. In *Malcolm* v. *Campbell*,[9] *M.* brought a declarator that *C.* had sold a house to her. She averred a completed bargain, and produced a probative writing by *C.* in these terms: "I have agreed to sell my house . . . for £150 . . . to *M.*" The Court construed this document merely as the record of one side of a mutual contract, and not as a promise to sell, and as there was no corresponding missive on the part of the pursuer, dismissed the action as irrelevant. In *Hamilton* v. *Lochrane*[10] a written agreement provided that one party should build a villa on plans to be

[1] See the arguments in *Crichton* v. *Syme*, 1772, M. 17047.

[2] *Baird's Tr.* v. *Murray*, 1883, 11 R. 153; *Young* v. *Paton*, 1910, S.C. 63; *MacLeish* v. *British Linen Bank*, 1911, 2 S.L.T. 168; *Boyd* v. *Shaw*, 1927, S.C. 414.

[3] Cases cited *supra*, p. 165. *Barron* v. *Rose*, 1794, M. 8463; *Malcolm* v. *Campbell*, 1891, 19 R. 278; *Sproul* v. *Wilson & Wallace*, 1809, Hume 920; *Sinclair* v. *Waddell*, 1808, 41 Sc. Jur. 121 (leases); *Jamieson* v. *Edinburgh Mutual, etc., Building Society*, 1913, 2 S.L.T. 52.

[4] *Barron* v. *Rose*, 1794, M. 8463.

[5] *Sinclair* v *Caithness Flagstone Co.*, 1880, 7 R. 1117; affd. 1881, 8 R. (H.L.) 78.

[6] *Infra*, p. 174.

[7] *Govan New Bowling Club* v. *Geddes*, 1898, 25 R. 485.

[8] Per Lord President Inglis in *Malcolm* v. *Campbell*, 1891, 19 R. 278, at p. 280; Bell, *Prin.*, sec. 889; *Alexander* v. *Kinglassie*, 1687, M. 8422; *Ferguson* v. *Paterson*, 1748, M. 8440; *Muirhead* v. *Chalmers*, 1759, M. 8444; *Fulton* v. *Johnston*, 1761, M. 8446; *Barron* v. *Rose*, 1794, M. 8463.

[9] 1891, 19 R. 278.

[10] 1899, 1 F. 478.

approved by the other, and that the second party should have an option to purchase it within a certain time. It was held by the Sheriff, and on appeal approved, that the exercise of the option must be by probative writ. The contract, in the opinion of Lord Trayner, was simply an offer, and the exercise of the option, which was acceptance, required a probative writ.

Right to Resile. The principle that a contract relating to heritage, if merely verbal, or constituted by improbative writings, allows either party to resile if matters are still entire, involves as a corollary that the party resiling is not liable in damages for breach of contract. He has not broken his contract, though he may have refused to fulfil his verbal agreement, because he has merely exercised a right which the law implies in the case of a verbal agreement of that particular class.[1] "The parties have each a legal right to resile, and the one party cannot recover damages from the other for the exercise of a legal right." [2]

It is a more doubtful question whether a party who resiles from an agreement relating to heritage before it has been completed by probative writing may not be exposed to a claim for reimbursement of the expenses which the other party may have incurred in reliance on the agreement. But this question will be more conveniently considered in a later page.[3]

The general rule that an agreement relating to heritage requires a writing probative of both parties is subject to important qualifications. Its application may be excluded by the effect given to acquiescence and personal bar, by subsequent acts approbatory of an improbative agreement, or by the fact that the right to resile has been barred by *rei interventus*.

Acquiescence.—A general definition of personal bar as involved by acquiescence, may be cited from an opinion of Lord Chancellor Campbell: "If a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have given faith to his words or to the fair inference to be drawn from his conduct." [4]

If a party who sees that his rights are being invaded abstains from taking action, the inference may be that he has agreed to the invasion, or that he is personally barred from objecting to it. And when the agreement which would be inferred is one which may be constituted without writing, it may be unnecessary to consider whether a contract has been formed, or whether the one party is barred from objecting to the acts of the other. But in cases where writing is necessary to a completed contract, acts which would be inoperative as an indication of agreement may be operative on the ground that they involve personal bar. "Estoppel," it has been said, "is only a rule of evidence; you cannot found an action upon estoppel." [5] But if *A.* is the only person who has any title to object to an assumption

[1] *Goldston* v. *Young*, 1868, 7 M. 188; *Sinclair* v. *Waddell*, 1868, 41 Sc. Jur. 121; *Allan* v. *Gilchrist*, 1875, 2 R. 587.

[2] Per Lord Deas in *Goldston* v. *Young*, *supra*, at p. 192; see also opinion of Lord Fullerton in *Bell* v. *Bell*, 1841, 3 D. 1201, 1204.

[3] *Infra*, p. 176.

[4] *Cairncross* v. *Lorimer*, 1860, 3 Macq. 827, at p. 829, and see Rankine, Personal Bar, p. 54.

[5] *Low* v. *Bouverie* [1891], 3 Ch. 82, per Bowen, L.J.

of right by *B.*, it may not matter whether *A.* has agreed not to object or whether he is barred from objecting.

The cases where the principle of personal bar may be applied so as to affect the rights of parties in heritage, in the same way as if they had entered into a completed agreement, arise when one party has invaded another's right of property. Then, if the party whose right has been invaded has taken no active steps he may be barred from founding on the invasion as a wrong for which he is entitled to damages, or, though more rarely, from objecting to the continuance of the invasion in the future. But the application of personal bar or acquiescence, as a practical exception to the rule that obligations relating to heritage require to be constituted in writing, is confined to a limited class of cases.

It may now be laid down with some approach to certainty that if *A.* was not in fact aware of *B.*'s acts, his right to object is not barred merely because he might have discovered them before *B.*'s aggression had become an accomplished fact.[1] A case [2] where it was held that the right to object to an encroachment on a river was lost because the party should have been aware of it if he had either resided on his property or appointed a factor has been disapproved.[3] Where a neighbouring feuar had the right to object to buildings of a particular character, it was held that a plea of acquiescence was not supported by proof that intimation of an application to the Dean of Guild Court had been sent to him—that intimation not necessarily shewing that the proposed buildings were a contravention of the restriction, and no proof of actual knowledge being offered.[4] And where acquiescence is pleaded against a corporate body, official knowledge by that body or its agents must be proved: it is not sufficient that certain individual members may have been aware of what was being done.[5]

If the acts to which a party has the right to object are done without his knowledge, it is probably the general rule that he is under no obligation to take objection as soon as he becomes aware of them, and consequently that the failure to do so is not to be construed as acquiescence.[6] In such a case the element of loss to the party pleading acquiescence would be wanting, and the plea must rest simply upon delay or *mora*.

If *B.* has expended money in preparation for an act amounting to an aggression on *A.*'s rights, but the expenditure has consisted in actings lawful in themselves, such as building on his own ground, the mere fact that *A.* is aware of *B.*'s proceedings, and knows also that they would be useless except as a preparation for the act of aggression in question, does not amount to acquiescence on his part. He is under no obligation to warn *B.* that he will object to something which *B.* has not yet done.[7] So where

[1] *Hill* v. *Wood*, 1863, 1 M. 360; *M'Gibbon* v. *Rankin*, 1871, 9 M. 423; *Scott* v. *Great North of Scotland Rly. Co.*, 1895, 22 R. 287 (opinion of Lord Kinnear); *Macgregor* v. *Balfour*, 1899, 2 F. 345.

[2] *Aytoun* v. *Melville*, 1801, M. App., Property, No. 6.

[3] *Lord Melville* v. *Douglas's Trs.*, 1830, 8 S. 841.

[4] *M'Gibbon* v. *Rankin*, 1871, 9 M. 423.

[5] *City of Edinburgh* v. *Paton*, 1858, 20 D. 731; *Brown* v. *Rollo*, 1832, 10 S. 667. As to what amounts to knowledge by a company, in a question of acquiescence, see *Houghton & Co.* v. *Nothard, Lowe, & Wills* [1928], A.C. 1.

[6] See the distinction between the legal effect of non-action when an illegal act is being done, and non-action afterwards, drawn in *De Bussche* v. *Alt*, 1878, 8 Ch. D. 286; and see opinion of Lord Justice-Clerk Hope in *Bargeddie Coal Co.* v. *Wark*, 1856, 18 D. 772, at p. 775; revd. 1859, 3 Macq. 467; opinion of Lord Kinnear, *Scott* v. *Great North of Scotland Rly. Co.*, 1895, 22 R. 287; *Rankine* v. *Logie Den Land Co.*, 1902, 4 F. 1072.

[7] *Earl of Kintore* v. *Pirie*, 1903, 5 F. 818; affd. 1906, 8 F. (H.L.) 16.

a millowner abstracted water from a river, and, in defence to an action at the instance of owners of salmon fishings, averred that in the knowledge of the pursuers he had expended large sums in alterations on his mill in order to adapt it to the use of the water he proposed to take, it was held that as the pursuers could not have objected to his alterations of his own mill, their failure to intimate that they would object to abstraction of the water could not be pleaded as acquiescence.[1]

Assuming a case where the party whose rights are encroached upon is aware of what is being done, and has a right to interfere if he pleases, his non-interference is probably enough to infer his consent so as to bar him from founding upon it as a wrong for which he is entitled to damages.[2] But it is only in very exceptional cases that mere non-interference can have any further effect, and involve what practically amounts to an agreement to allow an encroachment to continue. Such cases are presented when a party, in building, encroaches to a negligible extent on the property of his neighbour, or on his neighbour's air-space.[3] "If I build on my own ground, and a few inches or a few feet beyond on my neighbour's ground, and if he stands looking on without objection, he will be held to have given a tacit consent to my operations, which will have the same effect as express consent."[4] And the same inference might be drawn from non-interference in the commission of an act which was practically irremediable.[5] Apart from such cases mere non-interference does not amount to more than tolerance, from which no licence for the future can fairly be inferred.[6] Thus where a lessee of minerals is working under the general obligation not to bring down the surface, the surface owner is not barred by knowledge that the mineral workings have in the past been carried on without any provision for support.[7] When a millowner alters his works so as to adapt them to take more water from the river, the acquiescence of other parties having interests in the river in his taking the water will at the most bar them for claiming damages for past years, but will not infer any permission for the future.[8] And where a lease provided that minerals should be worked in a certain way it was held that the knowledge of the lessor that the tenants were contravening this provision, and the receipt by him of lordships without objection, did not amount to an agreement to alter the terms of the lease for the future, so as to entitle the tenants to continue to disregard

[1] *Earl of Kintore* v. *Pirie*, 1903, 5 F. 818; affd. 1906, 8 F. (H.L.) 16.

[2] *Moir* v. *Alloa Coal Co.*, 1849, 12 D. 77; *Carron Co.* v. *Henderson's Trs.*, 1896, 23 R. 1042; see opinions of Lord President Robertson and Lord M'Laren.

[3] *Duke of Buccleuch* v. *Magistrates of Edinburgh*, 1865, 3 M. 528; *Muirhead* v. *Glasgow Highland Society*, 1864, 2 M. 420; *Sclater* v. *Oddie*, 1881, 18 S.L.R. 495; *Wilson* v. *Pottinger*, 1908, S.C. 580.

[4] Per Lord Justice-Clerk Inglis in *Duke of Buccleuch* v. *Magistrates of Edinburgh*, 1865, 3 M. 528, at p. 531.

[5] See *Lamb* v. *Mitchell's Trs.*, 1883, 10 R. 640, where it was held that as a departure from a system of cropping could not be immediately remedied, acquiescence in such departure in the early years of the lease implied acquiescence in the later years.

[6] Bell, *Prin.*, sec. 946, approved by Lord Chancellor Chelmsford in *Bargaddie Coal Co.* v. *Wark*, 1859, 3 M. 467, and by Lord Cowan in *Cowan* v. *Lord Kinnaird*, 1865, 4 M. 236, at p. 243; *Houldsworth* v. *Burgh of Wishaw*, 1887, 14 R. 920; *Macgregor* v. *Balfour*, 1899, 2 F. 345; *Harper* v. *Stuart*, 1907, 15 S.L.T. 550, per Lord Ardwall, at p. 557; cases in following notes. But see *contra*, *Stirling* v. *Haldane*, 1829, 8 S. 131; *Ewen* v. *Turnbull's Trs.*, 1857, 19 D. 513. See also *Aytoun* v. *Douglas*, 1800, M. App., Property, No. 5, where actual assistance was proved.

[7] *Bank of Scotland* v. *Stewart*, 1891, 10 R. 957.

[8] *Earl of Kintore* v. *Pirie*, 1903, 5 F. 818, per Lord Kyllachy, Ordinary, at p. 839, Lord President at p. 849; affd. 1906, 8 F. (H.L.) 16.

the restrictions imposed upon them.[1] The case was one where the tenants' contention rested on acquiescence alone; they did not aver even a verbal agreement to alter the lease, and they failed to prove any expenditure in reliance on the continued tolerance of their disregard of the stipulated methods of working. The law has been laid down in very absolute terms by Lord Kyllachy: "Now I am not aware that the doctrine of acquiescence —taking it at its widest—has ever been applied to a case of this kind. Acquiescence may bar objection to what is past, or what has been done. But it can never, so far as I know, establish directly or indirectly a continuing and perpetual right. I may have allowed my neighbour, it may be for years, to draw and use, say, my share as well as his own of a certain stream or other water supply; but I may resume my own share at pleasure. Nor will it, I suppose, be a bar to my doing so, that my neighbour has, relying on my continued consent, spent money, say, in enlarging his mill or in taking water into his house. . . . The truth is that, to serve the defenders' purpose, what they call acquiescence would require to be something in the nature of an agreement. It may perhaps be true that if the defenders could shew that their operations in 1882 were entered upon and executed under some agreement with the pursuers, such agreement if acted on could be enforced, not only if constituted or proved by writing, but perhaps also if constituted and proved by facts and circumstances. But . . . the case presented is one of acquiescence pure and simple, and that has, in my opinion, no relevancy." [2]

A further difficulty in the application of mere acquiescence arises in the case where it is relied upon as a defence to proceedings taken against an actual encroachment on property, say a building erected on another man's ground. It seems clear that acquiescence in such an act cannot operate as a conveyance of the land.[3] But it may bar the right of the owner to object to the continued existence of the building. Thus in *Duke of Buccleuch* v. *Magistrates of Edinburgh*,[4] a building was erected with a portico which projected beyond the boundary of the feu, and encroached upon the street. To this the magistrates were proved to have acquiesced, in full knowledge of the facts. The legal result was held to be that though the ground encroached upon still belonged to the magistrates, yet they held it subject to a permission to use it for the pillars supporting the portico, and had no right to object to alterations in the building which did not involve any further encroachment. And where *A.* built a wall which overhung, to the extent of $4\frac{1}{2}$ inches, *B.'s* property, it was held that while *B.*, having assented to *A.'s* proceedings, was not entitled to insist on the demolition of the wall, the rights of property were in no way changed, so that the boundaries remained as before.[5]

In cases where acquiescence in an invasion on property can be pleaded as a bar to an objection to its continuance, it is not determined how far the plea is available in a question with a singular successor of the party

[1] *Carron Co.* v. *Henderson's Trs.*, 1896, 23 R. 1042; *Bargaddie Coal Co.*, v. *Wark*, 1856, 18 D. 722; revd. 1859, 3 Macq. 467.

[2] *Earl of Kintore* v. *Pirie*, 1903, 5 F. 818, at p. 839.

[3] *Lord Melville* v. *Douglas' Trs.*, 1830, 8 S. 841; *Leck* v. *Chalmers*, 1859, 21 D. 408. See opinion of Lord Cowan.

[4] 1865, 3 M. 528. See opinions of Lord Watson and Lord Blackburn in *Grahame* v. *Magistrates of Kirkcaldy*, 1882, 9 R. (H.L.) 91; *Davidson* v. *Thomson*, 1890, 17 R. 287; *Plimmer* v. *Mayor of Wellington*, 1884, 9 App. Cas. 699.

[5] *Wilson* v. *Pottinger*, 1908, S.C. 580; cp. *Sclater* v. *Oddie*, 1881, 18 S.L.R. 495.

who has acquiesced. It may be regarded as decided that a singular successor is in such a case in no better position than his author, if he acquired the subjects with notice of the facts.[1] And when the invasion of right is obvious, as in the case of a manufactory amounting to a nuisance, a party who acquires the subjects affected by it may be bound to inquire how it came to be tolerated, and has been held barred by his author's acquiescence.[2] When neither of these specialties is present, it would seem hard to find any ground on which a singular successor can be bound to submit to any interference with his property, merely on the ground that if his author had objected he would have been barred by acquiescence.[3]

Homologation of Improbative Agreement. While a mere admission that a writing is authentic will not save it from nullity if it lacks the solemnities of execution which the law requires, it may acquire validity from subsequent acts by which the granter homologates, or recognises the binding force of, his imperfect deed.[4] The argument that a party could not by his actings dispense with statutory requirements, and that it was *pars judicis* to take notice of their absence, was put forward and rejected at an early stage in the law.[5] The principle upon which the rejection of that argument may be justified, as stated by Erskine, and judicially approved,[6] is that "though it be declared by several statutes that deeds destitute of the legal solemnities are null, that they cannot be supported by any condescendence, and that they shall bear no faith in judgment; these enactments are made merely in favour of the granter, that he may be the better secured against the consequences of forgery, but they cannot be so interpreted as to deprive him of the power of supplying the defect himself—*quilibet enim juri pro se introducto renunciare potest.*" So though a party may sign and deliver an improbative deed without laying himself under any obligation to which he was not already subject, yet if once he recognises the binding character of the improbative writ, he cannot withdraw from that position. Such recognition (homologation) may be by treating it as binding on him,[7] *e.g.*, paying interest on an improbative bond, or by confirming it in later and probative writs.[8] The averment that a tenant, who had agreed to pay the expenses of a new lease, had sent a cheque which the landlord's agent had cashed, was treated as an averment of homologation by the landlord, as contrasted with *rei interventus*.[9] The proposition, then, that a contract relating to heritage is not binding unless undertaken by probative writ must be qualified by adding that an improbative writ may be validated by homologation, *i.e.*, by subsequent recognition, amounting to an admission that the contract is completely binding. So where a decreet-arbitral was challenged on the ground that the submission, though on a question affecting heritable

[1] *Muirhead* v. *Glasgow Highland Society*, 1864, 2 M. 420.

[2] *Colville* v. *Middleton*, 27th May 1817, F.C.; cp. *Aytoun* v. *Douglas*, 1800, M. App., Property, No. 5.

[3] The question is raised but not decided in *Macgregor* v. *Balfour*, 1899, 2 F. 345. See *Hall* v. *M'Gill*, 1847, 9 D. 1557; *Ross* v. *Martin*, 1888, 15 R. 282.

[4] Ersk. iii. 3, 47; Bell, *Prin.*, sec. 27; Bell, *Com.*, i. 140; and see as to homologation and adoption of a voidable contract, *infra*, Chap. XXXII.

[5] *Sinclair* v. *Sinclair*, 1715, M. 5654.

[6] Ersk. iii. 3, 47; approved in *Callander* v. *Callander's Trs.*, 1863, 2 M. 291.

[7] *Sinclair* v. *Sinclair*, *supra*; *Hepburn* v. *Hepburn*, 1736, M. 5658; *Liddel* v. *Creditors of Dick*, 1744, M. 5721; *M'Calman* v. *M'Arthur*, 1864, 2 M. 678. As to homologation where the objection to the deed is an erasure, see *Shepherd* v. *Grant's Trs.*, 1844, 6 D. 464; *Robertson* v. *Ogilvie's Trs.*, 1844, 7 D. 236.

[8] *Callander* v. *Callander's Trs.*, *supra*.

[9] *Danish Dairy Co.* v. *Gillespie*, 1922, S.C. 656.

property, had not been constituted by probative writ, the objection was fully met by the reply that the objector had homologated the arbitration, by claiming and leading evidence therein.[1]

Rei interventus. The preceding pages have related to the case where parties have entered into an improbative agreement relating to heritage, and the question of its obligatory force have been raised before anything has followed on the agreement. Then each party has the right to resile, or *locus pœnitentiæ*. But the rights of parties are altered when one of them has proceeded to act on the faith of the improbative agreement, and has been allowed to do so by the other. Such actings amount, or may amount, to *rei interventus*, and render the contract completely binding. The rule is well established, though it has been judicially characterised as an "unwarrantable evasion of a statute."[2]

Professor Bell's time-honoured definition of *rei interventus* has been already cited, and, for convenience, is quoted below.[3] It may be most convenient to reserve for another chapter cases where actings are averred in support of a verbal agreement to alter a written contract, or of acquiescence in a departure from its terms.[4] In cases where it is relied upon as obviating the necessity of writ probative of both parties in a contract relating to heritage, *rei interventus* has been inferred from entering into possession of subjects sold,[5] *a fortiori* from alterations or improvements on them;[6] from payment of the price;[7] of a feu-duty;[8] or of a grassum on a lease;[9] from granting leases of subjects sold;[10] from removing tenants or occupants;[11] from desisting from other efforts to obtain a purchaser or tenant;[12] or, in the converse case, from a tenant's abstention from efforts to obtain other accommodation;[13] from entering into other contracts in reliance on the one in dispute.[14] But it is not enough that the party, being a law agent, drew a disposition in his own favour,[15] or even that he employed a law agent to

[1] *Brown* v. *Gardner*, 1739, M. 5659.

[2] Per Lord Justice-Clerk Hope, *Johnston* v. *Grant*, 1844, 6 D. 875-888.

[3] See *ante*, p. 46; Bell, *Prin.*, sec. 26, "*Rei interventus* raises a personal exception, which excludes the plea of *locus pœnitentiæ*. It is inferred from any proceedings not unimportant on the part of the obligee, known to, and permitted by, the obligor to take place on the faith of the contract as if it were perfect, and productive of alteration of circumstances, loss or inconvenience, though not irretrievable."

[4] See Chap. XXI.

[5] *Smith* v. *Marshall*, 1860, 22 D. 1158. As to the effect of entering into possession on a lease, see *infra*, p. 173.

[6] *Colquhoun* v. *Wilson's Trs.*, 1860, 22 D. 1035; *Campbell* v. *M'Lean*, 1867, 5 M. 636; affd. 1870, 8 M. (H.L.) 40; *Forbes* v. *Wilson*, 1873, 11 M. 454; *Bathie* v. *Lord Wharncliffe*, 1873, 11 M. 490; *Walker* v. *Flint*, 1863, 1 M. 417.

[7] *Lawrie* v. *Maxwell*, 1697, M. 8425; *Sinclair* v. *Sinclair*, 1715, M. 5654; *Hamilton* v. *Wright*, 1836, 14 S. 323; affd. 1838, 3 Sh. & M'L. 127; *Foggo* v. *Hill*, 1840, 2 D. 1322 (proof of payment by parole evidence). But payment of £5 on a verbal bargain for the sale of subjects worth £6,000 was held merely earnest, and insufficient as an averment of *rei interventus* (*M'Lean* v. *Scott*, 1903, 10 S.L.T. 447).

[8] *Stodart* v. *Dalziel*, 1876, 4 R. 236.

[9] *A.* v. *B.*, 1553, M. 8410; *Macrorie* v. *M'Whirter*, 18th December 1810, F.C. As to payment of rent, see *infra*, p. 176.

[10] *Stewart* v. *Burns*, 1877, 4 R. 427; *Bell* v. *Goodall*, 1883, 10 R. 905.

[11] *Stewart* v. *Burns*, 1877, 4 R. 427; *Sutherland* v. *Hay*, 1845, 8 D. 283.

[12] *Sutherland* v. *Hay*, *supra*, per Lord Medwyn. And see *Station Hotel, Nairn* v. *Macpherson*, 1905, 13 S.L.T. 456, where the tenant of a hotel maintained the contract till it was too late for the landlord to apply for a licence.

[13] *Danish Dairy Co.* v. *Gillespie*, 1922, S.C. 656.

[14] *Moodie* v. *Moodie*, 1745, M. 8439; *Gordon* v. *Pitsligo*, 1674, M. 8415, where it was averred that a superior, at a sale of land, had verbally promised to enter the purchaser gratis. The purchase, being made after this promise, was *rei interventus*.

[15] *Allan* v. *Gilchrist*, 1875, 2 R. 587.

draw one.[1] And the averments of *rei interventus* must be specific; it is not enough to aver generally that the parties acted on the faith of the agreement.[2]

The actings relied on as *rei interventus* must have been known to and permitted by the other party. But it is not necessary to prove actual knowledge if the actings averred are those which the party would normally and almost necessarily take if he relied on the improbative agreement. So in cases where an improbative guarantee is supported by averments of *rei interventus*, consisting of advances made to the principal debtor, it is not necessary to prove that the guarantor was actually aware that the advances were made,[3] though this principle was not extended to the case where a tenant, attempting to enforce an improbative agreement for a new lease, relied on the fact that he had abstained from looking out for alternative premises.[4] In *Forbes* v. *Wilson*,[5] it was laid down that knowledge by an agent, such as a factor and commissioner for a landowner, was equivalent to the knowledge of the party himself; in *Danish Dairy Co.* v. *Gillespie*,[6] averments of knowledge of a landlord's law agent were found insufficient. The distinction may lie in the fact that in the former case the acts constituting *rei interventus* involved interference with the subject; in the latter, only an abstention from steps which, on the assumption that there was no binding contract, it would have been reasonable for the party to take.

The acts constituting *rei interventus* must be unequivocably referable to the contract. This excludes acts done before it. So when in an action to enforce an improbative agreement for the sale of a distillery the pursuer alleged that he had incurred expense, before entering into the agreement, in making inquiries as to the prospects of the distillery, it was held that there were no relevant averments of *rei interventus*.[7] Where the actings relied on have followed the agreement, and relate to the subject thereof, there will be in general little difficulty in ascribing them to the agreement, if there is no other title to which they can be ascribed. But there may be some other title. Thus where improbative missives were followed by a probative lease, but the lease was reduced on the ground of fraud, it was held that the tenant's possession and expenditure could not be relied upon in support of the improbative missives, in respect that they were actings naturally attributable to the *ex facie* perfect title afforded by the lease.[8] And where subjects are sold to a party who is already in possession of them as a lessee, any actings to support the sale must be such as would be reasonable on the part of a purchaser, unwarrantable on the part of a lessee.[9]

***Rei interventus* in Leases.**—The application of the principle of *rei interventus* to leases, where all that is relied upon is entering into possession, ordinary cultivation, and payment of rent, is beset with difficulties, because there is always the alternative that these acts may be ascribed, not to a

[1] *M'Lean* v. *Scott*, 1903, 10 S.L.T. 447; cp. *Gilchrist* v. *Whyte*, 1907, S.C. 984.
[2] *Van Laun* v. *Neilson*, 1904, 6 F. 644, per Lord Kinnear, at p. 653. See *Gardner* v. *Lucas*, 1878, 5 R. 638; affd. 1878, 5 R. (H.L.) 105.
[3] *Johnston* v. *Grant*, 1844, 6 D. 875; *Church of England Insurance Co.* v. *Wink*, 1857, 19 D. 1079; *National Bank* v. *Campbell*, 1892, 19 R. 885; and see opinion of Lord Shand in *Kirkpatrick* v. *Allanshaw Coal Co.*, 1880, 8 R. 327.
[4] *Danish Dairy Co.* v. *Gillespie*, 1922, S.C. 656.
[5] *Forbes* v. *Wilson*, 1873, 11 M. 454.
[6] 1922, S.C. 656. *Forbes* v. *Wilson* was cited, but is not referred to judicially.
[7] *Mowat* v. *Caledonian Banking Co.*, 1895, 23 R. 270.
[8] *Gardner* v. *Lucas*, 1878, 5 R. 638; affd. (on separate point) 1878, 5 R. (H.L.) 105.
[9] *Colquhoun* v. *Wilson's Trs.*, 1860, 22 D. 1035.

lease for years, as averred, but to a yearly tenancy, in which a verbal agreement is sufficient. And it is probably the law that such acts are not sufficient to validate a merely verbal agreement for a lease for a term of years.[1] Two years' possession, however, excludes the hypothesis of a lease for a single year, and binds the parties for the whole term.[2] And if there is a writing fixing the duration and terms of the lease, though it be probative only of one party to the contract, the lease is fully established if the tenant enters into possession.[3] And if a new lease has been verbally arranged with a tenant in possession on an expiring lease, his continued possession will be sufficient to support the new lease and exclude the only other possible assumption, that he continues to possess, by tacit relocation, on the terms of the old lease.[4] Where a tenant, whether already in possession on a lease for years, or sitting merely as tenant from year to year, enters into an improbative agreement for a new lease at an increased rent, payment of the increased rent is sufficient to constitute *rei interventus*.[5] And any improvements or expenditure by a tenant, which would be improvident on a yearly tenure, will render an informal agreement for a lease for a term of years binding.[6]

Effect of *rei interventus*.—It would appear to be the law that the result of acts amounting to *rei interventus* is to rivet the obligations involved in an incomplete or imperfect contract, to the same extent as if the contract had been originally formal or probative, so that it operates not merely as a bar to resiling by the party who has allowed the other to act upon it, but equally as a bar to the party who has chosen to act upon it.[7] Thus where a purchaser of lands had entered into possession it was held that he could not resile from the contract on the ground that the sale was verbal.[8] In *Bathie* v. *Lord Wharncliffe*, where a tenant relied on *rei interventus* in support of an improbative lease, and it was proved that the landlord had incurred expenditure on the subjects, Lord Deas said: "I do not know that in a question of this kind it makes much difference whether all that is done is at the expense of the landlord, or, as here, partly at the expense of the landlord and partly at the expense of the tenant. This is a mutual contract, binding on both parties or on neither; and the objection as to its not being binding might as well arise on the part of the tenant as on the part of landlord. If the one party is bound the other cannot be free. Most unquestionably if the tenant had been objecting, the landlord would have been entitled to say,

[1] *Buchanan* v. *Baird*, 1773, M. 8478; *Macrorie* v. *M'Whirter*, 18th December 1810, F.C.; *Fowlie* v. *M'Lean*, 1868, 6 M. 254; *Philip* v. *Cumming's Exrs.*, 1869, 7 M. 859. They are sufficient in England (*Nunn* v. *Fabian*, 1865, L.R. 1 Ch. 35; *Miller* v. *Sharp* [1899], 1 Ch. 622).

[2] *Macpherson* v. *Macpherson*, May 12, 1815, F.C.; *Wight* v. *Newton*, 1911, S.C. 762.

[3] *Ross* v. *Ross*, 1790, Hume 774; *M'Pherson* v. *M'Pherson*, 12th May 1815, F.C.; *Ballantine* v. *Stevenson*, 1881, 8 R. 959; *Buchanan* v. *Harris & Sheldon*, 1900, 2 F. 935, per Lord Adam.

[4] *Sutherland's Tr.* v. *Miller's Tr.*, 1888, 16 R. 10; *Buchanan* v. *Harris & Sheldon*, 1900, 2 F. 935; *Macfarlane* v. *Mitchell*, 1900, 2 F. 901.

[5] *Stewart* v. *Countess of Moray*, 1772, M. 4392; revd. 1773, 2 Pat. 317; *Earl of Aboyne* v. *Ogg*, 1810, Hume 847; *Sellar* v. *Aiton*, 1875, 2 R. 381.

[6] *Walker* v. *Flint*, 1863, 1 M. 417.

[7] This is not the law in England. "If I agree with *A.*, by parole, without writing, that I will build a house on my land and then sell it to him at a stipulated price, and in pursuance of that agreement I build a house, that may afford me ground for compelling *A.* to complete the purchase, but it certainly would afford no foundation for a claim by *A.* to compel me to sell on the ground that I had partly performed my contract."—Per Lord Chancellor Cranworth, *Caton* v. *Caton*, 1866, L.R. 1 Ch. 137.

[8] *Thomson* v. *Thomson*, 1699, M. 8426. See also *Home* v. *Home*, 1684, M. 8421; *Russell* v. *Freen*, 1835, 15 S. 752.

'I did all these things at my own expense.' The tenant, on the other hand, is entitled to say, 'You did all these things at your expense, in terms of this very lease—the draft—which you are now objecting to.'"[1]

Proof of Verbal Agreement.—When *rei interventus* is put forward in support of a contract resting on improbative writings, as, for instance, a document which is probative only of one party, the question of law is simply whether the acts averred or proved are sufficient. But when it is put forward in support of an alleged verbal agreement, there is the further question—How can the verbal agreement, if disputed, be proved? It is well settled that in the case of verbal contracts relating to heritage parole evidence of the fact of agreement is incompetent, and the proof is limited to the writ or oath of the defender. It follows that if a pursuer rests his case on a verbal agreement followed by *rei interventus*, and the verbal agreement is not admitted, his case is irrelevant if he does not offer to prove the agreement by the writ of the defender, or by referring it to oath.[2] A successful proof of *rei interventus*, if allowed, would leave his case deficient, because it would only establish that the verbal agreement was fully binding if it was ever entered into; it would not prove that there was a verbal agreement. Therefore proof of *rei interventus* in such cases will not be allowed unless the fact of agreement is admitted, or an offer is made to prove it by the writ or oath of the defender.[3] Thus, in *Walker* v. *Flint*,[4] a typical case, a tenant, in a suspension of a removing at the instance of the landlord, averred that he was in possession on a verbal lease for three years, and that he had incurred expenditure on the subjects in reliance on the agreement, with the knowledge and permission of the landlord. It was held that the tenant had made relevant averments of *rei interventus*, but that proof of the alleged lease on which these were founded was limited to the writ or oath of the landlord.

When proof by the defender's writ is attempted there is no necessity that the writ produced should be probative. The statutory rules as to authentication of writings apply to writs obligatory in themselves, not to writings used as evidence to prove a fact. So, in cases of leases, entries in the books of the landlord or his factor have been taken as his writ so as to let in proof of *rei interventus*,[5] and the same effect has been given to his return under the Valuation Acts,[6] probably even to his mention of the lease in a letter to a third party.[7] A draft lease, unsigned, but proved to

[1] *Bathie* v. *Lord Wharncliffe*, 1873, 11 M. 490, at p. 498; but see opinion of the same judge in *M'Calman* v. *M'Arthur*, 1864, 2 M. 678, 682. Possibly the cases and *dicta* cited should more properly be referred to the principle of homologation (see *supra*, p. 171). The difference between homologation and *rei interventus*, in so far as they are distinguishable, is that when it is said that a contract between *A.* and *B.* has been homologated it is meant that *A.* has recognised an informal or voidable contract as binding on him; when it is said that the contract is validated by *rei interventus*, it is meant that *A.* has allowed *B.* to act on the faith that the informal obligation is binding.

[2] *MacCrorie* v. *M'Whirter*, 18th December 1810, F.C.; *Neill* v. *Earl of Cassilis*, 22nd November 1810, F.C. (leases); *Rait* v. *Galloway*, 1833, 12 S. 131 (feu); *Gowans' Trs.* v. *Carstairs*, 1862, 24 D. 1382 (lease for 999 years); *Walker* v. *Flint*, 1863, 1 M. 417 (lease); *Paterson* v. *Earl of Fife*, 1865, 3 M. 423 (lease); *Allan* v. *Gilchrist*, 1875, 2 R. 587 (sale); *Gibson* v. *Adams*, 1875, 5 R. 144 (lease); *Dickson* v. *Blair*, 1871, 10 M. 41; opinion of Lord Kinloch.

[3] *Gowans' Trs.* v. *Carstairs*, and *Allan* v. *Gilchrist*, *supra*.

[4] 1863, 1 M. 417.

[5] *Campbell* v. *M'Lean*, 1867, 5 M. 636; affd. 1870, 8 M. (H.L.) 40; *Sellar* v. *Aiton*, 1875, 2 R. 381. Rankine, *Leases*, 3rd ed., p. 120.

[6] *Emslie* v. *Duff*, 1865, 3 M. 854; *Wight* v. *Newton*, 1911, S.C. 762.

[7] *Emslie* v. *Duff*, *supra*, per Lord President M'Neill, at p. 860.

have been adjusted by the parties, has been held to be sufficient.[1] So has a copy of a lease, found in its proper chronological order in an estate book, unsigned by the landlord, with the tenant's mark and the signatures of two witnesses.[2] Receipts for payment of feu-duty instruct a verbal contract of feu,[3] but mere receipts for payment of a term's rent are probably not sufficient to establish anything beyond a lease for a year.[4]

Admission on Reference to Oath.—An admission on record, or on a reference to oath, of the verbal agreement is sufficient to let in proof of *rei interventus*; without such proof it is merely an admission of a contract from which the party admitting it may resile.[5] And the defender's admission must be taken with the qualifications he attaches to it. So where a tenant in possession, as he alleged, on a verbal lease for nineteen years, sued the landlord for damages for breach of an obligation, also verbal, to make certain roads, ditches, and drains, and was met by an admission of the lease but a denial of the alleged obligation, it was held that as the tenant could not have proved the existence of the lease by parole evidence, neither could he prove its alleged conditions.[6] And where the question at issue was the constitution of a feu-right, it was decided that the defender's admission must be taken with the qualification that the feu-duty was considerably higher than that alleged by the pursuer.[7]

Recovery of Price where Seller Resiles.—Where, on a verbal contract of sale of land, the purchaser has paid a part of the price but has failed to instruct the agreement by competent evidence, and is therefore precluded from relying on his payment as *rei interventus*, he will have an action for repetition of his payment.[8]

Reimbursement of Expenses.—It is a more doubtful question whether, if a party has incurred expense in reliance on a verbal agreement which he cannot prove by the writ or oath of the other party, and which therefore leaves him no claim for implement or damages, he has a claim for indemnification of the expense he has incurred, and, in pursuance of that claim, may prove the agreement by parole evidence. On a previous page it is submitted, though with some doubt, that such a claim is irrelevant in the analogous case of a party who has incurred expense in the hope that negotiations would lead to a contract, though no actual agreement has been reached.[9] But the claim of a party who has acted in reliance on an actual agreement, though one not constituted in the forms required by law, may be stronger. If the pursuer's averments are that the defender, by entering into a verbal agreement from which he intended to resile, induced him to incur expense on the subject of the agreement, a case of fraud is presented, for which, it is conceived, general damages could be claimed, though in the cases which have occurred the claim has been stated as one

[1] *Bathie* v. *Lord Wharncliffe*, 1873, 11 M. 490.
[2] *Wares* v. *Duff-Dunbar's Trs.*, 1920, S.C. 5.
[3] *Bell* v. *Goodall*, 1883, 10 R. 905.
[4] *Maxwell* v. *Grierson*, 1812, Hume, 849; *Gowans' Trs.* v. *Carslairs*, 1862, 24 D. 1382.
[5] Bell, *Prin.*, sec. 1187; *Walker* v. *Flint*, 1863, 1 M. 417; *Jamieson* v. *Edinburgh Mutual etc., Benefit Society*, 1913, 2 S.L.T. 52.
[6] *Paterson* v. *Earl of Fife*, 1865, 3 M. 423; but see *Viscount Melville* v. *Douglas' Trs.*, 1830, 8 S. 841.
[7] *Rait* v. *Galloway*, 1833, 12 S. 131.
[8] *Lawson* v. *Auchinleck*, 1699, M. 8402; opinion of Lord M'Laren in *Paterson* v. *Paterson*, 1897, 25 R. 144, 191.
[9] *Ante*, p. 59.

for reimbursement of the expenditure.[1] Again, if the party who resiles has gained by the expenditure on the other side, he may be liable on the principle of recompense.[2] But there remains the case where *A.*, in circumstances where it is impossible to suggest fraud, has resiled from a verbal agreement after *B.* has been led to incur expenditure, but expenditure in no wise beneficial to *A.* There is a good deal of authority for the contention that in these circumstances *A.* is bound to meet the expenditure *B.* has incurred. In the leading case *Walker* v. *Milne* the pursuer's averments were that he had agreed with the subscribers to a proposed monument to Lord Melville to give them a site: that they had entered into possession thereof; that he in reliance on this agreement, had incurred expense; and that the subscribers had declined to carry out their bargain. He claimed damages. The Lord Ordinary, "in respect that no binding contract had been completed," assoilzied the defenders. The Court, while affirming the Lord Ordinary's judgment in so far as it refused damages, found "that the pursuer is entitled to indemnification for any actual loss and damage he may have sustained, and for the expenses incurred in consequence of the alteration of the site of the monument."[3] So in *Glassford* v. *Brown*,[4] where *A.* had agreed to lend money on heritable security and resiled from the agreement after the bonds had been prepared, it was held that, though he was entitled to resile, the borrower was entitled to claim from him the actual expenses he had been put to. In *Dobie* v. *Lauder's Trs.*[5] the Lord Ordinary (Shand), treating the case as one of concluded agreement which could not be proved, in an action for implement or damages, except by writ or oath, gave it as his opinion "that parole evidence of the arrangements and actings of parties is competent when the claim made is for relief or indemnity from actual loss sustained by a party acting in reliance on the fulfilments by another, who has refused to carry out his part, of an arrangement which has been entered into, but which could only be made legally binding so as to be capable of enforcement on being committed to writing." On the other hand, in *Allan* v. *Gilchrist*,[6] where the actual conclusion was for damages, and it was held that there were no relevant averments of actual expenditure in reliance on the agreement, the competency of parole proof on a claim for reimbursement of such expenditure was doubted, and the doubt has been shared by the judges in a more recent case.[7] And in *Hamilton* v. *Lochrane*, where, in special circumstances, a proof before answer was allowed, Lord Moncreiff laid it down that there was no authority for the proposition that "in every case in which a pursuer who claims damages for breach of a contract relating to heritage is unable to instruct the contract by writ or oath he is entitled to prove by parole the very same averments for the purpose of obtaining, it may be, the same items of claim under the name of reimbursement or recompense for outlays made or work done on the faith of the alleged

[1] *Bell* v. *Bell*, 1841, 3 D. 1201, followed, on the ground of fraud, in *Mackay* v. *Rodger*, 1907, 15 S.L.T. 42; *Heddle* v. *Baikie*, 1846, 8 D. 376, as explained by Lord Deas in *Allan* v. *Gilchrist*, 1875, 2 R. 587, 590; *Gilchrist* v. *Whyte*, 1907, S.C. 984 (opinion of Lord Ardwall).

[2] *Bell* v. *Bell*, *supra*; *Mackay* v. *Rodger*, *supra*; *Newton* v. *Newton*, 1925, S.C. 715; and see as to recompence, *infra*, Chap. XVIII.

[3] *Walker* v. *Milne*, 1823, 2 S. 379.

[4] 1830, 9 S. 105. The case was complicated by a question of agency, and is not referred to in any of the more recent decisions.

[5] 1873, 11 M. 749, at p. 753. In the Inner House it was held there was no concluded agreement.

[6] 1875, 2 R. 587, per Lords Deas and Ardmillan.

[7] *Gilchrist* v. *Whyte*, 1907, S.C. 984.

contract."[1] In *Gray* v. *Johnston*,[2] the majority of the Court held that in order to admit of parole evidence in the case of an alleged promise to leave a legacy there must be averments of definite expenditure in reliance on the promise, but the authority of *Walker* v. *Milne*,[3] and consequently the relevancy of a claim for reimbursement of definite expenditure in reliance on an agreement inadequately vouched, would appear to be recognised. Proof by parole evidence, it would seem, may be open to a pursuer, on condition that he avoids the word "damages," and contents himself with reimbursement.

Right to Enforce Contract.—Assuming that a verbal or improbative contract relating to heritage has been instructed by competent evidence, and that the right to resile has been barred by homologation or *rei interventus*, either party may insist on the completion of the contract, and is entitled to decree ordaining the other to execute, or concur in executing, the formal instrument which may be requisite in the circumstances of the case. So where an agreement to feu was established by improbative writ followed by *rei interventus*, it was held that the feuar was entitled to demand a feu charter.[4] And where a verbal lease is proved by writ or oath, and *rei interventus* has followed, either party is entitled to call on the other to concur in executing a formal and probative lease.[5] A refusal may be countered by a remit to a conveyancer,[6] and signature by the clerk of court.[7]

Questions with Singular Successors.—If no such proceedings are taken, and matters are allowed to remain on the basis of mere verbal agreement, or some improbative writing, questions may arise with a singular successor of the lands to which the agreement refers.

In the case of a sale of land either verbal or not completed by a probative conveyance, a subsequent purchaser is entitled to rely on the title as it stands in the Register of Sasines, and is not bound by any agreement, though binding on the seller, of which he had no notice.[8] But where he has notice that a prior agreement existed he will be barred from disputing it: and the cases suggest the rule that where a purchaser of lands is aware that the seller has entered into a prior agreement to dispose of them, he is bound to inquire into the nature and result of that prior agreement, and is not entitled to rely on the statement of the seller that there had been nothing more than negotiations, and that these had been broken off.[9]

In the case of leases, any written lease, however informal or improbative, if it is binding on the landlord by *rei interventus* or otherwise, is also binding on his singular successors, provided that the subjects, rent, and ish are

[1] *Hamilton* v. *Lochrane*, 1899, 1 F. 478, at p. 483.

[2] 1928, S.C. 659. The L.J.C. (Alness) was of opinion that the pursuer's averments were relevant, and that parole evidence of the alleged promise was admissible in pursuance of a claim for reimbursement.

[3] 1823, 2 S. 379.

[4] *Stodart* v. *Dalzell*, 1876, 4 R. 236.

[5] *Emslie* v. *Duff*, 1865, 3 M. 854; *Bathie* v. *Lord Wharncliffe*, 1873, 11 M. 490; *Wight* v. *Newton*, 1911, S.C. 762.

[6] *Erskine* v. *Glendinning*, 1871, 9 M. 656.

[7] *Whyte* v. *Whyte*, 1913, 2 S.L.T. 85.

[8] Bell, *Prin.*, sec. 880; *Calder* v. *Stewart*, 1806, Hume 440; *Mansfield* v. *Walker's Trs.*, 1833, 11 S. 813; affd. (*Inglis* v. *Mansfield*) 1835, 2 Sh. & Maclean, 203.

[9] *Petrie* v. *Forsyth*, 1874, 2 R. 214; *Marshall* v. *Hynd*, 1828, 6 S. 384; *Stodart* v. *Dalzell*, 1876, 4 R. 236. Question whether these cases are consistent with *Leslie* v. *M'Indoe's Trs.*, 1824, 3 S. 48, where it was held that the bondholder who first completed his title was preferable, though he had notice of prior bonds, and these were expressly excepted from the warrandice in his title; and see Stair, i. 14, 6.

ascertained.[1] In *Wilson* v. *Mann*[2] the tenant, who was also factor, and held the farm from year to year, founded on the following documents: (1) A letter to his landlord proposing to break up permanent pasture; (2) an agreement to this signed by the landlord, but not holograph; (3) a letter from the landlord's agents stating that the termination of the lease should be in eight years; (4) entries in the books kept by the tenant, in his capacity as factor, docqueted by the landlord, and shewing the amount of rent. It was held that the tenant's right to a lease for eight years from the date of the law agent's letter was established, in a question with a purchaser of the lands. The Lord Justice-Clerk expressed the opinion that a verbal agreement between landlord and tenant, proved *scripto*, and (it may be assumed) followed by possession, would be binding in a question with singular successors.[3]

Contracts of Service.—The law with regard to contracts of service presents some analogy to that of contracts relating to heritage. The authorities are not very numerous nor in all points conclusive, but the law would appear to be as follows:—

A contract of service for not more than a year may be constituted by verbal agreement, and proved by parole evidence.[4]

A contract of service for more than a year is not binding unless it is constituted by a writing probative of both parties.[5] So where an engagement for two years was entered into by an offer and acceptance on a lithographed form, and signed by the parties without witnesses, and the servant resiled from his agreement, it was held that he was not liable in damages.[6] And a similar decision was pronounced in a case where the offer and acceptance was holograph of the employer, but not of the servant.[7] In both cases the servant had withdrawn before he had actually entered into the service.

Actual Service as *rei interventus*.—Actual service amounts to *rei interventus*, but its effect is not definitely settled. Following on a contract entered into by an improbative writing, it binds the parties for the whole term.[8] Following upon a merely verbal contract, it is settled that it does not validate the contract for the whole term. So where workmen had entered into verbal contracts for a term of years, and had worked for more than a year, convictions obtained against them for deserting their employment, under the provisions of 4 Geo. IV. c. 34, were suspended on the ground that as the contracts were merely verbal there could be no obligation to serve for more than a year.[9] Actual service renders the contract, if admitted, binding for a year;[10] but probably, if disputed, it can be proved only by the defender's writ or oath.[11] And where the verbal agreement

[1] *Sievewright* v. *Scott*, 1796, Hume, 790; *Macarthur* v. *Simpson*, 1804, M. 15181; *Duke of Gordon* v. *Carmichael*, 1800, Hume, 805; *Burnet* v. *Forbes*, 1835, 8 S. 74; *Wilson* v. *Mann*, 1876, 3 R. 527.

[2] *Supra*. [3] 3 R., at p. 532.

[4] Bell, *Prin.*, sec. 173; Dickson, *Evidence*, sec. 567.

[5] Bell and Dickson, *ut supra*; *Caddel* v. *Sinclair*, 1749, M. 12416; *Paterson* v. *Edington*, 1831, 8 S. 931; *Dumbarton Glass Co.* v. *Coatsworth*, 1847, 9 D. 732; *Stewart* v. *M'Call*, 1869, 7 M. 544; *Grant* v. *Ramage & Ferguson*, 1897, 25 R. 35; cases in note 11, *infra*. The authorities throw no light on the origin of the law.

[6] *Stewart* v. *M'Call*, 1869, 7 M. 544.

[7] *Paterson* v. *Edington*, 1831, 8 S. 931.

[8] *Rymer* v. *M'Intyre*, 1781, M. 5726; *Campbell* v. *Baird*, 1827, 5 S. 335.

[9] *Murray* v. *M'Gilchrist*, 1863, 4 Irvine, 461; *Young* v. *Scott*, 1864, 4 Irvine, 541.

[10] *Caddel* v. *Sinclair*, 1749, M. 12416.

[11] *Reuter* v. *Douglas*, 1902, 10 S.L.T. 294; *Brown* v. *Scottish Antarctic Expedition*, 1902, 10 S.L.T. 433.

alleged was not an ordinary contract of service, but an agreement whereby *A.* undertook to advance £100 and *B.* undertook to serve for one year certain, and also for such time as might be necessary to pay off that advance out of his wages, it was determined that the contract must be taken as a whole, and that the pursuer's averments, though he stated that he had actually entered on the service, were not relevant to support an issue of an engagement for more than one year.[1]

The rule that contracts of service for more than a year require to be constituted by probative writ has never been applied, and probably would not be applied, to a contract, of undefined duration, to do a particular piece of work. And it does not apply to contracts of agency, at least if payment is partly by commission. Thus where, in an action of damages for breach of contract, the pursuer alleged that he had been verbally engaged as an agent for five years at an annual salary and a commission on all goods sold by the defenders (an English firm) in Scotland, and had been wrongfully dismissed, a proof before answer of these averments was allowed.[2] But no opinions were given, the interlocutor of the Lord Ordinary allowing a general proof was recalled, and the case seems to be open to the observation that if the contract was not service, it fell within the class of innominate and unusual contracts which, though they may be constituted verbally, cannot be proved by parole evidence.

Assignation of Incorporeal Right. The law applicable to a contract for the assignation of an incorporeal right is somewhat doubtful. In Bell's *Commentaries*[3] "assignations of written obligations" are classed with contracts relating to heritage, as contracts which require writing for their constitution, and admit of *locus pœnitentiæ* until writing is executed. No authority is cited, and the cases would lead rather to the conclusion that such contracts fall within the class where writing is required as a method of proof, but is not necessary for the conclusion of a binding obligation, in a question between the original parties, and not between parties holding competing rights to the subject assigned. Thus in *Isles* v. *Gill*,[4] where the question was between an arrester and one who, having an assignation lacking a stamp, was forced to rely on the agreement to assign, opinions were given that though the oath of the common debtor was not relevant in a question between the parties, yet it would have been competent proof of an effectual agreement to assign had the question been between cedent and assignee. In an early case it was observed that writing was not necessary to perfect an agreement for the sale of book-debts.[5] In *Jeffreys* v. *Kyle*[6] it was decided that a receipt by the owner of a copyright was (under the statute then ruling) sufficient proof of an assignation of it by which the cedent was bound. In *Moncreiff* v. *Seivwright*[7] it was found that a verbal assignation of the goodwill of a business was effectual. In *Clark* v. *Callender*[8] *A.*, by written agreement, had taken over *B.'s* interest in a sale of goods, and undertaken to give him £40 for his bargain. He alleged that *C.* had

[1] *Currie* v. *M'Lean*, 1864, 2 M. 1076.

[2] *Pickin* v. *Hawkes*, 1878, 5 R. 676.

[3] Bell, *Com.*, i. 345; and see opinion of Lord M'Laren in *M'Murrich's Trs.* v. *M'Murrich's Trs.*, 1903, 6 F. 121, at p. 125.

[4] 1837, 1 D. 380, note.

[5] *Campbell* v. *Douglas*, 1676, M. 8470.

[6] 1856, 18 D. 906; 1859, 3 Macq. 611. The Copyright Act, 1911 (1 & 2 Geo. V. c. 26), now provides (sec. 5): "No assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent."

[7] 1896, 33 S.L.R. 456.

[8] 8th March 1819, F.C.; affd. 1819, 6 Paton, 422.

verbally agreed to take over this bargain from him. It was held that his averments could not be proved by parole evidence, but, it would appear, on the ground the defender's writ was the only competent evidence, not on the ground that writing was necessary to complete the contract. In *M'Fadzean's Exr.* v. *M'Alpine*[1] it was averred by an employer that a workman, who was since deceased, had agreed to accept £10 in full of his claim for compensation under the Workmen's Compensation Act. Proof *prout de jure* was asked and refused, but proof by the writ of the deceased workman was allowed, thus inferring that the contract was binding by mere verbal agreement, though it could not be proved by parole evidence.

Sale of Shares.—A contract to take or to allot shares in a company does not require writing, and may be proved *prout de jure*.[2] The effect of a verbal agreement for the sale of shares seems to be doubtful. In an early case it was held that a contract for the excambion of shares in a company for shares in the Bank of Scotland left either party free to resile until the transfers were signed, but the decision may have proceeded on the ground that the parties did not intend any final agreement until the transfers were executed.[3] In a later case it was observed in argument that a party who should object *locus pœnitentiæ* in the case of a verbal sale of shares would be hissed off the Exchange, and the Court did not find it necessary to pronounce any decision on the point, holding that there had been *rei interventus* in respect of a partial payment.[4] On the whole, it would seem to be open to decide that a verbal contract is binding in the case of a sale of shares in an ordinary company.[5] In the case of shares in a banking company, however, it is provided by 30 & 31 Vict. c. 29 (Leeman's Act) that a contract for their sale shall be null and void unless the shares are identified in writing by their numbers in the register of the company, or, where there is no such register, with distinguishing numbers, unless the name of the party in whose name they stand on the register is set forth. Under this statute a verbal contract for the sale of shares in a banking company, or a written contract which does not comply with the statutory conditions, is void.[6]

Insurance.—It would seem that at common law the contract of insurance must be constituted in writing, that a merely verbal agreement to insure may be resiled from, and, consequently, that the insurers are not liable for a loss occurring before anything has followed on the verbal agreement. "As I have always understood—indeed I think it is perfectly settled in the law of Scotland - a contract of insurance can only be made in writing. It is true that in the somewhat parallel case of cautionary obligations a practice had grown up of allowing parole evidence in proof of mercantile guarantees—a practice which was afterwards corrected by statute. But there was no such practice in regard to insurance, and no argument or

[1] 1907, S.C. 1269.

[2] *Goldie* v. *Torrance*, 1882, 10 R. 174; *Wilson* v. *Dunlop, Bremner & Co.*, 1921, 1 S.L.T. 35 (O.H. Lord Anderson); *Devlin* v. *M'Kelvie*, 1915, S.C. 180, where this point was not disputed.

[3] *Lawson* v. *Auchinleck*, 1699, M. 8402. The report does not state whether the agreement was verbal or in writing.

[4] *Graham* v. *Corbet*, 1708, M. 8428.

[5] *Mitchell* v. *City of Glasgow Bank*, 1878, 6 R. 420 (affd. 1879, 6 R. (H.L.) 66). See opinion of Lord Shand, at p. 435.

[6] *Mitchell* v. *City of Glasgow Bank, supra.* In the House of Lords no decision was given on this point. As to the effect of a custom of the Stock Exchange to disregard the Act, see also *Neilson* v. *James*, 1882, 9 Q.B.D. 546; *Perry* v. *Barnett*, 1885, 15 Q.B.D. 388.

decision was offered to the contrary. Either a policy, or some informal writing followed by *rei interventus*, is requisite." [1]

The chief authority is *M'Elroy* v. *London Assurance Corporation*.[2] There the action was for loss caused by fire, and the pursuer alleged a verbal agreement to insure, and payment of a premium to an agent for the company. His averments as to payment of the premium were held to be irrelevant, as he did not aver that he had paid it before the fire occurred, nor that the agent had authority to receive it. His case was therefore narrowed down to a mere statement of a verbal agreement to insure, and it was held that the pursuer's averments were not relevant, in respect that a verbal agreement left the company free to resile. The opinions given were to the effect that payment of the premium would have amounted to *rei interventus*. The attention of the Court was not called to the case of *Christie* v. *North British Insurance Co.*[3] There, although the pursuer's case failed on the ground that his record fell short of an averment of a completed verbal agreement, the Lord Justice-Clerk (Boyle) intimated an opinion that a completed agreement to insure, though merely verbal, would be binding.

Where a policy is applied for and a premium paid, it is a common practice to issue a covering note to the effect that the applicant is insured for a certain limited period, during which the company may have time to consider whether to accept the risk. This, in fire insurance, constitutes a completed contract for the limited period in question, which renders the company liable in the event of a loss.[4]

Marine Insurance.—Under the Marine Insurance Act, 1906, it might appear that a contract of marine insurance is one which may be concluded verbally, but could not be proved except by the production of a marine policy. But as the rules of the common law, save in so far as they are inconsistent with the express provisions of the Act, are preserved, it is conceived that, in Scotland, writing is necessary to a concluded contract. The relative provisions of the statute are (sec. 21): "A contract of marine insurance is deemed to be concluded when the proposal of the insured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of shewing when the proposal was accepted reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped"; (sec. 22): "Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy, in accordance with this Act. The policy may be executed either at the time when the contract is concluded or afterwards"; (sec. 89): "Where there is a duly stamped policy reference may be made, as heretofore, to the slip or covering note, in any legal proceeding."

Cautionary Obligation. The necessity of writing to the constitution of a cautionary obligation now rests upon statute. The Mercantile Law Amendment Act (Scotland), 1856 (19 & 20 Vict. c. 60), enacts (sec. 6): "All guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to

[1] Per Lord M'Laren (*M'Elroy* v. *London Assurance Corporation*, 1897, 24 R. 287, at pp. 290, 291).

[2] 1897, 24 R. 287.

[3] 1825, 3 S. 519. In *Parker* v. *Western Assurance Co.* (1925, S.L.T. 131) it would appear that the Lord Ordinary (Constable) was of opinion that a verbal contract of fire insurance would be binding. He decided that there was no proof of the contract.

[4] *Bhugwandass* v. *Netherlands, etc., Insurance Co.*, 1888, 14 App. Cas. 83.

the character, conduct, credit, ability,[1] trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect."

The words of this section are sufficiently wide to exclude any action founded upon a verbal cautionary obligation or representation as to credit, although it may have been acted upon, or may have been given with fraudulent intent.[2] In *Clydesdale Bank* v. *Paton* the pursuers averred that an agent for the bank, acting within the scope of his authority and for the benefit of the bank, had made verbal representations as to the credit of a third party, with the object of inducing the pursuers to accept bills drawn by that third party, and with the fraudulent intention of placing sums thus obtained to the reduction of his adverse balance. In the Court of Session it was held that sec. 6 did not apply, in respect that fraud was averred, and a proof was allowed. On appeal the judgment was reversed, on grounds which may be stated in the words of Lord Watson: "The provisions of sec. 6 are expressed in terms as comprehensive as they are imperative. They enact that no verbal representations, being of the character and made for the purpose and with the intent specified in the clause, shall be of any legal effect as giving a remedy to the person who may be misled by them to his detriment. They in substance provide that no person to whom such verbal representations are made for such a purpose shall have any right to rely upon them, and that if he does choose to act upon them he must bear the consequences of his own credulity. It is also, in my opinion, obvious that these provisions were not intended to meet the case of truthful and honest representations, and that they necessarily include all representations of the character, and made with the purpose specified, however false and however fraudulent."[3] So a party who has been induced to undertake a cautionary obligation by misrepresentations as to the credit of the principal debtor cannot found on these as a ground for the reduction of his obligation unless they were made in a writing which satisfies the conditions of the statute.[4] It has, however, been held in England that if *A.*, in the particular circumstances, is bound to take reasonable care in making statements to *B.*, and fails to exhibit that care, the fact that the statements he makes are verbal representations as to the credit of a third party does not preclude an action by *B.*, based, not on the representations, but on the failure in the pre-existing obligation to take reasonable care.[5]

In view of the statutory provisions it is unnecessary to consider the question—by no means clear upon the authorities—whether at common law a verbal cautionary obligation could in any event be binding.[6] But a question still unsettled remains, whether it is sufficient that the obligation complies

[1] Meaning "ability to pay." *Irving* v. *Burns*, 1915, S.C. 260.

[2] *Clydesdale Bank* v. *Paton*, 1895, 23 R. 38; revd. 1896, 23 R. (H.L.) 22; *Irving* v. *Burns*, *supra*.

[3] *Clydesdale Bank* v. *Paton*, *supra*, 23 R. (H.L.), at p. 26.

[4] *Union Bank* v. *Taylor*, 1925, S.C. 835.

[5] *Banbury* v. *Bank of Montreal* [1918], A.C. 626.

[6] See *Church of England Assurance Co.* v. *Hodges*, 1857, 19 D. 414; *Park* v. *Gould*, 1851, 13 D. 1049.

with the requirements of the statute (*i.e.*, is in writing and signed by the granter), or whether the common law demands in addition that it should be executed with the formalities necessary to constitute a probative writ. It is decided that a probative writing is not necessary in guarantees *in re mercatoria*.[1] It is also clear that an improbative writ (provided it be signed by the obligant) is binding if advances are made on the faith of it. Such advances constitute *rei interventus* and bar any right to resile, if such right exists.[2] The question undecided is whether an improbative writ constitutes a binding guarantee for a debt already incurred. In *National Bank* v. *Campbell*[3] Lord M'Laren expressed the opinion that so long as no actings had followed on the guarantee, and it was improbative in form, it was open to the guarantor to resile. In *Snaddon* v. *London, Edinburgh*, and *Glasgow Assurance Co.*[4]—a case relating to a guarantee for the fidelity of an agent—the Lord Ordinary (Kyllachy) laid down the rule that a guarantee to be binding must be probative, and, being of opinion that there was no proof of *rei interventus*, assoilzied the guarantor. In the Inner House the Court adhered on a separate ground, but doubts were expressed as to the Lord Ordinary's view of the law, and Lords Trayner and Moncreiff indicated an opinion that a guarantee might be fully binding if signed, though not in a probative form.

Bill Signed as Guarantee.—A mere signature on a bill of exchange does not satisfy the statutory requirements for the constitution of a cautionary obligation. A party so signing may incur liabilities, but these must rest on the law of bills of exchange, not on the law of cautionry. Thus, as no one but the drawee can accept a bill, a party who was not the drawee but who signed as acceptor incurred no liability to prior parties. His liability could not be rested on the bill; if rested on the ground that his signature was intended as a guarantee for the credit of the drawee the conclusive objection was that the guarantee was not expressed in writing.[5]

Contract of Mandate.—The contract of mandate can as a general rule be constituted verbally, and there is no restriction as to the evidence by which the fact of agreement may be proved.[6] Thus proof *prout de jure* was allowed in an action of damages for failure to carry out a mandate to execute diligence.[7] And even a mandate to buy land may be proved by parole evidence.[8] There is some doubt whether a mandate to advance money can be proved, in an action for repayment, other than by the writ or oath of the mandate, but the authorities do not suggest that a verbal mandate, if so proved, is not sufficient.[9] On averments that money was given to the mandatary in order that he might invest it, the fact of mandate, and the payment of the money, may both be proved by parole evidence.[10]

There would seem to be no decision on the general question whether a

[1] *Paterson* v. *Wright*, 31st January 1810, F.C.; affd. 1814, 6 Paton, 38; *Johnston* v. *Grant*, 1844, 6 D. 875; *National Bank* v. *Campbell*, 1892, 19 R. 885.

[2] Ersk. iii. 2, 3; Bell, *Com.*, i. 346; *M'Neill* v. *Black*, 1814, Hume, 103; *Church of England Life Assurance Co.* v. *Wink*, 1857, 19 D. 1079; *Ballantyne* v. *Carter*, 1842, 4 D. 419; *Johnston* v. *Grant* and *National Bank* v. *Campbell*, *supra*.

[3] 1892, 19 R. 885, at p. 892.

[4] 1902, 5 F. 182.

[5] *Walker's Trs.* v. *M'Kinlay*, 1879, 6 R. 1132; affd. 1880, 7 R. (H.L.) 85.

[6] Dickson, *Evidence*, sec. 570; *Mackenzie* v. *Brodie*, 1859, 21 D. 1048.

[7] *Highgate* v. *Boyle*, 1819, Hume, 356.

[8] *Mudie* v. *Ouchterlony*, 1766, M. 12403; *Corbet* v. *Douglas*, 1808, Hume, 346; *Horne* v. *Morrison*, 1877, 4 R. 977.

[9] See *Annand's Trs.*, 1869, 7 M. 526; *Ross* v. *Cowie's Exrx.*, 1888, 16 R. 224.

[10] *Burt* v. *Laing*, 1925, S.C. 181.

written mandate is necessary to entitle the mandatary to act as a proxy for the mandant at a meeting. It is decided that it is not necessary that such a mandate, if given, should be probative.[1] From the words of the Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), it would seem that a mandate to vote at a meeting of creditors must be in writing.[2] And a mandate to vote at a meeting of a company must be in writing and signed by the mandant.[3] A mandatary in an action in Court also must have a written mandate, signed by the mandant.[4]

Sale or Mortgage of Ship. The Merchant Shipping Act, 1891 (57 & 58 Vict. c 60), provides (sec. 24): "A registered ship or a share therein . . . shall be transferred by bill of sale," which must be executed by the transferror in the presence of, and be attested by, a witness or witnesses. By sec. 31 it is provided that a mortgage of a ship, or shares therein, "shall be in the form marked B. in the first part of the First Shedule to this Act." The Act contains no provision to the effect that a verbal contract for the sale or mortgage of a ship should not be binding, as it was at common law.[5] It is provided (sec. 57) that the intention of the Act is "that without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book or received by the Registrar . . . interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property." On these provisions it has been decided that writing is not necessary in the sale of a ship or shares thereof.[6]

Writings *in re mercatoria*.—A contract which is not one of those considered in the preceding pages, and which may be entered into verbally and proved by parole evidence, may in fact be reduced to writing. If then it is founded on as involving an obligation, and not merely as proof of a fact from which an obligation might be inferred,[7] it must, as a general rule, be executed in probative form.[8] But this rule is subject to an exception in the case of documents *in re mercatoria*, which are valid if signed by the party, though neither attested nor holograph. While it is recognised that this exception is to be extended rather than narrowed, it is conceived that it does not apply to documents recording a contract which, by a positive rule of law, must be constituted in writing. Thus it does not apply to a lease of business premises, though in one sense clearly *in re mercatoria*,[9] nor to a contract of service by which a salesman was engaged for two years.[10] Outside these contracts the exception is of wide range. A statement in Bell's *Commentaries*[11] has been

[1] *Thompson* v. *Muir*, 1871, 10 M. 178; affd. 1876, 3 R. (H.L.) 1.

[2] See sec. 59. "The mandatary . . . may vote . . . provided he exhibit a mandate."

[3] Companies Act, 1908, Sched. I., Table A., sec. 66.

[4] *Gunn & Co.* v. *Couper*, 1871, 10 M. 116.

[5] *Cathcart* v. *Holland*, 1681, M. 8471. Earlier statutes (26 Geo. III. c. 60, sec. 17; 34 Geo. III. c. 68, sec. 14) provided that transfers which were not in the statutory forms should be void, but there is no subsisting enactment to that effect. On the history of legislation, see *Watson* v. *Duncan*, 1879, 6 R. 1247.

[6] *M'Connachie* v. *Geddes*, 1918, S.C. 391.

[7] See *infra*, p. 192.

[8] Ersk. iii. 2, 6; Bell, *Com.*, i. 345. "If the parties agree, however unnecessarily, to put their bargain into an obligatory writing, a writing which can be sued upon without more as containing and setting forth the obligation, then (apart from writs *in re mercatoria*) the writing must be probative." Per Lord Pearson, *Paterson* v. *Paterson*, 1897, 25 R. 144 at p. 183.

[9] *Danish Dairy Co.* v. *Gillespie*, 1922, S.C. 656.

[10] *Stewart* v. *M'Call*, 1869, 7 M. 544.

[11] I. 342. "The writings which are held to be comprehended under this privilege are bills, notes, and checks on bankers, mandates and procurations, guarantees, offers, and acceptances to sell or to buy wares and merchandise, or to transport them from place to place, and, in

accepted as a general canon. Within it have been held to fall a contract under which advertising spaces in post offices were let [1]; an obligation to subscribe for, or find subscribers for, shares to be issued by a company [2]; a bargain for the purchase of the fittings of premises held on lease [3]; a letter by which bankers intimated that they held the interest in a block of bonds for the pursuer [4]; an award, in an arbitration between seed-merchants, referred to a person in the trade.[5] A case where it was decided that an acknowledgment of the correctness of an account due by one brother to another, consisting partly of items for goods supplied and partly of money lent, was not *in re mercatoria*, seems to ignore the distinction between documents founded on as obligatory and documents founded on as evidence of a fact, and to be of very doubtful authority.[6] But it would appear that contracts between private parties, not engaged in any trade,[7] or even between landlord and tenant,[8] are not *in re mercatoria*, and require to be probative. In *Commercial Bank* v. *Kennard* [9] a warrant issued by an ironfounder, and indorsed to a bank as a security, was held not to be *in re mercatoria* so as to pass by indorsation and without any written assignation, but it was not suggested that, although in an improbative form, it would not have been valid as between the original parties.

Parole Evidence where Contract in Writing.—A contract where writing is not required by law may in fact be reduced to writing. As will be explained in another chapter, this involves the general consequence that where one party produces and founds upon the written record of their agreement, the other cannot rely in defence upon any extrinsic evidence.[10] Does it also involve the consequence that the original agreement is extinguished as a ground of action, with the result that where the creditor fails to produce the written contract, or where, for any reason, the written contract is not in itself obligatory, there is nothing left upon which a claim can be founded ? The answer to this question, on the authorities, is by no means clear, and the cases in which it may arise must be distinguished.

Improbative Writings. It may first be noted that where a written contract is founded on it must be probative, unless it falls within the class of writings privileged as *in re mercatoria*, or unless the objection to its improbative character is obviated by proof of homologation or *rei interventus*. It is not easy to find any case in which this has actually been decided with regard to a contract which would have been completely binding as a verbal agreement had the parties not chosen to record it in writing, but the

general, all the varieties of engagements, or mandates, or acknowledgments, which the infinite occasions of trade may require." See also Ersk. iii. 2, 24. In *Pyranon* v. *Ramsay's Exrs.*, 1627, M. 16960, a claim for payment of wine supplied failed, because the order for it was not probative. In *Turner* v. *Ker*, 1632, M. 12409, it was held that a tailor could not recover his bill, if exceeding £100 Scots, unless he could prove it by the debtor's writ or oath. In *Ramsay & Hay* v. *Pyranon*, 1632, M. 16963, the rule that writs *in re mercatoria* need not be probative was applied, apparently for the first time, to a discharge of accounts between merchants; and see a review of some of the early cases by Lord Medwyn in *Johnston* v. *Grant*, 1844, 6 D. 875, 879.

[1] *United Kingdom Advertising Co.* v. *Scottish Bagwash, etc., Co.*, 1926, S.C. 303. The contract was not a lease, because no specific subject was let.

[2] *Beardmore* v. *Barry*, 1928, S.C. 101. This point was not questioned on appeal.

[3] *Kinninmont* v. *Paxton*, 1892, 20 R. 128.

[4] *Stuart* v. *Potter, Choate & Prentice*, 1911, 1 S.L.T. 377.

[5] *Dykes* v. *Roy*, 1869, 7 M. 357.

[6] *M'Adie* v. *M'Adie's Exrx.*, 1883, 10 R. 741, Lord Rutherfurd Clark dissenting.

[7] *Goodlet* v. *Lennox*, 1739, M. 16932, 16979; *Thomson* v. *Philp*, 1867, 5 M. 679.

[8] *Hamilton's Exrs.* v. *Struthers*, 1858, 21 D. 51. See however, *Fell* v. *Rattray*, 1869, 41 Sc. Jur. 236.

[9] 1859, 21 D. 864.

[10] *Infra*, Chap. XX.

statements of Erskine and Bell may be accepted as authoritative on the point.[1]

Assuming the existence of a probative written contract (or one which, if improbative, has been validated by homologation or *rei interventus*) the party who under it is the creditor does not require to found on the underlying obligation. He founds upon the writing as a document inferring in itself an obligation, an obligation incurred by the subscription and delivery, where delivery is necessary, of the written contract. Any objection to the validity of the writing as a source of obligation must be established by the party who takes it. The written contract is produced, not as evidence of an obligation undertaken *aliunde*, but as constituting in itself an obligation.[2] Thus it has been pointed out that the fundamental distinction between a bond or promissory note, on the one hand, and an acknowledgment of the receipt of the money, from which the law will infer an obligation to repay, on the other, is that in the former case the creditor need not found upon the debt, he can found upon the bond or note as a substantive and independent obligation, in the latter he must found upon the debt, of which the acknowledgment is only evidence.[3]

Has, then, the party who is the creditor in a written contract two obligations—one arising from agreement, the other from the execution of a written and obligatory document—on either of which, subject to the rules of evidence, he may found, or is the original agreement extinguished by the execution of the subsequent obligation?

The question does not properly arise when there is no objection to the production and to the validity of the written contract. The general rule, which requires proof by the best evidence, excludes parole proof of the agreement on which the written contract was founded.[4] So where, in an action for a share of the profits of a partnership, it was an admitted fact that a deed of partnership had been drawn up, and there was no proof that it had been lost or destroyed, it was held to be incompetent to ask a witness what were the terms on which the business was carried on.[5]

Proof of Bond by Separate Writ.—The authority of Lord Fullerton may be adduced for the proposition that though an obligation has been undertaken in writing (as in the case of a bond), and though that writing may be extant and producible, the creditor is not bound to produce it, but may fall back on the original debt, provided he be able to prove it by the writ of the debtor.[6] The point which it was proposed to prove was that a bank had received certain shares on the condition that they should hold them only as a security for a particular debt, and not for the general balance due by the depositor. This it was proposed to prove by entries in the books of the bank. But a letter was in process which referred to a letter of undertaking granted by the bank on the receipt of the shares, and it was objected that it was incumbent on the party relying on the alleged obligation of the bank to produce this letter of undertaking. The objection was repelled by the Lord Ordinary, and his decision was approved by the Court. The law was stated by Lord Fullerton as follows: "Take the case of a claim

[1] Ersk. iii. 2, 6; Bell, *Com.*, i. 345.

[2] See argument in *Coult* v. *Angus*, 1749, M. 17040, as reported by Lord Kames.

[3] *Neilson's Trs.* v. *Neilson's*, 1883, 11 R. 119, per Lord Young. As was held in *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764, a document acknowledging receipt of money may itself be sufficient proof of loan, but still it is only evidence, not in itself a source of obligation.

[4] Dickson, *Evidence*, sec. 206.

[5] *Clark* v. *Clark's Trs.*, 1860, 23 D. 74.

[6] *Thom* v. *North British Banking Co.*, 1850, 13 D. 134.

of debt. The creditor may have the benefit of written correspondence and the entries in the debtor's books, and he may have a bill and a bond. Can it be said that if, for some reason best known to himself, he puts his case on the general obligation as inferred from the correspondence and books of his adversary, and proves it, a verdict must go against him because he did not found upon the bill or bond? The answer is obvious—that the party who holds these separate modes of proving his case by evidence all primary and admissible in itself may take any one he chooses, and cannot be impeded in that course by the contemporaneous existence of another open to him, and which might perhaps have been easier. No doubt, if the defender says that the agreement or obligation was embodied in a written contract, and that that contract, if produced, would be found to affect the issue, that is quite relevant. But, on that supposition the written contract is made part of the defender's case. It would lie on him to produce it, and not on the pursuer." [1] In this passage Lord Fullerton is dealing with the matter as a question of evidence; he is not, it is conceived, adverting to the question whether, when money is lent and a bond taken for it, there remains any obligation apart from the bond.

Writing Unstamped or Improbative. That question comes to prominence when there is an objection to the bond or other written contract. It may be unstamped; it may be (if a bill or note) prescribed [2]; it may be improbative. Can the creditor, unable to sue on the writing, sue on the underlying debt?

When the objection is the want of a stamp the answer, it is conceived, is in the negative. It is part of the duty of the Court to prevent evasion of the stamp laws, such as would be effected by an action on a contract which had been reduced to writing but not stamped. So it is not admissible for the parties to an action, by joint minute, to agree to accept a copy in place of the principal document without paying the stamp-duty.[3] And when a yearly tenant possessed on letters which were held to be agreements to let, and these were not stamped, it was held that although, had there been no letters, his right as lessee might have been proved by parole, yet, as they existed and were unstamped, the right could not be proved without them, in a question with a third party who laid claim to a portion of the subject of the lease.[4] It is hard to reconcile the decision in *Fraser* v. *Bruce* [5] with the respect usually paid by the Court to the stamp laws. It was there held that a loan for which an unstamped promissory note had been given might be proved by other writings of the lender. The objection based on evasion of the stamp laws does not appear to have been suggested.

It is by no means clear that the same principles apply to an improbative bond. Until comparatively recently the decisions seem to have proceeded on the theory that when money was advanced and a bond given for it the only obligation on which the creditor could found was the obligation involved in the bond. He had contracted for a bond, not for a bond and (in addition) an independent liability on the part of its granter. The contract was analogous to a sale, the delivery of the bond being equivalent to the delivery of the article sold. So, in many cases, actions based on

[1] 13 D., at p. 143.
[2] As to the effect of the prescription of a bill, see *infra*, Chap. XL.
[3] *Cowan* v. *Stewart*, 1872, 10 M. 735.
[4] *Hutchinson* v. *Ferrier*, 1851, 13 D. 837; affd. 1852, 1 Macq. 196.
[5] 1857, 20 D. 115.

bonds found to be improbative were dismissed, without any suggestion that the debt might be otherwise established and enforced.[1] And in his report of the case of *Coult* v. *Angus*,[2] Lord Kames (who was counsel in the case) states as an undisputed point that an improbative bond cannot be used as evidence of a loan, and gives the reason that the intention of the parties is to create an obligation on the bond, and on the bond alone. But this can no longer be regarded as fixed since the decision of the whole Court in *Paterson* v. *Paterson*.[3] The actual point there decided was that though the borrower's writ was necessary to prove a loan, yet the writ need not be probative. The writ in question was not a bond, as it contained no direct obligation to repay; but the question naturally was pressed, What would be the effect of an improbative bond, supposing it to contain—as bonds in ordinary form do—an acknowledgment of the receipt of money? The opinions were to the effect that the point was open, and that it was not necessary to decide it.

Mutual Contracts in Improbative Writing. In the case of a contract involving obligations on both parties, and reduced to writing in an improbative form, the result would seem to depend on the nature of the original agreement between the parties. A provision that a contract is to be reduced to writing may or may not be suspensive of complete obligation, may or may not involve *locus pœnitentiæ* until the writing is executed.[4] If it does not, *i.e.*, if a binding agreement is arrived at verbally, with an additional agreement to reduce it to writing, there would seem no reason to suppose that the obligatory force of the verbal agreement would be in any way affected by the execution of an improbative writing. Parties would still be under the obligation to concur in executing it in a probative form. If, on the other hand, there was no agreement fully binding until the writing was executed it is conceived that either party could still resile, although an improbative writing had been drawn up. This, however, would hold only if no actings had followed on the improbative contract; if it had been acted upon it would become fully binding on the principle of *rei interventus*.[5] "We are familiar with cases in which a party to a contract claims the right to resile on the ground that his deed is not executed with the statutory formalities, and in general this course is open to an obligant while matters are entire; that is, if there has not been payment or performance by the other party. But it is perfectly useless to plead the statute of 1681 against the demand of a creditor who has performed his part of the bargain and is seeking fulfilment of the counterpart, for there is nothing more certain in our law than that *rei interventus*, or part performance, will set up an informal obligation, or, what is the same thing, will bar the right to resile." [6]

Lost Documents. Where a party puts forward a claim as founded on a contract reduced to writing, and avers that the document has been lost or destroyed, he must, as a general rule, set it up by an action of proving of the tenor, and cannot lead parole evidence to establish the obligation which

[1] *Stevenson* v. *Stevenson*, 1682, M. 16886; *Kirkpatrick* v. *Ferguson*, 1704, M. 17022; *Douglas, Heron & Co.* v. *Clark*, 1787, M. 16908; *Stewart* v. *Syme*, 12th December 1815, F.C.; *Alexander* v. *Alexander*, 1830, 8 S. 602. The cases are reviewed in *Paterson* v. *Paterson*, 1897, 25 R. 144, but many of the cases referred to there by Lord Young related to cautionary obligations.

[2] 1749, M. 17040.

[3] 1897, 25 R. 144; see *infra*, p. 193.

[4] *Supra*, p. 42.

[5] *Supra*, p. 172.

[6] Per Lord M'Laren, *National Bank* v. *Campbell*, 1892, 19 R. 885, at p. 891.

the writing embodied.[1] But this rule finds an exception in the case where it is averred that the writing was in the defender's possession, and wrongfully destroyed by him.[2] When *A.* averred a sale of the goodwill of his business, carried out by written offer and acceptance, and also averred that the document had been lost while in the purchaser's possession, and the purchaser admitted that such a document had existed (though he denied that he had signed it) a proof was allowed, and, on the evidence of witnesses, it was found that the sale was proved.[3]

[1] *Shaw* v. *Shaw's Trs.*, 1876, 3 R. 813; *Walker* v. *Nisbet*, 1915, S.C. 639.
[2] *Rannie* v. *Ogg*, 1891, 18 R. 903; *Elliott* v. *Galpern*, 1927, S.C. 29.
[3] *Elliott*, *supra*.

CHAPTER XI

OBLIGATIONS REQUIRING PROOF BY WRIT

THE last chapter was concerned with those contracts in which writing is necessary in order to form a completed obligation; in the present it is proposed to deal with the cases where writing is necessary only as a mode of proof. This necessity may arise either from the nature of the contract from which an alleged obligation is derived, or, under various statutes establishing prescription, from lapse of time.[1]

General Rule. In the earlier part of the seventeenth century the Court seems to have been disposed to limit the proof of any obligation of importance to the writ or oath of the party alleged to be liable. So it was held, in 1632, that a tailor, suing for an account exceeding £100 Scots, must prove it by the writ or oath of his customer.[2] But this and similar decisions, though perhaps never formally overruled, were not followed, and Lord Stair states that proof by witnesses is allowed in the case of sale, and to prove the intromission or receipt of any moveable, whether fungible or not, except the borrowing of current money.[3] So it is settled that in ordinary consensual contracts not relating to heritage, such as partnership,[4] deposit,[5] affreightment,[6] the obligations on each side may be proved by parole evidence. This rule does not hold when the obligation in question is gratuitous, a point already considered.[7] And, in addition to the contracts considered in the last chapter, there are certain contracts which give rise to obligations which can be proved only by the writ or oath of the defender. These are loan, trust, including securities constituted by *ex facie* absolute disposition, certain obligations of relief, contracts which are innominate and unusual, and in certain cases, the promise to marry. Of these the proof of trust will be more conveniently discussed in relation to the general rule that written contracts cannot be qualified by parole evidence,[8] of which it is really a particular instance; the others form the subject of the present chapter. The law as to the constitution of marriage is not within the scope of the present work.

Proof Limited to Writ or Oath. Before entering into the particular cases it may be as well to state two principles which are applicable generally, and in which the contracts which require writing merely as a mode of proof are in contrast with those where writing is necessary as a method of constitution.

[1] As to prescription, see *infra*, Chap. XL.

[2] *Turner* v. *Ker*, 1632, M. 12409

[3] Stair, iv. 43, 4. Sec. 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), under which a note or memorandum in writing is required in the sale of goods of the value of £10 or upwards, does not apply to Scotland. A sale of goods may be proved by parole evidence (*Hamilton* v. *Richard*, 1698, M. 12412 (damages for failure to deliver)).

[4] Bell, *Prin.*, sec. 361.

[5] *Taylor* v. *Nisbet*, 1901, 4 F. 79 (deposit of bank notes to be returned *in formâ specifica*).

[6] Per Lord Moncreiff in *Rederi Aktiebolaget Nordstjernan* v. *Salvesen*, 1903, 6 F. 64, at p. 75; revd. 1905, 7 F. (H.L.) 101.

[7] *Supra*, p. 50.

[8] *Infra*, Chap. XX.

The statutory rules as to the authentication of writings have no application to the case where the writing is relied on merely as proof of an obligation. It does not then require to be probative; it is sufficient if it be established in some way to be the writ of the party against whom it is used. "The scope of the statutes is confined to those writings by which a person becomes directly bound, and which form the substantive *vincula* upon which action may be raised. They have no application to a document which is used merely as evidence of a fact. They do not mean that every piece of written evidence must be probative under the statute." [1]

Again, the doctrine of *rei interventus* finds no place in a case relating to a contract which may be constituted without writing, but cannot be proved except by writ or oath. *Rei interventus*, as has been already explained, may have the effect either of proving that an agreement has been reached, or of barring the right to resile from an agreement proved or admitted, but informally constituted.[2] But it cannot satisfy the requirements of the law as to the proof of an obligation, in cases where the evidence of witnesses is excluded. Actings on the faith of an alleged agreement, if unequivocally referable to it, especially if they are actings of both parties, may be evidence which will exclude all doubt of the fact that agreement was reached, but then, in the contracts under consideration, the law requires evidence of a particular kind, viz., by the writ of the defender, his admission on record, or in a reference to his oath.[3]

Proof of Loan.—It is a general rule of common law that the fact that money has been lent, when alleged in an action for repayment, can be proved only by the writ or oath of the defender. There is no need to elaborate a point on which the authorities are quite conclusive.[4] From an early decision,[5] and the analogy of the law as to proof of payment of advances,[6] it would appear that the rule does not apply to proof of a loan not exceeding £100 Scots (£8. 6s. 8d.). And it does not apply to proof of a loan of corporeal moveables.[7]

But though the rule is general in its application to cases where the existence of a loan is raised as an isolated question, it would appear that it does not always hold where a loan is only one incident in the course of contractual relations between the parties. In *Smith's Tr.* v. *Smith*,[8] a trustee in bankruptcy raised an action against the bankrupt's son for conveyance to him of certain heritable property which he alleged the son had obtained from the bankrupt gratuitously. The son, in his defences, admitted receipt of the property, but averred that he had received it in security of advances made to his father, and for relief of a cautionary obligation which he had undertaken for him. These grounds of defence, it was held, could be

[1] Per Lord Benholme in *Thoms* v. *Thoms*, 1867, 6 M. 174, 177; approved and developed by Lord Kyllachy in *Paterson* v. *Paterson*, 1897, 25 R. 144, 173.

[2] *Supra*, pp. 46 and 174.

[3] *Smith* v. *Oliver*, 1911, S.C. 103 (opinion of Lord Cullen (Ordinary)).

[4] Stair, iv. 43, 4; Ersk. iv. 2, 20; Bell, *Prin.*, sec. 2257; Dickson, *Evidence*, sec. 594; *Haldane* v. *Speirs*, 1872, 10 M. 537, where the earlier cases are reviewed. If a general proof has been allowed and led, the Court, on appeal, may consider the whole evidence. *Kerr's Trs.* v. *Ker*, 1883, 11 R. 108. Writ dated after borrower's sequestration is not sufficient—*Carmichael's Tr.* v. *Carmichael*, 1929, S.L.T. 230.

[5] *Hammermen of Glasgow* v. *Crawford*, 1628, M. 12408; Dickson, *Evidence*, sec. 594. But see reporter's note to *Turbet* v. *Bennet*, 1803, Hume, 500. Parole evidence is incompetent if the original loan was more than £100 Scots, though the balance sued for is less (*Clark* v. *Glen*, 1836, 14 S. 966).

[6] *Annand's Trs.* v. *Annand*, 1869, 7 M. 526.

[7] *Geddes* v. *Geddes*, 1678, M. 12730; *Scot* v. *Fletcher*, 1665, M. 11616.

[8] 1911, S.C. 653.

proved by parole evidence. In such cases it was laid down by Lord President Dunedin that the question to be considered is, "whether the proof adduced is such proof as would be the natural proof under the circumstances of the transaction alleged." [1] In a subsequent case the Lord Ordinary, accepting this dictum, decided that the fact that a father had debited his son with certain payments in his business books did not amount to the "natural proof" of loan by the father.[2]

Probative Writ not Required. When proof by the defender's writ is attempted, it is now settled that the writ need not be probative. The point, disputable on the earlier cases, was decided by the whole Court in *Paterson* v. *Paterson*.[3] The document there in question was in the following terms: "Received the sum of £400, and I agree to assign a bond for same in favour of Mrs Paterson, as arranged." This document was not holograph of the defender, but was signed by him. It was held that, though it was not probative, it was admissible as proof of loan by his writ.

Receipt for Money as Evidence of Loan. By a long series of cases it is established that a receipt for money, if not qualified *in gremio*, implies that the money has been received on loan, and lays on the party who has signed the receipt the onus of proving that it was granted for some other reason.[4] "There is nothing better settled in our law" . . . "than that a receipt for money in absolute terms is sufficient evidence of a loan." [5] Thus, where a writing was produced signed by the defender in the words, "Received from Mr *G.* the sum of £30 sterling, as per agreement," it was held that the defender must disprove the presumption that he had the money on loan.[6] And an order on a savings bank granted by the pursuer, with a receipt for the money written upon it by the defender, was held to be sufficient proof of a loan.[7] A letter admitting receipt of money, but adding that it was in payment of "a debt of honour," was held to take the case out of the rule.[8] And the production of a cheque, indorsed by the payee, merely proves that money has passed between the parties; is not, if it stands alone, the writ of the payee to prove a loan to him by the drawer; does not justify the admission of parole evidence that the money was received on loan; nor raise any presumption of loan which the payee must displace.[9] The same rule is applied to the indorsement of a deposit-receipt.[10] But the rule that an indorsed cheque does not prove a loan does not apply when the loan in

[1] *Smith's Tr.* v. *Smith*, 1911, S.C. 653, at p. 659.

[2] *Grant's Exrx.* v. *Grant*, 1922, S.L.T. 156 (O.H., Lord Anderson).

[3] 1897, 25 R. 144 (Lord Young alone dissenting), approving *Bryan* v. *Butters*, 1892, 19 R. 490. The interlocutor in *Paterson* was: "Find that the proof of the loan alleged must be by writ or oath, but that such writ need not be holograph or tested."

[4] *Martin* v. *Crawford*, 1850, 12 D. 960; *Fraser* v. *Bruce*, 1857, 20 D. 115; *Robertson* v. *Robertson*, 1858, 20 D. 371; *Thomson* v. *Geekie*, 1861, 23 D. 693; *Duncan's Trs.* v. *Shand*, 1873, 11 M. 254; *Gill* v. *Gill*, 1907, S.C. 532. The evidence by which the defender may disprove the presumption of loan depends on the nature of the defence. If there is an admission of loan, and an averment of payment, proof is restricted to the writ or oath of the other party (*Fraser* v. *Bruce*, *supra*; *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764; but see *M'Vean* v. *M'Vean*, 1873, 11 M. 506). The same rule holds if the defence is that the money for which the receipt was granted already belonged to the defender (*Gill* v. *Gill*, *supra*). Proof that the receipt was granted for payment for work done, or goods supplied, may be by parole (*Thomson* v. *Geekie*, *supra*; see *Dinesmann* v. *Mair*, 1912, 1 S.L.T. 217). Parole proof that the money, originally received as a loan, was afterwards given to the defender, was admitted in *Anderson's Trs.* v. *Webster* (1883, 11 R. 35), rejected in *Robertson* v. *Robertson* (*supra*).

[5] *Christie's Trs.* v. *Muirhead*, 1870, 8 M. 461, per Lord President Inglis, at p. 463.

[6] *Thomson* v. *Geekie*, 1861, 23 D. 693.

[7] *Gill* v. *Gill*, 1907, S.C. 532.

[8] *Duncan's Trs.* v. *Shand*, 1873, 11 M. 254.

[9] *Haldane* v. *Speirs*, 1872, 10 M. 537; *Scotland* v. *Scotland*, 1909, S.C. 505.

[10] *Nimmo* v. *Nimmo*, 1873, 11 M. 446.

question is part of a continuous account, when advances made by one party to the other are sufficiently vouched by an indorsed cheque.[1]

Nature of Writ Required.—A mere jotting in the books of the defender (*e.g.*, "borrowed from *A.* £100") has been held insufficient as the defender's writ.[2] But a formal entry in the defender's books, especially if there were added a note of payment of interest, would probably be held sufficient.[3] And a cheque indorsed by the defenders (a company), together with entries in pencil in the company's books, were held sufficient to prove a loan.[4] According to Lord Neaves, the mention of the loan in a letter by the defender to a third party would not suffice.[5] A letter by the defender's agent has been accepted [6] and rejected [7] in cases which seem very difficult to reconcile. A reference to money lent, in a letter by a father to a son relating to the testamentary arrangements which the father proposed to make, was read as a mere allusion to the relations formerly existing between them, and not as an admission of any existing debt.[8] Letters indicating indebtedness, but with no mention of any particular loan or amount, will not warrant parole evidence to prove that the loan sued for was referred to.[9]

In *Paterson* v. *Paterson* [10] the majority of the judges were inclined to hold that a bond, if, from informality of execution, it could not be sued upon as a substantive obligation, might yet be sufficient as proof of loan by the defender's writ, assuming that the genuineness of his signature was admitted or proved. It was not necessary to decide the question, as it was held that to bring a writing within the definition of a bond, it must, however informal, contain an obligation to repay, while the document produced (quoted *supra*, p. 193) contained none. An I.O.U., though it contains no obligation to repay, is an acknowledgment of debt, and if proved to be genuine (for which purpose parole evidence is competent) requires no other evidence.[11]

Reference to Oath.—Where a party alleging a loan is unable to produce any writ of the borrower, and in consequence refers the matter to the defender's oath, he must take the deposition with any intrinsic qualifications which may be adjected to it. He is not, however, bound by extrinsic qualifications.[12] Where the defender merely admits the receipt of money from the pursuer, and adds that he received it in payment of a debt,[13] or of a debt of a third party for whom the pursuer was acting,[14] or in payment of services rendered,[15] or board and lodging supplied and to be supplied,[16]

[1] *Robb* v. *Robb's Trs.*, 1884, 11 R. 881. *Cp.* opinion of Lord Dunedin in *Smith's Tr.* v. *Smith*, 1911, S.C. 653, quoted at p. 193; *Inglis* v. *Inglis's Tr.*, 1925, S.L.T. 686 (O.H., Lord Murray).

[2] *Waddel* v. *Waddel*, 1790, 3 Pat. 188; *Wink* v. *Speirs*, 1868, 6 M. 657.

[3] *Thomson* v. *Lindsay*, 1872, 1 R. 65 (proof of deposit).

[4] *Hope* v. *Derwent Rolling Mills Co.*, 1905, 7 F. 837.

[5] *Wink* v. *Speirs*, 1868, 6 M. 657, at p. 658.

[6] *Smith* v. *Smith*, 1869, 8 M. 239.

[7] *Laidlaw* v. *Shaw*, 1886, 13 R. 724.

[8] *Patrick* v. *Patrick's Trs.*, 1904, 6 F. 836.

[9] *Rutherford's Exrs.* v. *Marshall*, 1861, 23 D. 1276; *Morison's Trs.* v. *Mitchell*, 1925, S.L.T. 231 (O.H., Lord Constable).

[10] 1897, 25 R. 144.

[11] *Haldane* v. *Speirs*, 1872, 10 M. 537; *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764, which overrules Lord Young's opinion in *Neilson's Trs.* v. *Neilson's Trs.*, 1883, 11 R. 119; *Williamson* v. *Allan*, 1882, 9 R. 859; *Bishop* v. *Bryce*, 1910, S.C. 426.

[12] As to the general law of intrinsic and extrinsic qualifications in a reference to oath, see Ersk. iv. 2, 11; Dickson, *Evidence*, sec. 1506; *Cowbrough* v. *Robertson*, 1879, 6 R. 1301.

[13] *Aitken* v. *Finlay*, 1702, M. 13205.

[14] *Minty* v. *Donald*, 1824, 3 S. 394.

[15] *Gow's Exrs.* v. *Sim*, 1866, 4 M. 578.

[16] *Thomson* v. *Duncan*, 1855, 17 D. 1081.

or in prepayment of services to be rendered in the future,[1] or even that it was intended as a gift,[2] his admission of the receipt of money must be taken with its qualification, and is therefore negative of the receipt of a loan. Where he admits that the money was originally received as a loan, but adds that he repaid it, this has been held to be an intrinsic qualification of the oath, and negative of the reference.[3] And the same rule has been applied to an explanation that the lender had refused payment, and agreed to hold the loan as discharged.[4] But an admission of the receipt of money on the footing of a loan, qualified by a statement that the debt has been subsequently extinguished by compensation, amounts to an admission with an extrinsic qualification, and entitles the pursuer to take the deposition as proof of the loan, without admitting it as proof of the obligations in respect of which compensation is pleaded. The defender has admitted his liability as a lender, and must establish *aliunde* the verity of other claims he may pretend to have against the pursuer.[5] Where, however, in the analogous case of a prescribed debt, the defender deponed that it had been arranged that goods supplied by him were to be met by goods supplied to him, and that this arrangement had been carried out, it was held that this was not an averment of compensation, but of payment in a particular way, and that the oath was negative of the reference.[6]

Obligations of Relief.—There is probably sufficient authority for the proposition that an obligation of relief can be proved only by the writ or oath of the defender.[7] But some qualification is necessary. In the first place, a right of relief is in many circumstances implied by law, and to such cases the rule has clearly no application. And even in express obligations of relief it would seem that in questions between cautioners and co-obligants rights of relief, other than those which the law would imply from the relation of the parties, may be proved by parole evidence. Thus a party who is bound as a joint obligant may prove by parole that he is truly a cautioner, and therefore entitled to complete relief from another obligant.[8] And a cautioner has been allowed to prove by parole an agreement that he was to have the sole benefit of certain securities,[9] and that he was to have complete relief from a co-cautioner.[10] In Dickson on *Evidence* (sec. 606) the general rule that obligations of relief require proof by writ is qualified by the statement that "parole will be admitted to prove the obligation when it forms part of a transaction which may be established by that means." This statement was considered in *Derlin* v. *M'Kelvie*.[11] It was held that

[1] *Lauder* v. *M'Gibbon & Medina*, 1727, M. 13206. See opinion of Lord Justice-Clerk (Inglis) in *Gow's Exrs.* v. *Sim*, 1866, 4 M. 578, at p. 581.

[2] *Stewart* v. *Walpole*, 1804, Hume, 416; *Penney* v. *Aitken*, 1927, S.C. 673. As to the qualification that the creditor had agreed that repayment should not be demanded until a certain event had occurred, see *Hamilton's Exrs.* v. *Struthers*, 1858, 21 D. 51.

[3] Ersk. iv. 2, 13; *Newlands* v. *M'Kinlay*, 1885, 13 R. 353.

[4] *Galbraith* v. *Cuthbertson*, 1866, 4 M. 295.

[5] Ersk. iv. 2, 11; *Mitchell* v. *Ferrier*, 1842, 5 D. 169; *Gow's Exrs.* v. *Sim*, 1866, 4 M. 578; *Thomson* v. *Duncan*, 1855, 17 D. 1081, per Lord Wood, at p. 1086.

[6] *Thomson's Exr.* v. *Thomson*, 1921, S.C. 109.

[7] Ersk. iv. 2, 20; *Donaldson* v. *Harrower*, 1668, M. 12385. The rule seems to be assumed in *Thoms* v. *Thoms*, 1867, 6 M. 174 (deciding that the writ need not be probative); *Clark* v. *Callender*, 9th March 1819, F.C.; affd. 1819, 6 Paton, 422; *Maconochie* v. *Stirling*, 1864, 2 M. 1104; *Woddrop* v. *Speirs*, 1906, 14 S.L.T. 319; 44 S.L.R. 22.

[8] Bell, *Prin.*, sec. 267; *Drummond* v. *Nicolson's Creditors*, 1697, M. 12329. But there are *obiter dicta* to the contrary in *M'Phersons* v. *Haggart*, 1881, 9 R. 306; *Lindsay* v. *Barmcotte*, 1851, 13 D. 718, per Lord Cuninghame, at p. 725.

[9] *Hamilton & Co.* v. *Freeth*, 1889, 16 R. 1022.

[10] *Thow's Tr.* v. *Young*, 1910, S.C. 588.

[11] 1915, S.C. 180.

the cases on which it was founded were limited to a guarantee for the price incident to a sale of moveables. They did not justify the admission of parole evidence when it was averred that a director of a company had agreed to purchase the company's debentures, and to relieve certain other directors of their liability as guarantors of the company's overdraft. These were separable obligations; the former proveable by parole, the latter only by writ or oath.

Innominate and Unusual Contracts.- A rule which has survived much adverse criticism is that the proof of innominate and unusual contracts is limited to the writ or oath of the defender.[1] The word innominate means that the contract is not one of those usually known by a distinctive name, as sale, agency, partnership; but it has been held that the mere fact that the contract alleged is innominate is not a ground for restricting the method of proof, unless it is also, in the opinion of the Court, unusual and anomalous.[2] On the ground that the contract was innominate and unusual, proof by parole has in one case been refused where it was averred that a law agent had agreed to act without charge except in the event of success[3]; that a landlord had promised that if the tenant would remain he would repay any money lost in the course of the lease[4]; that *A.* had agreed to leave all his property to *B.* if *B.* would settle as a doctor in Shetland[5]; that where, under a private Act, property was destined to the survivor of two parties, they had agreed to divide it[6]; that a contract, expressed in sale notes, was intended as a contract of agency[7]; that the pursuer had been appointed editor of a newspaper on very exceptional terms[8]; that one party had agreed to pay the whole expense of a proposed feu, whether completed or not[9]; that parties had agreed to payment of a capital sum in lieu of weekly payments under the Workmen's Compensation Act.[10]

On the other hand, parole evidence has been received, in spite of the plea that the contract averred was innominate and unusual, where it was alleged that an innkeeper had agreed to stable coach horses free of charge, in consideration of the coach starting and arriving at his inn[11]; that a party had agreed to manage his brother's business at a fixed salary plus a share

[1] Ersk. iv. 2, 20; Bell, *Prin.*, sec. 2257; cases in following notes; and see questions raised, but not decided, in *Reid* v. *Reid Brothers*, 1887, 14 R. 789; *Henderson, Tucker & Co.* v. *United Collieries*, 1904, 11 S.L.T. 653; *Dobie* v. *Lauder's Trs.*, 1873, 11 M. 749.

[2] *Forbes* v. *Caird*, 1877, 4 R. 1141; *Allison* v. *Allison's Trs.*, 1904, 6 F. 496. But see opinion of Lord Salvesen in *Hallet* v. *Ryrie* (1907, 15 S.L.T. 367), to the effect that this is a discretion which a Court is unfitted to exercise.

[3] *Taylor* v. *Forbes*, 1853, 24 D. 19, note; but see *Moscrip* v. *O'Hara*, 1880, 8 R. 36; *Jacobs* v. *Macmillan*, 1899, 2 F. 79; *Campbell* v. *Campbell's Exrs.*, 1910, 2 S.L.T. 240, which practically settle that such an agreement may be proved by parole: *Hallet* v. *Ryrie*, *supra*.

[4] *Garden* v. *Earl of Aberdeen*, 1893, 20 R. 896.

[5] *Edmondston* v. *Edmondston*, 1861, 23 D. 995; *Johnston* v. *Goodlet*, 1868, 6 M. 1067; *Gray* v. *Johnston*, 1928, S.C. 659.

[6] *M'Murrich's Trs.* v. *M'Murrich's Trs.*, 1903, 6 F. 121.

[7] *Müller* v. *Weber & Schaer*, 1901, 3 F. 401.

[8] *Copeland* v. *Lord Wimborne*, 1912, S.C. 355.

[9] *Woddrop* v. *Speirs*, 1906, 44 S.L.R. 22; 14 S.L.T. 319.

[10] *M'Fadzean's Exrs.* v. *M'Alpine*, 1907, S.C. 1269. In this case Lord President Dunedin expressed the opinion that proof was limited to the defender's writ or oath of "all obligations to pay money not incidental to one of the well-known consensual contracts." This general rule has been expressly disapproved, and the correction of the decision doubted, in *Smith* v. *Reekie*, 1920, S.C. 188. In *Craig* v. *Hill* (1832, 10 S. 219) parole proof was allowed of an agreement to commute a local tax ("ladle-dues") for an annual payment (see also *Thomson* v. *Fraser*, *infra*); and there seems to be sufficient authority for the statement that an agreement to compromise an action may be proved by parole (*Love* v. *Marshall*, 1872, 10 M. 795; *Anderson* v. *Dick*, 1901, 4 F. 68; *Torbat* v. *Torbat's Trs.*, 1906, 14 S.L.T. 830).

[11] *Forbes* v. *Caird*, 1877, 4 R. 1141.

in the profits [1]; that *A.* had promised to pay *B.* £100 if she would settle an action which she had raised against *C.*[2]; that a widow had agreed to waive her claim to *jus relictæ* in consideration of an increased liferent [3]; that the pursuer in an action of damages for slander had undertaken not to raise proceedings if the name of the defender's informant was disclosed [4]; that the owner of a drifter, which it was proposed to hire to the Admiralty, had undertaken to give a member of the crew a bonus in addition to his Admiralty pay.[5]

[1] *Allison* v. *Allison's Trs.*, 1904, 6 F. 496.
[2] *Thomson* v. *Fraser*, 1868, 7 M. 39.
[3] *Jack* v. *M'Grouther*, 1901, 38 S.L.R. 701.
[4] *Downie* v. *Black*, 1885, 13 R. 271, doubted by Lord Dunedin in *M'Fadzean's Exrs.* v. *M'Alpine*, 1907, S.C. 1269; and see *Reid* v. *Gow*, 1903, 10 S.L.T. 606 (agreement not to use diligence).
[5] *Smith* v. *Reekie*, 1920, S.C. 188.

CHAPTER XII

JOINT AND SEVERAL OBLIGATIONS

Obligations Joint and Several, or *pro rata*.—The interest on either side of a contract—as debtor, or as creditor—may be vested in more than one person, as in cases where several persons unite in binding themselves for payment or performance to a single creditor, or where one person promises a particular act or payment to more than one creditor. In such cases the result may be that the liabilities or rights created are divisible, so that each party concerned as a debtor is liable only for a share in the obligation—each creditor has only the right to exact a share; or they may be so far indivisible that the creditor has the right to exact the whole debt from any one of the obligants, or, in the converse case, that each of the creditors may exact the whole from the common debtor. In the former case the liabilities and rights involved are said to be *pro rata*; in the latter, to be *in solidum*.[1]

General Rule.—As a mere general rule, subject to many exceptions, and yielding to expressions indicative of an intention to the contrary, obligations are construed as involving rights and liabilities *pro rata*, so that one of two creditors can exact payment of a half only; one of two debtors is liable only in the same proportion.[2] So where two persons, by separate verbatim letters of the same date, each undertook to be liable along with the other to the extent of £800, it was held that these letters were to be construed as a *pro rata* obligation, in which the liability of each was limited to £400.[3]

Bonds.—In written obligations for payment of money, such as bonds, the measure of the obligations undertaken or conferred will depend on the terms used, any attempt to qualify them by proof of intention being excluded by the rule that it is incompetent to lead parole evidence to contradict the terms of a written contract.[4] If the parties bind themselves simply, without any adverbial qualification, the general rule just stated holds, and each is liable only *pro rata*, unless an indication of an intention to constitute liability *in solidum* can be found in the other parts of the bond, as in a case where there was a clause providing that the co-obligants were *inter se* to be entitled to *pro rata* relief.[5] The same result is reached if they are bound expressly

[1] In Roman law debtors who were bound *in solidum* were known as *duo rei debendi* or *promittendi*, or simply as *correi*; parties who were creditors in an obligation in which either might exact the whole, as *duo rei credendi* or *stipulandi* (Savigny, *Obligationenrecht*, chap. i. sec. 16).

[2] Stair, i. 17, 20; Ersk. iii. 3, 74; Bell, *Prin.*, sec. 51; *Com.*, i. 361; Pothier, *Obligations*, secs. 258, 265; Savigny, *Obligationenrecht*, chap. i. sec. 16. English law differs in this respect from the Scots and other systems founded on the civil law, and presumes that an obligation undertaken by more than one person involves liability *in solidum* (Leake, 7th ed., 306; *Kendall* v. *Hamilton*, 1879, 4 App. Cas. 504; Evans' translation of Pothier, ii. 64; cp. *White* v. *Tyndall*, 1888, 13 App. Cas. 263).

[3] *Alexander* v. *Scott*, 1827, 6 S. 150.

[4] *Infra*, Chap. XX. But the ordinary meaning of an obligatory expression may be displaced by an admission by the defender on a reference to his oath (*Campbell* v. *Farquhar*, 1724, M. 14626).

[5] *Boyd* v. *Peter*, 1649, 1 Brown's Supp. 403; *Wallace* v. *Corsane*, 1671, 1 Brown's Supp. 635.

pro rata, or each for his own part. On the other hand, if they are bound conjunctly and severally,[1] or as principals and full debtors,[2] it is established that each is liable for the whole debt. And an obligation conceived in favour of more than one creditor jointly and severally makes each a creditor for the whole sum.[3] The meaning of the words "jointly" or "conjunctly" (which appear to be synonymous) does not seem to be definitely fixed, but the balance of authority leads to the conclusion that their use does not displace the general rule in favour of *pro rata* liability.[4]

Obligations *in solidum*.—Apart from cases of bonds, there are certain contracts where liability *in solidum* is implied. Thus parties who join as co-acceptors of a bill of exchange, or as co-obligants in a promissory note, are liable *singuli in solidum*;[5] and, conversely, where a bill was drawn in favour of three persons, each was a creditor for the whole sum.[6] Each partner of a firm is jointly and severally liable for all the obligations of the firm incurred while he is a partner.[7] Even when the relationship of partnership does not exist, but several parties join in contracting for a common object, the presumption is that any resulting liability is *in solidum*. Thus where several persons employed a law agent to conduct a litigation in which they were all interested,[8] or where several proprietors employed a tradesman to build a bridge,[9] it was held that each employer was liable for the whole account. The same rule was applied where creditors in a private trust authorised the trustee to carry on the business of the debtor, and he made advances to that end;[10] and where trustees borrowed money for trust purposes, and bound themselves, as trustees and individually, for repayment.[11] Where two persons concur in making a purchase, it would appear, on the authority of a case where two parties bought a wood, and gave a written obligation for the price, without expressly binding themselves con-

[1] Bell, *Prin.*, sec. 56; *Richmond* v. *Grahame*, 1847, 9 D. 633. In *Farquhar* v. *M'Kain*, 1638, M. 2282, an ill-expressed bond bound the parties "conjunctly and severally, ilk ane for his own part." The liability was held to be *pro rata*. As to the construction of an obligation in a lease or feu-contract by a party, his heirs, representatives, and successors, jointly and severally, see *infra*, p. 262.

[2] *Cleghorn* v. *Yorston*, 1707, M. 14624.

[3] Bell, *Prin.*, sec. 52.

[4] Bell (*Prin.*, sec. 57; *Com.*, i. 362) laid down the rule that the word "conjunctly" imported joint and several liability. But the case he refers to (*Sloan* v. *Macmillan*, 1751, M. 14630) was one where the parties were principal and cautioner, and in a prior case co-obligants bound conjunctly were held to be liable only *pro rata* (*Campbell* v. *Farquhar*, 1724, M. 14626). See Lord M'Laren's note to Bell's *Commentaries*, i. 362; Menzies, *Conveyancing* (Sturrock's ed.), 237; Mont. Bell, *Conveyancing*, 3rd ed., i. 261; Duff, *Treatise on Deeds Affecting Moveables*, p. 20. In *Coats* v. *Union Bank*, 1928, S.C. 711, it was definitely decided that the use of the word "jointly" or "conjunctly" does not import liability *in solidum*, but the case has been appealed. There is a similar doubt about the import of the phrase "joint property." See conflicting views of Lord Kinnear and Lord Shand in *Schaw* v. *Black*, 1889, 16 R. 336.

[5] Bell, *Prin.*, sec. 61; *M'Morland* v. *Maxwell*, 1675, M. 14673; *Gordon* v. *Sutherland*, 1761, M. 14677. *Henderson Ltd.* v. *Wallace & Pennell*, 1902, 5 F. 166, explained in *Coats* v. *Union Bank*, *supra*. But the statement in Bell's *Principles* that this rule holds "even where it is otherwise expressed," is not borne out by the cases cited, which refer to the rights of parties *inter se* where one of them has signed expressly as cautioner, and there seems to be no reason why an acceptance expressly *pro rata* should infer joint and several liability. *Cp.* Bills of Exchange Act, 1882, sec. 19 (*b*) and sec. 44.

[6] *Lord Lyon* v. *Ardoch*, 1744, M. 14676.

[7] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 9.

[8] *Walker* v. *Brown*, 1803, M. App. *Solidum et pro rata*, No. 1; *Webster* v. *M'Lellan*, 1852, 14 D. 932; *Smith* v. *Harding*, 1877, 5 R. 147; *Neilson* v. *Wilson*, 1890, 17 R. 608.

[9] *French* v. *Earl of Galloway*, 1730, M. 14706.

[10] *Wilson* v. *Magistrates of Dunfermline*, 1822, 1 S. 417.

[11] *Commercial Bank of Scotland* v. *Sprot*, 1841, 3 D. 939. So where trustees held shares on which calls were made, they were jointly and severally liable (*Gillespie* v. *City of Glasgow Bank*, 1879, 6 R. 714; affd. 1879, 6 R. (H.L.) 104).

junctly and severally, that each is liable for the whole price.[1] In marine insurance each underwriter is liable only *pro rata*, so that, in the event of a partial loss, each is liable only for a share proportionate to the amount for which he had agreed to underwrite.[2] But where more than one policy is issued, to an amount exceeding the insurable value, the liability is joint and several, so that the insured, though he cannot obtain more than that value, may sue under any policy for the whole of it.[3] If several persons are taken bound expressly as cautioners, they are presumably liable only *pro rata*;[4] but if two persons are bound, and it appears from the terms of the bond that they are principal and cautioner, the implication is for liability *in solidum*: to hold that each is liable only *pro rata* would make the principal liable for only half of his own debt.[5]

Obligation *ad factum præstandum*.—An obligation *ad factum præstandum* implies the joint and several liability of the obligants, provided that the prestation undertaken is by its nature indivisible. Thus while the payment of money or the furnishing of a certain amount of commodities[6] as a general rule result in an obligation only *pro rata*, an undertaking to carry goods,[7] to erect buildings on a feu,[8] to return an article lent or hired,[9] involve liability *in solidum*, both in the sense that any one of the obligants may be called upon to perform the act undertaken, and that, in the event of failure, each is liable in a question with the creditor for the whole damages. If, however, the obligation is undertaken in alternative terms—either to perform an indivisible act or to pay a certain amount—so that the obligant could resist a demand for actual performance by tendering payment, the liability, once the election to pay has been settled, either by force of circumstances or by the act of the obligant, is merely *pro rata*.[10] But the circumstance that a sum is fixed as payable in the event of non-performance does not make the obligation alternative, unless it is within the rights of the debtor either to perform the act or tender the money; and therefore when *A.* and *B.* guaranteed that *C.* would return hired furniture, with the clause, "Our liability is not to extend to furniture of greater value nor to a sum of greater amount than £60," it was held that either, on *C.'s* failure, could be sued for the whole £60.[11] An obligation to relieve a third party of a debt is a doubtful point. In *Grant* v. *Strachan*,[12] it was held that an obligation to retire a bill involved liability *singuli in solidum*, but the decision was probably reached, as appears from another report, on the ground that the obligants were principal debtor and cautioner. In *Dennistoun* v. *Semple*,[13] a case also involved in specialties, three persons, who undertook that a minor's curators should relieve his tutor of a debt, were held to be liable only *pro rata*, on the ground that the substance of the obligation was the payment of money, and therefore in its nature divisible.

[1] Bell, *Prin.*, sec. 59; *Com.*, i. 363; Pothier, *Obligations*, sec. 266; *Mushet* v. *Harvey*, 1710, M. 14636. But see Savigny, *Obligationenrecht*, chap. i. secs. 20, 16; cp. *Reid* v. *Lamond*, 1857, 19 D. 265.

[2] Marine Insurance Act, 1906 (6 Edw. VII. c. 41), sec. 67 (2); *Tyzer* v. *Shipowners' Syndicate* [1896], 1 Q.B. 135.

[3] *Ibid.*, sec. 32.

[4] Ersk. iii. 3, 63; Bell, *Prin.*, sec. 267.

[5] *Grant* v. *Strachan*, 1721, M. 14633 and 14637.

[6] Ersk. iii. 3, 74.

[7] *Grott* v. *Sutherland*, 1672, M. 14631.

[8] *Rankine* v. *Logie Den Land Co.*, 1902, 4 F. 1074.

[9] *Darlington* v. *Gray*, 1836, 15 S. 197.

[10] Bell, *Com.*, i. 332, Lord M'Laren's note. *Urie* v. *Cheyne* (1630, M. 14626) may perhaps be read as a case of this kind; if not, it is irreconcilable with *Darlington* v. *Gray*, *infra*.

[11] *Darlington* v. *Gray*, 1836, 15 S. 197.

[12] 1721, M. 14633 and 14637.

[13] 1669, M. 14630.

Result when One Obligant does not Accede.—It is a general rule that where by the original conception of an obligation it is to be undertaken, on one or other side, by more than one person, there is no concluded or binding contract unless all accede. Until then there is *locus panitentia*. An agreement to undertake a particular obligation in conjunction with others does not infer an agreement to undertake it if the others, or some of them, are not bound; in other words, a party who undertakes a joint and several obligation does so under the implied condition that the other obligants are equally bound. An obligation on which *A.* and *B.* are liable is, from the point of view of *A.*, a very different thing from an obligation on which he is liable alone. In both cases he may be liable to pay the whole debt, but, in the former case and not in the latter, he has a right of relief against *B.*[1] So, on principle, if one party agrees to become liable along with others, and signs an obligatory document to that end, he ought to be free if the signatures of the others are not obtained.

Where three parties had agreed to take a lease, the terms had been arranged, and two had signed, it was held that they might resile on the refusal of the third to sign.[2] Where *A.* agreed that he and *B.* would buy corn, and signed a contract with the seller, his signature was only conditional, not binding on him when *B.* refused to accede.[3] In private trust deeds for creditors it is an implied condition that a creditor who accedes is not bound unless all others accede.[4] Where a married woman agreed to restrict the provision to which she would be entitled on the death of her husband, in consideration of an undertaking by certain friends to guarantee the husband's debts, it was held that she was not bound when some of the friends in question had executed the guarantee but others had drawn back.[5] In *Brown* v. *Nielson*[6] certain feuars entered into a contract with the proprietor of the lands *ex adverso* of their feus, under which he agreed not to build on these lands on condition that he should receive a certain yearly feu-duty from each feuar in the street. Some of the other feuars refused to accede, and it was held that the proprietor was not bound, though he was liable in repetition of any payments made by the feuars who had contracted with him, and also—a liability for which it is difficult to see any reason—for expenses they had incurred in enclosing the ground in question.

In cases when the contract is one where writing is not required, the creditor who has failed to obtain the signature of all the obligants may rely on the agreement which preceded the written contract. This was the argument presented when several beneficiaries had, it was averred, agreed to alter the terms of a will, and the terms of the agreement had been reduced to writing and signed by some and not by all. It was held that in such a case the underlying agreement might be enforceable, but that a heavy onus lay on the pursuer to prove that it was intended to be immediately and irrevocably binding, and that the subsequent writing was nothing more than a record.[7]

Cautionary Obligations.—In cautionary obligations, where the signature of the cautioner is a prerequisite of liability, an argument based on an under-

[1] Bell, *Prin.*, sec. 250.
[2] *York Buildings Co.* v. *Baillie*, 1724, M. 8435.
[3] *Hope* v. *Cleghorn*, 1727, M. 8409.
[4] Bell, *Com.*, ii. 400; *Jopp* v. *Hay*, 1844, 7 D. 260; *Weighton* v. *Cuthbert*, 1906, 14 S.L.T. 251 (O.H., Lord Ardwall).
[5] *Lady Edenham* v. *Stirling*, 1634, M. 8408. See *Paterson* v. *Paterson*, 1849, 11 D. 441.
[6] 1825, 4 S. 271.
[7] *Gordon's Exrs.* v. *Gordon*, 1918, 55 S.L.R. 497; 1918, 1 S.L.T. 407 (H.L.).

lying agreement is not maintainable, and the rule is well established that if several persons have agreed to become cautioners those who have signed are free if the signature of the others is not obtained. It has so been decided where one cautioner refused to sign ;[1] or where the creditor neglected to obtain the signature of one, though in fact he was bankrupt ;[2] or where the signature of one was forged by the principal debtor ;[3] or where one, though willing to sign, died before doing so ;[4] or even where one, in signing, limited his liability to a sum below that for which the others understood he was to be bound.[5] In the case last cited the doctrine was carried to its extreme limits. Four persons, *A.*, *B.*, *C.*, and *D.*, had agreed to guarantee the actings of an agent. The liability of *A.* and *B.* was not to exceed £25, the liability of *C.* and *D.* not to exceed £50. *D.*, who signed last, added to his signature the words "£25 only," and the bond in this form was accepted by the creditor. It was held that he could not enforce it against any of the obligants—not against *A.*, *B.*, or *C.*, because they had signed in reliance on *D.* becoming liable for £50, and he had limited his liability to £25 ; not against *D.*, because he had signed in reliance on the other three being bound, and they were not.[6]

A cautioner may be personally barred from maintaining that he is free because one of the others is not bound, as in a case where he signed in the knowledge that one of those who, *ex facie* of the bond, were to be obligants, had refused.[7] And probably if the bond is prepared in a form which gives no indication of the number of obligants who are expected to sign, anyone who signs it takes his chance that other co-obligants will be liable with him, and cannot object if they are not.[8] Two cases go further than this, and treat the question of liability on a bond not signed by all as one depending on proof of negligence on the part of the creditor. One—*Macdonald* v. *Stewart*[9]—is distinguished, and practically overruled, in *Paterson* v. *Bonar*,[10] which is a decision of the whole Court. In the other[11] a litigant was ordered to find caution for expenses. He submitted a bond *ex facie* signed by *A.* and *B.* Expenses were found due, and *A.* was charged on the bond. He brought a suspension, on the ground that the signature of *B.* was a forgery, and therefore, as he had agreed to sign only on the understanding that *B.* was to join him, he was not liable. The Court held him liable, in respect that, in a judicial bond of caution, no duty was cast upon the creditor to see that the signatures of all the obligants were obtained. But it is very difficult to see the answer to the cogent reasoning of the Lord Ordinary (Kinloch) to the effect that *A.* could not be liable unless he had agreed to be so ; that he had agreed to be so only conditionally ; and that the condition—the liability of *B.*—had not been purified.[12]

Title to Sue by One of Several Creditors.—Where there are several creditors in an obligation so constituted that each is a creditor for the whole debt,

[1] *Paterson* v. *Bonar*, 1844, 6 D. 987 ; *Loudoun* v. *Jackson*, 1825, 3 S. 558.
[2] *Fitzgerald* v. *M'Cowan* [1898], 2 Ir. R. 1.
[3] *Scottish Provincial Assurance Co.* v. *Pringle*, 1858, 20 D. 465.
[4] *National Provincial Bank* v. *Brackenbury*, 1906, 22 T.L.R. 797.
[5] *Ellesmere Brewery Co.* v. *Cooper* [1896], 1 Q.B. 75.
[6] *Ellesmere Brewery Co.* v. *Cooper*, *supra*. The case was decided on the assumption that *D.* had never agreed to become liable for more than £25. If he had agreed to become liable for £50, he could hardly have been allowed to profit by his own breach of contract.
[7] *Craig* v. *Paton*, 1865, 4 M. 192.
[8] *Blair* v. *Taylor*, 1836, 14 S. 1069 ; contrast *Loudoun* v. *Jackson*, 1825, 3 S. 558.
[9] 5th July 1810, F.C.
[10] 1844, 6 D. 987.
[11] *Simpson* v. *Fleming*, 1860, 22 D. 679.
[12] See also opinion of Lord Fullerton in *Paterson* v. *Bonar*, 1844, 6 D. 987, 1014.

as in the case of a bill or promissory note in favour of more than one party, any creditor is entitled to sue without the concurrence of the others.[1] If the action is for the enforcement of a contractual right which is in its nature indivisible, all those entitled to enforce the right must join in the action, no one creditor having a title to sue separately, and without the authority of the others. Thus where several owners of a patent made an arrangement with the owner of a similar patent, providing for the mutual use of patented parts, and the payment of royalties, it was held that one of the owners of the first-mentioned patent had no title to sue in an action to enforce the terms of the agreement, unless he could obtain the concurrence of the other co-owners.[2] And where a lease is granted by *pro indiviso* owners, all must concur in an action of removing.[3] The same rule holds in a lease granted by liferenter and fiar.[4] So if joint lessees propose to enforce a contractual right under the lease, they must all concur in the action.[5] But if the pursuer, in any of these cases, has the real interest in the action, it is probable that the defect in the instance can be cured by the production, *pendente processu*, of an assignation of their rights by the other co-creditors.[6] If the action is for the constitution of an alleged obligation for the payment of money (or any other obligation equally divisible), it is probably established that each obligant has a title to sue for his share without the concurrence of the other. In *Scotland* v. *Walkinshaw*[7] it was held that an action by some of the part owners of a ship for their share of a sum alleged to be due as demurrage was incompetent, but in the opinions given much reliance was placed on the fact that there was no difficulty in obtaining the concurrence of the others, and the case has not been regarded as determining generally that one co-creditor cannot sue separately. In *Pyper* v. *Christie*[8] two out of five joint adventurers in a transaction which had been closed sued the fifth, who had acted as treasurer, in an action of count and reckoning, with conclusions for payment of their respective shares in the profits. The action was held to be competent, but the real objection taken to it was that it should have been brought at the instance of the dissolved firm, and the question whether two out of four co-creditors had a title to sue alone does not appear to have been pressed on the notice of the Court. But the case has been treated as an authority for holding that under an obligation to divide certain profits equally between *A.* and *B.*, a summons at the instance of both might be proceeded with by *A.* alone, restricting the conclusions to payment of one-half of the sum to which the profits might be found to amount.[9] It is established that where there are several creditors in an obligation resulting from delict or negligence, each may sue for his share, and therefore that one part owner of a ship might sue, for his share of the

[1] *Lord Lyon* v. *Ardoch*, 1744, M. 14676.

[2] *Detrick & Webster* v. *Laing's Patent, etc., Sewing Machine Co.*, 1885, 12 R. 416.

[3] Ersk. ii. 6, 53; *Bruce* v. *Hunter*, 16th November 1808, F.C.; *Grozier* v. *Downie*, 1871, 9 M. 826. But one *pro indiviso* proprietor may take action to prevent unauthorised intrusion on the subjects (*Johnston* v. *Craufurd*, 1855, 17 D. 1023; *Warrand* v. *Watson*, 1905, 8 F. 253; *Aberdeen Station Committee* v. *North British Rly.*, 1890, 17 R. 975.

[4] *Buchanan* v. *Yuille*, 1831, 9 S. 843.

[5] *District Committee of Middle Ward of Lanarkshire* v. *Marshall*, 1896, 24 R. 139.

[6] *District Committee of Middle Ward of Lanarkshire* v. *Marshall*, 1896, 24 R. 139.

[7] 1830, 9 S. 25. See comments on this case in *Lawson* v. *Leith and Newcastle Steam Packet Co.*, 1850, 13 D. 175. An action by the master of a foreign ship, as master and part owner, and as such representing the ownership of the vessel, concluding for damages for breach of contract, has been sustained; *Larsen* v. *Ireland*, 1892, 20 R. 228.

[8] 1878, 6 R. 143.

[9] *Shaw* v. *Gibb's Trs.*, 1893, 20 R. 718.

damages, a party who was alleged to have injured the ship in a collision.[1] One beneficiary may sue the trustees for breach of trust, when the action will be intimated to the others.[2] Where a claim for *solatium* has arisen to a widow and children, all must concur in an action; or, if not, the pursuer must aver and prove that the others have refused to concur.[3] It has never been actually decided whether one of two parties who have granted a lease may sue alone for his share of the rent, but the authorities, so far as they go, negative the competency of such an action.[4] It is also undecided whether one of two or more joint tenants can give an effectual notice of intention to remove.[5]

Discharge by One Creditor.—Where a debt is constituted in favour of more than one creditor, and their rights are joint and several, so that any one may exact the whole debt, then, in the absence of any provision to the contrary in the writing by which the debt is constituted, a discharge granted by one, if not fraudulent or collusive, is good against the rest.[6] But a mere agreement by one creditor not to sue does not affect the right of the rest.[7] And a debtor is not entitled to plead that his debt is compensated by a debt due to him by one of several creditors, at least if the creditors are partners. This conclusion is reached, in Scotland, on the ground that in partnership debts the firm is the creditor, and not the individual partners, and therefore there is no *concursus debiti et crediti*;[8] in England, on the more general ground, which may be applicable to the case of co-creditors who are not partners, that while a debtor may be entitled to pay to a partner, on the assumption, unless he has notice to the contrary, that to receive payment is within the partner's mandate, he is not entitled to assume that any partner has authority to compensate his private debt with a debt due to the firm.[9] Payment of a debt to a partner is valid in a question with the firm or with the other partners.[10] When a firm is dissolved, each of the partners becomes the creditor in a *pro rata* share, according to the share of the assets to which he is entitled, of the debts outstanding, and therefore a debtor to the dissolved firm, who is also a creditor of an individual partner, may plead compensation to the extent of that partner's *pro rata* share.[11]

Action by One Creditor *res judicata*.—Where an action by one creditor has resulted in a decree of absolvitor, and the question at issue was the validity of the claim, not merely the right of the particular pursuer to enforce it, the decree would, it is submitted, be *res judicata* in a question with any of the other creditors.[12]

Joint Debtors' Liability.—In cases where several persons are liable in the

[1] *Lawson* v. *Leith and Newcastle Steam Packet Co.*, 1850, 13 D. 175.

[2] *Allen* v. *M'Combie's Trs.*, 1909, S.C. 710.

[3] *Pollok* v. *Workman*, 1900, 2 F. 354; explained by Lord President Dunedin in *Allen* v. *M'Combie's Trs.*, *supra*, at p. 715.

[4] *Stewart* v. *Wand*, 1842, 4 D. 622; *Schaw* v. *Black*, 1889, 16 R. 336.

[5] *Graham* v. *Stirling*, 1922, S.C. 90.

[6] *Wilkinson* v. *Lindo*, 1840, 7 M. & W. 81; *Powell* v. *Brodhurst* [1901], 2 Ch. 160; Pothier, *Obligations*, sec. 260; Savigny, *Obligationenrecht*, chap. i. sec. 18. Cp. *Lord Lyon* v. *Ardoch*, 1744, M. 14676; but see, as to the presumptions arising in such a case, *Steeds* v. *Steeds*, 1889, 22 Q.B.D. 537.

[7] *Walmesley* v. *Cooper*, 1839, 11 A. & E. 216.

[8] *Morrisson* v. *Hunter*, 1822, 2 S. 68; *Thom* v. *North British Bank*, 1850, 13 D. 134.

[9] *Piercy* v. *Fynney*, 1871, L.R. 12 Eq. 69.

[10] *Nicoll* v. *Reid*, 1878, 6 R. 216.

[11] *Oswald's Tr.* v. *Dickson*, 1833, 12 S. 156; *Heggie* v. *Heggie*, 1858, 21 D. 31; *Mitchell* v. *Canal Basin Foundry Co.*, 1869, 7 M. 480.

[12] *Allen* v. *M'Combie's Trs.*, 1909, S.C. 710. *Cp.* Savigny, *Obligationenrecht*, chap. i. secs. 19, 10.

same debt, the question whether one of them may be sued without calling the others depends on the way in which the debt is constituted. If the obligants are liable only *pro rata*, it would appear that all the obligants who are subject to the jurisdiction of the Scotch Courts must be called.[1] If the obligation is joint and several, and expressed in writing, any one obligant may be sued for the whole debt without calling the others.[2] But if the debt has to be constituted, the general rule is that all the co-obligants must be called.[3] It is a sufficient ground for not complying with this rule that some of the co-obligants are not subject to the jurisdiction of the Scotch Courts;[4] not merely that they are not all subject to the jurisdiction of the Sheriff Court in which the action is brought against one of them.[5] So where several persons employed a law agent, and he sued some of them in the Sheriff Court, it was held that the action was incompetent without calling the others, though they were not subject to the jurisdiction of that Court.[6] But this rule is limited to actions for the enforcement of obligations purely contractual. Where the obligation alleged is founded on delict, negligence, or breach of duty (as where trustees are sued for breach of trust), any obligant may be sued without calling the others.[7] Nor does the rule apply where an obligation is undertaken by a principal debtor and a cautioner; it is then competent to sue either the principal or the cautioner without calling the other.[8]

Partnership Cases.—In cases of partnership, while each partner is jointly and severally liable for all the debts of the firm,[9] it is not always competent to sue an individual partner without calling the firm or the other partners. If the firm debt is constituted by a bond, bill, or decree, any partner may be sued alone, or charged for payment.[10] But if the debt requires to be constituted, the action must be against the firm, and not against an individual partner.[11] If the firm is domiciled abroad, an action against all the partners who are subject to the jurisdiction of the Scotch Courts is competent, unless, by the law of the domicile, the firm is recognised as a separate *persona*.[12] If the firm is dissolved, the general rule is that all the partners must be called

[1] Mackay, *Manual*, 172; *Johnstone* v. *Arnott*, 1830, 8 S. 383. But in *M'Arthur* v. *Scott* (1836, 15 S. 270), where three persons undertook a cautionary obligation *pro rata*, it was held that action against two was competent, without calling the representatives of the third, who had died. The grounds of judgment are not given. As to adding a defender to the action, see A.S., 20th March 1907, sec. 2 (*e*); C.A.S., 1913, B., i. 5.

[2] Ersk. iii. 3, 74; Bell, *Prin.*, sec. 56; *Richmond* v. *Graham*, 1847, 9 D. 633.

[3] *Ross* v. *Baird*, 1848, 10 D. 1493; *Muir* v. *Collett*, 1862, 24 D. 1119; *Neilson* v. *Wilson*, 1890, 17 R. 608, where *Zuill* v. *M'Murchy* (1842, 4 D. 871) is explained by Lord Shand, at p. 618. See also *Gibson* v. *Macdonald* (1824, 3 S. 374), an exceptional case, where the obligant who was sued was barred from pleading that his co-obligant was not called.

[4] *Muir* v. *Collett*, 1862, 24 D. 1119.

[5] *Neilson* v. *Wilson*, 1890, 17 R. 608.

[6] *Neilson* v. *Wilson*, *supra*.

[7] *Croskery* v. *Gilmour's Trs.*, 1890, 17 R. 696; *Sim* v. *Muir's Trs.*, 1906, 8 F. 1091; *Allen* v. *M'Combie's Trs.*, 1909, S.C. 740.

[8] Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60), sec. 8; *Morrison* v. *Harkness*, 1870, 9 M. 35; *Sheldon & Ackhoff* v. *Milligan*, 1907, 14 S.L.T. 703. When decree has been taken against one of several parties liable jointly and severally it is no bar to an action against the others, except in so far as the party decerned against has actually satisfied the debt. *Steven* v. *Broady, Norman & Co.*, 1928, S.C. 351. As to parties alternatively liable, see *supra*, p. 140.

[9] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 9.

[10] *M'Tavish* v. *Saltoun*, 3rd February 1821, F.C.; *Maclean* v. *Rose*, 1836, 15 S. 236; *Wallace* v. *Plock*, 1841, 3 D. 1047.

[11] *Reid* v. *M'Call & Douglas*, 11th June 1814, F.C.

[12] *Edinburgh and Glasgow Bank* v. *Ewan*, 1852, 14 D. 547; *Muir* v. *Collett*, 1862, 24 D. 1119, per Lord Justice-Clerk Inglis, at p. 1122.

in an action for the constitution of the debt,[1] with the qualification that it is sufficient to call all the partners who are subject to the jurisdiction of the Scotch Courts.[2]

Bankruptcy of One Obligant.—If one co-obligant becomes bankrupt, and the obligation is *in solidum*, the loss falls on the other obligants: they remain liable *singuli in solidum* to the creditor, and lose their right of relief against the bankrupt obligant. If the liability is *pro rata*, it is an established rule in cautionary obligations that the deficiency due to the bankruptcy of one cautioner must be made up by the rest.[3] But it is not certain that this rule holds in the case of co-obligants who are not cautioners. It is clear that if each limits his liability to a certain amount, he cannot be liable beyond that amount even if all the other co-obligants fail. The loss falls on the creditor. And where several proprietors undertook to make up, year by year, the deficiency in the fund available for the upkeep of the roads, not exceeding in any year £130, and in proportions according to their respective valuations, it was held that the bankruptcy of one resulted in a diminution of their total contribution, and did not increase the amount exigible from any of the solvent contributors.[4]

Right of Relief.—It is a general principle, dependent on equity, that where several persons are liable for the same debt, each, though he may be liable *in solidum* to the creditor, is liable only for a proportionate share in a question with his co-debtors, and, if he is forced to pay more, has a right of relief against them.[5] This principle, though it has been chiefly illustrated in questions between co-cautioners and insurance companies who have undertaken the same risk, does not depend on any specialty in the law of cautionary obligations or insurance, but proceeds "upon a principle of law which must be applicable to all countries, that where several persons are debtors, all shall be equal."[6]

Principal and Cautioner.—In the application of the rule it must first be noted that when the parties, though bound jointly and severally as principal obligants, are *inter se* principal debtor and cautioner, the cautioner is entitled to be fully relieved by the principal. The rule is not equality of burden but total relief.[7]

Co-cautioners. Where the parties are not principal and cautioner the rule is a proportionate equality of burden. Where the obligants are bound jointly and severally, it has never been doubted that the one who has paid the whole debt, or more than his share, may recover from the others the excess payments, and any expenses properly incurred. So where one of two cautioners for a contractor intervened on the contractor's failure, and completed the work, it was held that he was entitled to recover from the other half the expense he had incurred, including a fee for his work.[8] In cases where the obligation is only *pro rata*, or where each undertakes liability for a specific sum, no question of relief can arise if the obligation is for a definite

[1] *Geddes* v. *Hopkirk*, 1827, 5 S. 747; *Dewar* v. *Munnoch*, 1831, 9 S. 487; *M'Naught* v. *Milligan*, 1885, 13 R. 366.

[2] *Muir* v. *Collett*, 1862, 24 D. 1119.

[3] Bell, *Prin.*, sec. 267.

[4] *Duke of Montrose* v. *Edmonstone*, 1845, 7 D. 759.

[5] Stair, i. 8, 9; Ersk. iii. 3, 74; Bell's *Prin.*, sec. 62. There is no right of relief on payment of a debt not legally binding, though there may be a moral obligation to pay it (*Henderson* v. *Paul*, 1867, 5 M. 628).

[6] Per Lord Redesdale in *Stirling* v. *Forrester*, 1821, 3 Bligh, 575, at p. 596; also in 1 Sh. App. 37.

[7] Stair, i. 17, 4; Ersk. iii. 3, 61; Bell, *Prin.*, sec. 245.

[8] *Marshall* v. *Pennycook*, 1908, S.C. 276.

sum and is fully exacted, because in that case no one can have paid more than his share. In cases where the amount of the debt is indefinite, as where several cautioners guarantee the amount to become due on an account opened by a principal debtor with a bank, with a clause restricting the liability of each to a certain amount, it is established in England that the right of relief applies, so that any one cautioner, called upon to pay more than his proportionate share of the debt, has the right to recover from the others the amount they would have paid if the creditor had chosen to allocate the amount due equitably amongst them. Each therefore has to bear, not necessarily an equal share, but a share proportionate to the amount for which he undertook to be liable.[1] So where three persons bound themselves as guarantors for the intromissions of a public official, in three separate bonds for £4,000 each, and the total amount ultimately due (slightly under £4,000) was recovered from one, it was held that the others were each bound to relieve him of a third of what he had paid.[2] The law of Scotland has been stated to be to the same effect by writers of authority and by a Lord Ordinary,[3] in spite of a case where it was held that where the obligations of cautioners were not joint and several, one who had obtained a security was not bound to communicate it to the rest.[4]

Relief of Expenses.—The question whether expenses in an unsuccessful defence to the creditor's demand can form an item in a claim for relief against a co-obligant depends upon whether, in the circumstances, defence was a reasonable course.[5] It has been laid down that a party who is sued, and refuses to admit liability, cannot at that stage maintain an action against another against whom he has a claim of relief, but that he ought to intimate the demand made upon him with a view to concerted action.[6] Without such intimation, it is conceived, he must meet the expenses he incurs without relief.[7] A compromise with the creditor will reduce *pro tanto* the amount claimable as relief, even although the debtor from whom relief is claimed may have refused to agree to it.[8]

Rights of Relief with New Cautioner. As the right to relief is implied by law on principles of equity, and not on any supposed contract between the parties, it applies whether the co-obligants or co-cautioners are bound in one or in several instruments, and even where they were unaware of each other's existence, provided that their respective obligations formed part of one transaction.[9] If a new cautioner has interposed at a later stage, it is a question of fact—on which parole evidence is competent [10]—whether he is to be regarded as a co-cautioner, and therefore liable in relief,[11] or whether he interposed as a guarantor of the existing cautioners, in which case they

[1] *Dering* v. *Lord Winchelsea*, 1787, 1 Cox, 318; 2 White and Tudor, *L.C.*, 8th ed., 539; *Pendlebury* v. *Walker*, 1841, 4 Y. & C. 424; *Ellesmere Brewery Co.* v. *Cooper* [1896], 1 Q.B. 75.

[2] *Dering* v. *Lord Winchelsea*, *supra*.

[3] Bell, *Com.*, i. 367; Brodie, *Notes to Stair*, 943; *Morgan* v. *Smart*, 1872, 10 M. 610 (per Lord Gifford).

[4] *Lawrie* v. *Stewart*, 1823, 2 S. 368.

[5] *Carrick* v. *Manford*, 1854, 16 D. 410; *Straiton Estate Co.* v. *Stephens*, 1880, 8 R. 299.

[6] *Duncan's Trs.* v. *Steven*, 1897, 24 R. 880.

[7] *The Wallsend* [1907], P. 302.

[8] *British Dominions Insurance Co.* v. *Duder* [1915], 2 K.B. 394.

[9] *Stirling* v. *Forrester*, 1821, 3 Bligh, 575; 1 Sh. App. 37; *Whiting* v. *Burke*, 1871, L.R. 6 Ch. 342; *Duncan, Fox & Co.* v. *North and South Wales Bank*, 1880, 6 App. Cas. 1.

[10] *Craythorne* v. *Swinburne*, 1807, 14 Vesey, 160; *Thorburn* v. *Howie*, *infra*.

[11] *Thorburn* v. *Howie*, 1863, 1 M. 1169; *Whiting* v. *Burke*, *supra*; *Re Ennis* [1893], 3 Ch. 238. The early cases in Scotland are collected in More's *Notes to Stair*, p. cxiv.

are to be regarded, in a question with him, as principals, and are bound to relieve him of anything he may be called upon to pay.[1]

Amount of Relief.—When a claim of relief is made, and all the co-obligants who are exposed to it are solvent, the claim against any one cannot exceed his proportionate share. It was indeed held in two early cases that a co-obligant who had paid and obtained an assignation of the creditor's rights was thereby placed in the position of the creditor, and could therefore sue any one of the other co-obligants for the balance of the debt after deducting his own share, leaving the party sued to work out his relief against the other co-obligants.[2] But it may now be said to be established that the rights of a co-obligant under a contractual obligation are the same whether he has obtained an assignation from the creditor, or founds his claim on the implied obligation of relief, and do not extend, in a case where all the co-debtors are solvent, beyond a right to recover from each his proportionate share.[3] The effect of the assignation "must be measured, not by the mere terms of the document which he has obtained, but by the measure of the right which has enabled him to obtain it."[4] It has long been settled that where some of the co-obligants are insolvent, their shares, in a question of relief, are to be ignored; so that if there are five co-obligants, and two are insolvent, one who pays the whole debt may recover one-third, and not merely one-fifth, from each of the other two who remain solvent.[5] It has never been settled what is the exact meaning, in this connection, of the word "insolvency," but it would appear that proof that a co-obligant was unable to pay, even though he had not been rendered bankrupt, would be sufficient.[6] In the case referred to, two out of five co-obligants bound jointly and severally had paid the whole debt. They sued another for a third of the debt, averring that the remaining two were insolvent. It was held that, whether the insolvency had been proved or not, the pursuers were entitled to insist that the defender should be placed in the same position as that in which they stood, and therefore that he was liable for the sum sued for, leaving him, like themselves, to take his chance of relief from the two doubtful estates. Where an obligation has been granted by a firm, its partners, and an outside party, the firm is counted as a separate obligant; so that if in such a case there are two partners, and the firm and partners are compelled to pay, all that they can

[1] *Inglis* v. *Bethune*, 1798, Hume, 87; *Inglis* v. *Walker*, 1827, 5 S. 726; affd. 1830, 4 W. & S. 40; *Craythorne* v. *Swinburne*, *supra*; *Re Denton's Estate* [1904], 2 Ch. 178; *Thow's Tr.* v. *Young*, 1910, S.C. 588. The opinion of Lord President Dunedin in *Thow's Tr.* (p. 596) is difficult to follow. He lays it down that in Roman, Scots, and English law the right of a cautioner to relief "is treated from the standpoint of the necessity of the parties being bound *in solidum* in the original obligation. In fact the principle is never applied except when the parties are so bound in the original obligation." If this means that there is no right of relief unless all the cautioners are bound jointly and severally for the whole debt, it is contradicted by *Dering* v. *Lord Winchelsea* and other cases cited above (note 1, p. 207). If it means that relief can never be applicable to cases where a new cautioner is afterwards introduced, it is refuted by the cases cited in the note just preceding.

[2] *Kincaid* v. *Leckie*, 1665, M. 14640; *Smeiton* v. *Kininmond*, 1684, M. 14641. The law is stated in accordance with these decisions in Erskine (iii. 3, 74).

[3] *Craigie* v. *Graham*, 1710, M. 14649; *Gilmour* v. *Finnie*, 1832, 11 S. 193; *Anderson* v. *Dayton*, 1884, 21 S.L.R. 787; *Thow's Tr.* v. *Young*, 1910, S.C. 588; cp. *Buchanan* v. *Main*, *infra*. As to obligations resulting from delict, see Bell, *Prin.*, sec. 550; *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, 1893, 20 R. 275; affd. 1894, 21 R. (H.L.) 39.

[4] Per Lord Kinnear in *Anderson* v. *Dayton*, 1884, 21 S.L.R. 787. See also opinion of Lord Skerrington (Ordinary) in *Thow's Tr.* v. *Young*, 1910, S.C. 588, at p. 592.

[5] *Muire* v. *Chalmers*, 1682, M. 14654; *Lamberton* v. *Earl of Annandale*, 1683, M. 14655; Bell, *Prin.*, sec. 62; Savigny, *Obligationenrecht*, chap. i. sec. 24.

[6] *Buchanan* v. *Main*, 1900, 3 F. 215.

claim from the remaining obligant is one-fourth, and not one-third of the debt.[1]

No Double Ranking in Sequestration.—If a co-obligant is bankrupt, and the creditor ranks on his estate, the other co-obligants, on paying the balance, cannot also rank for relief, because to allow such a ranking would be contrary to the rule in bankruptcy that no debt can be ranked for twice.[2] But if the matter is arranged so that payment is made by a solvent co-obligant, without any ranking by the creditor, the co-obligant who pays may rank for relief on the bankrupt estate. According to the authorities in Scotland, his ranking is limited to the share of the debt for which the bankrupt, if solvent, would have been liable;[3] according to an English decision he may, on obtaining an assignation of the debt from the creditor, rank for the whole sum, though of course he cannot draw in dividends more than his proper amount of relief;[4] but it is submitted that this rule, which is contrary to the principle that a co-obligant's measure of relief does not depend upon whether he has an assignation of the debt or not, should not be followed in Scotland.

Proof of Relations of Parties.—In all questions of relief the true relations of the parties may be proved to be other than those which appear in the written obligation by which the debt is founded. This is not excluded by the rule that parole evidence is not competent to vary the terms of a written contract, because the written obligation is intended to settle the relations of the obligants to the common creditor, not their relations to each other. So it may be proved that parties *ex facie* bound as co-obligants are principal debtor and cautioners;[5] that successive parties to a bill are co-obligants and not creditor and debtors;[6] or that one cautioner is not entitled to share in a security which another has obtained from the debtor.[7]

Relief in Insurance.—In marine and fire insurance, which are contracts of indemnity, it may happen that policies have been effected with more than one insurer to an amount exceeding the value of the subjects. The insured is not entitled to recover more than indemnity for his loss, but, in the absence of any provision to the contrary, he may recover the whole under any policy.[8] But if in this way the whole of the loss, or more than his proportionate share, is laid upon any one insurer, he has a right of relief against the others[9]—a right which he may enforce by action in his own name without any assignation from the insured.[10]

Contribution Clauses.—In fire insurance there is invariably a clause in

[1] *Macbride* v. *Clark, Grierson & Co.*, 1865, 4 M. 73; *Hamilton* v. *Freeth*, 1889, 16 R. 1022, per Lord Fraser (Ordinary).

[2] Bell, *Com.*, ii. 420; *Anderson* v. *Mackinnon*, 1876, 3 R. 608. The rule does not apply to a composition contract when the bankrupt is not deprived of his estate (*Mackinnon* v. *Monkhouse*, 1881, 9 R. 393; see Goudy, *Bankruptcy*, 3rd ed., 614).

[3] *Keith* v. *Forbes*, 1792, M. 2136; revd. 1794, 3 Paton, 350; Bell, *Com.*, i. 371.

[4] *Parker, In re* [1894], 3 Ch. 400. Clearly the Scotch rule is right. *A.* and *B.* are cautioners for £100. *A.* pays the whole debt. If *B.* is solvent, *A.*, with or without an assignation from the creditor, can claim from him £50, and no more. Can any reason be suggested why, if *B.* is bankrupt, *A.*, in competition with *B.*'s other creditors, should be entitled to rank for £100?

[5] Bell, *Prin.*, sec. 267; *Thorburn* v. *Howie*, 1863, 1 M. 1169; *Thow's Tr.* v. *Young*, 1910, S.C. 588.

[6] *Macdonald* v. *Whitfield*, 1883, 8 App. Cas. 733; *Crosbie* v. *Brown*, 1900, 3 F. 83.

[7] *Hamilton & Co.* v. *Freeth*, 1889, 16 R. 1022.

[8] Marine Insurance Act, 1906 (6 Edw. VII. c. 41), sec. 32; *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380; *Glasgow Provident Investment Society* v. *Westminster Fire Office*, 1887, 14 R. 947, per consulted judges, at pp. 965, 966; affd. 1888, 15 R. (H.L.) 89.

[9] Marine Insurance Act, 1906, sec. 80.

[10] *Sickness and Accident Assurance Association* v. *General Accident, etc., Co.*, 1892, 19 R. 977.

the policy (usually known as the contribution clause) making it a condition that if at the time of the loss there shall be any other policies, "whether effected by the insured or by any other person covering the same property," the company issuing the policy shall not be liable to pay or contribute more than its rateable proportion of the loss.[1] But to found this right of relief or contribution the various policies must cover not merely the same physical subject, but the same interest in that subject. "There may be a number of persons who may have an interest in the house—(1) the fiar, (2) the life-renter, (3) the holder of a ground-annual, (4) a bondholder, (5) the tenant. Each of these persons is entitled to insure his own interest; each has a distinct interest from the other. What each insures is not the house, but the risk of losing his own special interest."[2] So where a wharfinger had insured all goods in his store, and the owner of the goods had also insured them, it was held that there was no contribution, on the ground that the former policy covered the liability of the wharfinger to pay for the goods if destroyed, the latter, the risk of the loss of the goods themselves.[3] And where policies were taken by a prior and a postponed bondholder over a mill, it was held that these were independent contracts, which, though they covered the same building, did not cover the same interest in that building, and therefore that the contribution clause in the policies did not apply, although the debtor (the owner of the mill) was also a party to the policies, and in fact paid the premiums on both.[4] But where policies were taken by the owner of the subjects and by a mortgagee, and it was provided that any sums received under the latter policy should be applied in payment of the mortgage debt, and the owner paid the premiums thereon, it was held that the real interest secured under both policies was that of the owner, and therefore that the right of contribution could be asserted.[5]

Right to Assignation from Creditor.—A co-obligant who has paid the debt, or more than his proportionate share, is entitled to claim from the creditor an assignation of the debt, any securities held for it, and any diligence that may have been done on it.[6] This right accrues when the obligant is called on to pay, or when he tenders full payment, which, when the debt is payable,

[1] Since the case of *North British and Mercantile Co.* v. *London, Liverpool, and Globe Co.* (1877, 5 Ch. D. 569), the form of this clause has been altered. The words quoted now run, "Whether effected by the insured or by any other person or persons on his behalf covering the same property" (see Bunyan, *Fire Insurance*, 7th ed., 279).

[2] Per Lord Fraser in *Glasgow Provident Investment Society* v. *Westminster Fire Office*, 1887, 14 R. 947; affd. 1888, 15 R. (H.L.) 89, at 14 R. 972. See *Andrews* v. *Patriotic Association*, 1886, 18 L.R. Ir. 355 (insurance by landlord and tenant).

[3] *North British and Mercantile Co.* v. *London, Liverpool, and Globe Co.*, 1877, 5 Ch. D. 569. Since this case a rule has been passed by the Fire Offices Committee enforcing contribution even although separate rights are insured.

[4] *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Co.*, 1883, 11 R. 287. In a sequel to this case (*Glasgow Provident Investment Society* v. *Westminster Fire Office*, 1887, 14 R. 947; affd. 1888, 15 R. (H.L.) 89) it was held that the postponed bondholder might recover under his policy notwithstanding that the whole damage due to the fire (as fixed by arbitration) had been paid under the prior bondholder's policy, it being admitted as a fact that the mill, while sufficient to cover both bonds before the fire, was, after it, insufficient to cover the second bond. It was objected that in this way the owner of the mill recovered double compensation for the fire, but the objection was met by the observation that the company under the postponed bondholder's policy would be entitled to an assignation, *pro tanto*, of the postponed bond.

[5] *Nichols* v. *Scottish Union and National Insurance Co.*, 1885, an English case reported as an appendix to 14 R., at p. 1094.

[6] Bell, *Prin.*, sec. 255; *Erskine* v. *Manderson*, 1780, M. 1386; *Lowe* v. *Greig*, 1825, 3 S. 543; *Sligo* v. *Menzies*, 1840, 2 D. 1478. An obligant called on to pay is entitled to enforce claims of relief from others equally liable before he has actually paid (*Wolmershausen* v. *Gullick* [1893], 2 Ch. 514).

the creditor is not entitled to refuse.[1] But the right is dependent on full payment; and therefore where a creditor claimed to rank on the bankrupt estate of a cautioner, it was held that he was entitled to do so without assigning to the trustee securities which he held from the principal debtor,[2] unless the trustee chose to tender full payment of the debt, which would entitle him to an assignation.[3]

Bonds of Caution.— In bonds of caution where the liability of the cautioner is limited to a fixed amount, the obligation may be read as a guarantee for a part of the debt, or as a guarantee of the whole debt subject to a limit of the amount which may be demanded from the cautioner. The question depends on the terms of the bond;[4] although, according to an English decision, there is a presumption for the former construction if the guarantee is for a debt to be incurred in future, as in the case of a cash credit bond; for the latter, if the guarantee is for a debt already incurred.[5] Where the guarantee is construed as for part of the debt only, the cautioner, on paying the sum for which he has engaged, is entitled to an assignation of the debt *pro tanto*, and may rank to that extent in the bankruptcy of the principal debtor; or, if the creditor ranks for the whole debt, his claim against the cautioner is limited to the balance remaining after deduction of the dividend paid or that part of his debt.[6] If the guarantee covers the whole debt, with a limit on the cautioner's liability, it might be inferred from an early decision that the creditor is entitled to rank for the whole debt, and recover from the cautioner so much of the balance as the limit of the latter's liability may permit, without deducting from his claim any part of the dividend received from the bankrupt estate.[7] In a more recent case, however, the Court refused to lay down any general rule to that effect, and held that the respective rights of creditor and cautioner in such circumstances were to be gathered from the terms of the bond in each case.[8] When the creditor who has engaged for the whole debt subject to a limit in amount has paid the sum for which he has engaged before the bankruptcy of the principal debtor he is entitled to a ranking for what he has paid, and the creditor, whether the cautioner chooses to rank or not, cannot rank except under deduction of what he has received from the cautioner, even although he may have accepted payment with an express reservation of his right to rank for the whole debt.[9] For the application of this rule there must have been actual payment by the cautioner before the bankruptcy of the principal debtor: where the cautioner had merely deposited with the creditor a sum to meet his ultimate liability it was held that this was in effect a security, and that the creditor might rank for the whole debt.[10]

Refusal to Assign. –A creditor is entitled to refuse an assignation of the debt, or of the securities held for it, if to grant it would conflict with some legitimate interest of his own.[11] It has been laid down that it lies on the party demanding an assignation to shew that the creditor has no interest

[1] *Gilmour* v. *Finnie*, 1832, 11 S. 193; *Paul* v. *Henderson*, 1867, 5 M. 1120.
[2] *Ewart* v. *Latta*, 1863, 1 M. 905; revd. 1865, 3 M. (H.L.) 36.
[3] *Fleming* v. *Burgess*, 1867, 5 M. 856.
[4] *Veitch* v. *National Bank*, 1907, S.C. 554.
[5] *Ellis* v. *Emanuel*, 1876, 1 Ex. D. 157.
[6] *Veitch* v. *National Bank*, *supra*.
[7] *Mein* v. *Sanders*, 1824, 2 S. 778.
[8] *Harvie's Trs.* v. *Bank of Scotland*, 1885, 12 R. 1141.
[9] *Hamilton* v. *Cuthbertson*, 1841, 3 D. 494; *Mackinnon's Tr.* v. *Bank of Scotland*, 1915, S.C. 411; *In re Sass* [1896], 2 Q.B. 12.
[10] *Commercial Bank of Australia* v. *Wilson* [1893], A.C. 181.
[11] Ersk. iii. 5, 11; Bell, *Prin.*, sec. 557. Cases in following notes.

to refuse,[1] and that a risk of loss is sufficient interest.[2] Yet only in exceptional cases can the creditor have an interest to refuse to assign the debt, on receiving full payment, apart from all question of assigning securities held for it. He has such an interest if the payment is tendered in circumstances in which an assignation of the debt might expose him to the risk of an action of count and reckoning at the instance of the other co-obligants. Thus in *Will* v. *Elder's Trs.*,[3] a creditor had obtained a decree against several persons jointly and severally, had adjudged heritable property of which they were joint owners, had entered into possession, and drawn the rents. One of the debtors brought an action of count and reckoning, concluding for the ascertainment of the balance of the debt remaining after deduction of the rents received by the creditor, and for decree that on payment of such balance the creditor should be ordained to convey to him the decree of adjudication and the estate covered by it. None of the other co-debtors were parties to the action. It was held that as the accounting would not be conclusive in a question with the other obligants, and would leave the creditor exposed to an action by them, the pursuer was not entitled to the decree for which he asked. In *Bruce* v. *Scottish Amicable Life Assurance Society*[4] the holder of a bond and disposition in security, on failure of the debtor to pay the interest, had entered into possession, and drawn the rents. On balance, according to his version of the accounts, £700 of unpaid interest was due to him. The debtor, having arranged to borrow the money elsewhere, tendered payment of the principal sum and of the £700 of interest, at the same time intimating that he did not admit that the creditor's accounts of the rents were correct, and demanded an assignation. This the creditor was willing to grant, but proposed to insert a clause acknowledging that the balance of £700 was correct. This clause the debtor objected to, and sued for an assignation *de plano*. It was held that the creditor was within his rights. An assignation was due only if he would suffer no prejudice thereby. If he granted an assignation while the question of accounts was still unsettled, he would be prejudiced, because, should litigation follow, he would be deprived of the security for any expenses that might be found due which the possession of the subjects gave him.

Again, as an assignation preserves the debt, and does not extinguish it, a creditor who has further claims on his debtor may have an interest to refuse it. So a landlord who was in course of sequestration for rent was held to be entitled to continue his diligence, in spite of an offer of payment by a third party, expressed as conditional on an assignation of the debt and diligence, in respect that it was desirable for him to have a tenant who could pay his rent without pledging his crop and stocking by an assignation of hypothec.[5] And if a feuar dispones part of the subjects, taking the disponee bound to pay part of the feu-duty, but without obtaining an allocation of the feu-duty from the superior, and if he then is compelled to pay the whole feu-duty, it would appear that he cannot demand an assignation of the superior's rights, on the ground that such an assignation would preserve in his favour

[1] Per Lord President Inglis in *Guthrie & M'Connachy* v. *Smith*, 1880, 8 R. 107, at p. 111.

[2] *Mitchell* v. *M'Kinlay*, 1842, 4 D. 634; *Fraser* v. *Carruthers*, 1875, 2 R. 595.

[3] 1867, 6 M. 9. Cp. *Mitchell* v. *M'Kinlay*, 1842, 4 D. 634; *Smith* v. *Gentle*, 1844, 6 D. 1164.

[4] 1907, S.C. 637.

[5] *Graham* v. *Gordon*, 1842, 4 D. 903. The reason given is Lord Fullerton's, p. 908. It does not seem very convincing, but the other judges proceed on the ground that the point had already been decided by the House of Lords in a prior stage of the case (reported, 2 Robinson 251), where no reasons are given at all. See also *Steuart* v. *Stables*, 1878, 5 R. 1024.

a *debitum fundi*, which would or might conflict with the superior's rights for recovery of future feu-duties.[1]

Even when a creditor has no sufficient interest to refuse an assignation, he is entitled to qualify it by a clause providing that it shall not be used in competition with his own rights, or excluding any warrandice on his part of the validity of the debt.[2]

Assignation of Securities.—Where not merely an assignation of the debt, but also of securities held for it, is demanded, the interest of the creditor to refuse it may consist in the fact that another debt is due to him by the co-obligant who has granted the securities. The rights of parties will then depend upon the respective dates of the debts. If, for example, *A.* and *B.* become jointly and severally liable to *C.*, and *A.* grants a security over property belonging to him, *B.*, on paying the whole debt, is generally entitled to an assignation of that security, in order to safeguard his right of relief against *A.* If, however, *C.* held a prior bond over the same subjects for a separate debt due by *A.*, he would be entitled, in assigning to *B.*, to qualify his assignation by a declaration that it should not be used in competition with his own prior debt. But if *C.* has made further advances to *A.*, after the constitution of the debt for which *A.* and *B.* are liable, he cannot refuse to assign to *B.* on the plea that he proposes to retain the security to satisfy this later debt.[3]

Effect of Assignation.—It is probably the law, as explained in a prior page,[4] that the substantial right of a co-obligant—the measure of relief to which he is entitled—is not affected by his success or failure in obtaining an assignation from the creditor. But though an assignation may not increase the substantial rights of a debtor who has a claim for relief, it may still be of paramount importance to him to secure it. If a security is transferred, he thereby obtains the same right over the subjects impledged which the creditor held, in a question either with other bondholders over the same subjects, or with the general creditors of the party liable in relief.[5] If the debt is entitled to a preference, *e.g.*, if the creditor is the Crown,[6] or a landlord entitled to hypothec,[7] the assignation will carry that preference, which, without it, would be lost.[8] If there is no security or preference in question, the assignation of the debt may still be of advantage in simplifying the procedure by which the right of relief may be enforced. Thus if the debt is constituted by bond, bill, or decree, the assignee can charge for payment at once; if diligence has been commenced, he can obtain warrant to carry it on in his own name.[9]

Right of Co-cautioners in Securities.—If the co-obligants are cautioners, each is entitled, in a final accounting between them, to share in the benefit

[1] *Guthrie & M'Connachy* v. *Smith*, 1880, 8 R. 107, Lord Shand dissenting. See *Wemyss* v. *Thomson*, 1836, 14 S. 233; *Nelson's Trs.* v. *Tod*, 1904, 6 F. 475.

[2] *Russell's Tr.* v. *Mudie*, 1857, 20 D. 125.

[3] *Sligo* v. *Menzies*, 1840, 2 D. 1478; *Scott* v. *Fotheringham*, 1859, 21 D. 737; *Fleming* v. *Burgess*, 1867, 5 M. 856; *Veitch* v. *National Bank*, 1907, S.C. 554. These cases relate to the rights of cautioners; it is conceived that the rights of co-obligants are, in this respect, the same.

[4] *Supra*, p. 208.

[5] This is fully explained by Lord Shand in *Guthrie & M'Connachy* v. *Smith*, 1880, 8 R. 107.

[6] *In re Churchill*, 1888, 39 Ch. D. 174. Contrast *Fraser* v. *Shepherd*, 1830, 8 S. 851, where no assignation was obtained.

[7] *Garden* v. *Gregory*, 1735, M. 3390; *Graham* v. *Gordon*, 1842, 4 D. 903. Cp. *Brown* v. *Doctor*, 1852, 1 Stuart, 269.

[8] *Garden* v. *Gregory*, *supra*.

[9] Ersk. iii. 5, 8; Bell, *Com.*, ii. 18. For procedure, see Personal Diligence Act, 1838 (1 & 2 Vict. c. 114), secs. 7, 12; Graham Stewart, *Diligence*, 282 and (bills) 392.

of any security which another may have obtained over the estate of the principal debtor.[1] The other creditors of the principal debtor have no title to object.[2] The rule holds even where the cautioner claiming to share in it was not aware of the security when he undertook the obligation, or where the cautioner who obtained it did so as a condition of his undertaking,[3] but yields to proof that the other cautioners had agreed to its being held independently—a fact which may be proved by parole evidence.[4] It rests on the principle that all the cautioners are entitled to equal relief from the estate of the common debtor, which is diminished *pro tanto* by the security which has been given, and therefore does not extend to a security granted by a third party.[5] So it would appear to have no application to the case of co-obligants who are not cautioners. If *A.* and *B.* engage in a joint and several debt, and *A.* obtains a security from some third party, there seems to be no ground upon which *B.* can claim to share in the benefit derived from it.[6]

Acts Prejudicing Relief: Giving Time.—A creditor has no right to do anything which will prejudice the rights of relief of his debtors *inter se*: and his failure to observe this rule will either involve the complete discharge of the obligants thereby prejudiced, or will relieve them in so far as they are prejudiced, according to the relations in which they stand to each other.[7] If the obligants are principal and cautioner, the law goes far beyond this, and holds that any contract by which the creditor gives time to the principal debtor will liberate the cautioner, if he has thereby precluded himself, and therefore precluded the cautioner, from immediate action for the debt.[8] This rule, being applied whether the cautioner has suffered any loss or not,[9] is a very technical one, and probably does not hold in the case of co-obligants who are not principal and cautioner.[10] But as a creditor is bound to assign his securities to a co-obligant who pays the whole debt, whether he is a cautioner or not, the rule that a cautioner is discharged if a creditor gives up his securities,[11] or neglects to take measures to make them effectual,[12] would seem to be applicable to all cases of co-obligants with claims of relief.

[1] Bell, *Prin.*, sec. 270; *Com.*, i. 366; *Campbell* v. *Campbell*, 1775, M. 2132; *Humble* v. *Lyon*, 1792, Hume, 83; *Steel* v. *Dixon*, 1881, 17 Ch. D. 825; *Berridge* v. *Berridge*, 1890, 44 Ch. D. 168. Cp. *Stenhouse* v. *Tod*, 1890, 27 S.L.R. 261.

[2] *Fisher's Creditors* v. *Campbell's Creditors*, 1778, M. 2134.

[3] *Steel* v. *Dixon*, 1881, 17 Ch. D. 825; *Sheffield Banking Co.* v. *Clayton* [1892], 1 Ch. 621; but see *Murray* v. *Miller*, 1832, 10 S. 706; Gloag and Irvine, *Rights in Security*, p. 821.

[4] *Hamilton* v. *Freeth*, 1889, 16 R. 1022.

[5] Bell, *Com.*, i. 368; *Coventry* v. *Hutchison*, 1830, 8 S. 924; *Scott* v. *Young*, 1909, 1 S.L.T. 47 (O.H.).

[6] *Scott* v. *Davidson*, 1914, S.C. 791.

[7] *Infra*, p. 227.

[8] Bell, *Prin.*, sec. 262; Gloag and Irvine, *Rights in Security*, 887 *et seq.*; White and Tudor, *L.C.*, 8th ed., ii. 587; *Hamilton's Exr.* v. *Bank of Scotland*, 1913, S.C. 743.

[9] *Johnstone* v. *Duthie*, 1892, 19 R. 624.

[10] *Duncan, Fox & Co.* v. *North and South Wales Bank*, 1880, 6 App. Cas. 1, per Lord Chancellor, at p. 11. But if the parties, though bound as co-principals, are or become *inter se* principal and cautioner, and the creditor is aware of the fact, the rules as to giving time apply (*Rouse* v. *Bradford Banking Co.* [1894], A.C. 586).

[11] *Hume* v. *Youngson*, 1830, 8 S. 295; *Sligo* v. *Menzies*, 1840, 2 D. 1478; *Marshall* v. *Pennycook*, 1908, S.C. 276; *Mayor of Kingston* v. *Harding* [1892], 2 Q.B. 494. The discharge is only *pro tanto*, in so far as the cautioner or obligant is prejudiced by the loss of the securities (*Taylor* v. *New South Wales Bank*, 1886, 11 App. Cas. 596, per Lord Watson, at p. 603), unless it was part of the original contract that the security should be given. In that case the other obligant's debt is completely discharged if the security is given up. *Smith* v. *Wood* [1929], 1 Ch. 15.

[12] *Fleming* v. *Thomson*, 1825, 4 S. 221; revd. 1826, 2 W. & S. 277, on which see note to 1 Bell, *Com.* 379. But the law seems settled against the doctrines there cited from Pothier (*Storie* v. *Carnie*, 1830, 8 S. 853; *Wulff* v. *Jay*, 1872, L.R. 7 Q.B. 756; *Polak* v. *Everett*, 1876, 1 Q.B.D. 669; *Harmer* v. *Gibb*, 1911, S.C. 1341).

And where four parties, *A.*, *B.*, *C.*, and *D.*, were sub-feuars each of a fourth of a building plot on which the feu-duty had never been allocated, and the superior, by charter of confirmation, fixed the feu-duty payable by *A.* at one-fourth of the *cumulo* feu-duty, and then proposed to recover arrears unpaid by *B.* by a poinding of the ground directed against *C.*, on the theory that he had a real right over the whole subjects, or any part of them, for the recovery of the whole feu-duty, it was held that as he had cut off *C.'s* right of relief against *A.* he could not recover from him more than the share of the feu-duty applicable to his own plot. By an allocation of feu-duty in favour of one sub-feuar he had impliedly made an allocation in favour of all.[1]

Discharge of One Co-obligant.—In no way can a right of relief be more prejudiced than by freeing the party liable in it from all liability for the debt on which it is founded, and therefore when a creditor has a right against more than one person for a debt, and does anything whereby one of those who are either primarily or equally liable is entirely freed from all liability, he thereby loses his right against the others, either wholly, or to the extent to which their rights of relief are prejudiced. Thus if a creditor having *A.* and *B.* bound to him accepts a new debtor in place of *A.*, by so doing he extinguishes the debt due by *A.*, on the principle of delegation, and thereby impliedly discharges *B.* wholly or in part: and it is immaterial that in the transaction with *A.* he expressly reserves his right against *B.*, because he has deprived *B.* of his right of relief against *A.*[2] And any absolute and total discharge of one obligant has the same effect.[3]

Pactum de non petendo.—But a distinction is here to be taken between an absolute discharge and a *pactum de non petendo*, *i.e.*, an undertaking by the creditor that he will not insist on payment. This, as it does not bind anyone but the creditor himself, does not prejudice the other co-obligants, who remain liable, and have their normal right of relief against their fellow-debtors. And a document expressed as a discharge may be construed simply as a *pactum de non petendo*. It may almost be laid down as a rule that a discharge on a partial payment, where the creditor's rights against other parties liable are expressly reserved, will receive this construction.[4] But in *Smith* v. *Harding*[5] five persons employed a law agent (thereby incurring joint and several liability for his account), and he compounded with two of them for less than their *pro rata* shares, giving receipts by which he expressly reserved his rights against the others. He sued the others for the balance

[1] *Nelson's Trs.* v. *Tod*, 1904, 6 F. 475. Question, whether this decision did not strain the law against the superior? If *C.*, by means of the poinding of the ground, had been forced to pay the arrears properly due by *B.*, he would, no doubt, have had a right of relief against *A.*, and this right the superior had cut off. But his right would only have been to recover half of what he had paid, the other half being due by *D.* So, it would appear, *C.*, by the superior's allocation in favour of *A.*, gains more than he has lost.

[2] *Commercial Bank of Tasmania* v. *Jones* [1893], A.C. 313.

[3] *Stirling* v. *Forrester*, 1821, 3 Bligh, 575; *British Linen Co.* v. *Thomson*, 1853, 15 D. 314; *E. W. A., in re* [1901], 2 K.B. 642. This does not hold where co-obligants are bound *pro rata* for a fixed sum. Then as none can be called upon to pay more than his share, there is no right of relief, and therefore the discharge of one obligant does not prejudice the other (*Collins* v. *Prosser*, 1823, 1 Barn. & Cr. 682. Cp. *Morgan* v. *Smart*, 1872, 10 M. 610).

[4] *Smith* v. *Ogilvies*, 1821, 1 S. 159; affd. 1825, 1 W. & S. 315; *Lewis* v. *Anstruther*, 1852, 15 D. 260; *Church of England Life Assurance Co.* v. *Wink*, 1857, 19 D. 1079; *Muir* v. *Crawford*, 1873, 1 R. 91; affd. 1875, 2 R. (H.L.) 148; *Morton's Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72; *Bateson* v. *Gosling*, 1871, L.R. 7 C.P. 9; *Duck* v. *Mayeu* [1892], 2 Q.B. 511 (joint wrongdoers).

[5] 1877, 5 R. 147. No question seems to have been raised as to the competency of leading parole evidence of intention to construe a written discharge. Cp. *Ex parte Good*, 1877, 5 Ch. D. 46, as explained *in re E. W. A.* [1901], 2 K.B. 642.

of the debt. A proof was allowed, and it was established that the intention, both of the creditor and of the two obligants whom he discharged, was that they should be completely liberated. It was held that the debt due by the two who were discharged was extinguished, that thereby the right of relief of the remaining three was prejudiced, and, consequently, that they were not liable collectively for more than the three-fifths which formed their *pro rata* shares of the debt.

Effect of Discharge.—If a discharge is granted without any express reservation of the creditor's rights against other co-obligants, the English authorities would seem to lay down that the debt is necessarily extinguished, and that proof of the creditor's intention to preserve his rights against the other obligants is incompetent or irrelevant.[1] But the opinions given in the leading case in Scotland rather indicate that this strictness of construction applies only where the co-obligants concerned are principal debtor and cautioner, and that where they are *inter se* equally liable, the general construction of the discharge of one (at least if it is on a composition or partial payment, and no other case is likely to occur in practice) is that the creditor agrees not to sue the party whom he discharges, leaving the rights of other parties unaffected.[2] In *Morton's Trustees* three partners as co-obligants were, with the firm, liable for a debt. *R.*, one of the partners, died, and the business was carried on by the remaining partners under the same firm-name. They ultimately granted a trust deed, to which the creditor acceded, and received a dividend. It was a condition of accession to the trust deed that the bankrupts should be discharged; it was also provided that the rights of creditors acceding were reserved against any persons who might be liable along with the bankrupts. In an action against *R.'s* representative for the balance of the debt, he pleaded in defence that by the discharge of the other two his right of relief against them had been cut off, and that action against him was therefore barred. This defence was repelled, on the ground that the creditor, by acceding to the trust deed and discharging the partners who had granted it, had not interposed any obstacle to an action of relief against them at the instance of the defender. Lord M'Laren, who gave the leading opinion, held that even if the trust deed had contained no reservation of the creditor's rights against other parties, a mere discharge on a composition should be construed as the exercise by the creditor of the "right to select his debtors, and take from one what he is able to pay without professing to exert any influence on the liabilities of the obligants *inter se*."

The discharge of one co-obligant will not limit the rights of the creditor against the others if they had, in the original obligation, agreed that anyone might be discharged without relieving the others;[3] nor if they have consented to it, expressly or impliedly.[4] But it would appear that a co-obligant is entitled to take advantage of the carelessness of his creditor, though he is aware that the other obligant is being discharged, and takes no steps to warn the creditor of the consequences of framing that discharge

[1] *Nicholson* v. *Revill*, 1836, 4 A. & E. 675; *Mercantile Bank of Sydney* v. *Taylor* [1893], A.C. 317.

[2] *Morton's Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72; *Delaney* v. *Stirling*, 1893, 20 R. 506. See also *White* v. *Robertson*, 1864, 2 M. 553, reported as "a very special case," where the absolute discharge of a principal debtor was held not to involve the discharge of the cautioner.

[3] *Perry* v. *National Provincial Bank* [1910], 1 Ch. 464.

[4] *Fleming* v. *Wilson*, 1823, 2 S. 336; *Wright's Trs.* v. *Hamilton's Trs.*, 1834, 12 S. 692.

in absolute terms.[1] It is expressly provided by statute that the assent of a creditor to the discharge of one co-obligant in bankruptcy, with or without a composition, does not prejudice the rights of the creditor against others liable along with him.[2] But there is no such statutory provision with regard to extra-judicial trust deeds for creditors; and a creditor granting a discharge under such a deed is in exactly the same position, in a question with co-obligants, as if he had compounded with his debtor while still solvent.[3]

Discharge of Co-cautioner. In English law it is established that the release of one joint and several obligant without the consent of the others releases them completely.[4] In Scotland the general rule used to be, and is still, except in cases where the co-obligants are co-cautioners, that the co-obligant is released in so far as his right of relief is prejudiced, and no further. He remains liable for his own share of the debt.[5] Of course, if *inter se* the co-obligants are principal debtor and cautioner, the release of the principal discharges the cautioner completely, because no part of the obligation is the cautioner's own proper debt. But where the obligants *inter se* are all equally liable, and the debt is a fixed sum, one obligant has lost nothing by the release of another unless he is called upon to pay more than his proportionate share. Then, and only then, his right of relief is prejudiced, and he is entitled to be freed in so far as it is prejudiced. Or, as it has been put by Lord Gifford, the creditor who has granted to one of his debtors an absolute discharge "must himself become, as it were, a contributory in respect of the share of the person he has discharged, when the total is divided rateably among the others who are liable."[6] But if, in the case of cautionary obligations, one cautioner was discharged while the account guaranteed was still current, and advances on it were made thereafter, this operated the complete discharge of other cautioners.[7] And this rule has been applied to all cases of co-cautioners by sec. 9 of the Mercantile Law Amendment Act (Scotland), 1856.[8] The section enacts: "Where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners without the consent of the other cautioners shall be deemed and taken to be a discharge granted to all the cautioners, but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt." It has been held that this section does not apply to the case where each cautioner undertakes liability for a separate sum, that sum being less than the whole debt; only to cases where their liability is joint and several.[9] And an opinion has been expressed that it does apply where each cautioner undertakes liability for the whole debt, though their respective obligations are contained in different instruments.[10]

[1] *Polak* v. *Everett*, 1876, 1 Q.B.D. 669, per Blackburn, J., at p. 673; *Allan, Buckley, Allan & Milne* v. *Pattison*, 1893, 21 R. 195.

[2] Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 20), sec. 52.

[3] *Cragoe* v. *Jones*, 1873, L.R. 8 Ex. 81. Cp. *Morton's Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72.

[4] Leake, *Contracts*, 677; *E. W. A., in re* [1901], 2 K.B. 642. "It is too late now to question the law—that where the obligation is joint and several the release of one of two debtors has the effect of releasing the other" (per Collins, L.J., at p. 648).

[5] *Gilmour* v. *Finnie*, 1832, 11 S. 193; *Church of England Life Assurance Co.* v. *Wink*, 1857, 19 D. 1079; *Smith* v. *Harding*, 1877, 5 R. 147; *Morgan* v. *Smart*, 1872, 10 M. 610.

[6] *Smith* v. *Harding*, 1877, 5 R. 147, at p. 153.

[7] *British Linen Co.* v. *Thomson*, 1853, 15 D. 314. See opinion of Lord Ivory, at p. 320.

[8] 19 & 20 Vict. c. 60.

[9] *Morgan* v. *Smart*, 1872, 10 M. 610; *Ward* v. *National Bank of New Zealand*, 1883, 8 App. Cas. 755, a decision of the Judicial Committee upon a similar clause in a colonial statute.

[10] *Morgan* v. *Smart*, *supra*, per Lord Cowan, at p. 615.

CHAPTER XIII

TITLE TO SUE

It is proposed to consider in this and the two following chapters the rights of action which may result from contract: as the most convenient division, to take, first, the conditions which entitle a party to enforce contractual obligations; secondly, the question how far the right of action is limited by an interest, or lack of it, in the enforcement of the obligation on which action is taken; and, thirdly, the incidence of the liability to which a contract may give rise. Generally, the question of title to sue on a contract, and the question of liability to be sued, admit of separate treatment, but in certain cases, notably that of contracts running with lands, their separation would involve much repetition, and has not therefore been attempted.

Plea of no Title to Sue. The plea of no title to sue, in the mouth of a defender, has whatever advantages may attach to ambiguity. Opposed to an action based on contract—as indeed to all actions—it may imply (1) an objection to the pursuer's capacity to sue; (2) an objection to the instance, or the manner in which the title to sue is set forth; (3) an argument either that the pursuer has no right to enforce the obligation on which the action is based, or (4) that he has no interest to obtain the decree for which he concludes. Of these possible meanings of the plea, the first has been already considered in dealing with capacity to contract, the second is irrelevant in a work not directly concerned with the rules of procedure, the third and fourth it is proposed to consider. And first, of the title to enforce contractual obligations.

Title to Sue as Depending on Intention.—A party who enters into a contract has presumably consented to the curtailment of his ordinary liberty of action. He has incurred an obligation, and must submit to its enforcement by the person on whom he has conferred the right to enforce it. That person need not necessarily be the other party to the contract. But it is not to be assumed that a party who binds himself to a contractual obligation intends to bind himself to anyone who may think that the fulfilment of that obligation would be advantageous to him, and hence it is a general rule that only the parties to a contract have a title to sue upon it. An obligation resulting from a contract between *A.* and *B.* is as a general rule *jus tertii* to *C.*; to entitle him to enforce it he must shew that the right to do so has in some way been conferred upon him. And the question, On whom was the right of enforcement conferred? is, except in one special case, a question of the intention of the party who undertook the obligation, to be determined, as other questions of intention are, on the assumption that a man intended that meaning which his words or acts are calculated to convey. If *A.* contracts with *B.*, and incurs an obligation under the contract, he may have intended that the obligation should be enforced by *B.* alone. But he may also have intended that it should be enforceable by *B.'s* representatives after his death, by *B.'s* successors in the ownership of a particular subject, by his assignees,

or even by a third party—not directly connected with *B.* on whom he and *B.* desire to confer a benefit. Where that intention may be reasonably assumed, the representative, the successor in title, the assignee, or the third party will have a title to sue.

The exceptional case above referred to, where an obligation may be enforced by a party to whom the obligant did not intend to be bound, is the right of an undisclosed principal to sue on contracts made by his agent. The law on this point has been already considered.[1]

General Rule.—The general rule that only the parties to a contract have a title to sue upon it will be best illustrated in the ensuing discussion of the cases which form exceptions to it. But certain examples of its application may be cited at the outset.

Creditor cannot Sue Debtor's Debtor.—When a man incurs a debt his obligation is to pay to the creditor. He is under no immediate obligation to pay to that creditor's creditor, and the latter therefore has no title to sue for payment.[2] In *Henderson* v. *Robb* decree of cessio has been pronounced against *A.*, and a trustee appointed. *B.*, averring that he was a creditor of *A.*, brought an action against *C.*, a debtor to *A.*, concluding for payment either to himself or to the trustee in the cessio. He averred that he had in vain tried to induce the trustee to take steps to recover the debt. The plea of no title to sue was sustained. "I am of opinion that the pursuer has no title to sue. He is doing that which has been found over and over again to be incompetent—trying to sue his debtor's debtor. The defenders, if the original debtor had been solvent, would have been debtors to him, and now that he is insolvent they are debtors to the trustee in the cessio, and the pursuer can have no direct action against anyone except the trustee."[3]

Beneficiary and Debtor to Trust.—The beneficiary under a trust has no title to sue for debts due to the trust. The creditor is the trustee. So the beneficiary has no title to sue the law agent of the trust for damages for loss caused to the trust estate through his negligence or want of professional skill.[4] But while the general rule is that the beneficiary has no title, yet in an exceptional case, where the alleged debtor was one of the trustees, and it was averred that the trustees had collusively refused to take action against him, the title of the beneficiary was sustained.[5] And the rule that the beneficiary has no title to sue is more formal than substantial, because he is entitled, on finding caution for expenses, to sue in the name of the trustee.[6]

Title of Bondholder.—The creditor in a bond and disposition in security may have a title to recover debts due to the granter of the bond, in so far as these debts are assigned to him by the bond. Thus, as an assignee, he has a title to sue for rents and feu-duties. He is subject to any plea which would have been available against the debtor: and so where ground was feued and the superior undertook to lay out certain streets, it was held that the vassal was entitled to retain his feu-duty, in a question with a bondholder from the

[1] *Supra*, p. 128.

[2] *Henderson* v. *Robb*, 1889, 16 R. 341; *Gill's Trs.* v. *Patrick*, 1889, 16 R. 403. So a superior has no title to bring an action of maills and duties against the tenants of the vassal, *i.e.*, he has no title to sue his debtor's debtor (*Prudential Assurance Co.* v. *Cheyne*, 1884, 11 R. 871).

[3] Per Lord President Inglis, *Henderson* v. *Robb*, 1889, 16 R. 341, at p. 343.

[4] *Raes* v. *Meek*, 1888, 15 R. 1033; affd. 1889, 16 R. (H.L.) 31.

[5] *Watt* v. *Roger's Tr.*, 1890, 17 R. 1201; doubted by Lord Trayner, *Scott* v. *Craig's Reprs.*, 1897, 24 R. 462, 470. See also *Teulon* v. *Seaton*, 1885, 12 R. 971; *Morrison* v. *Morrison's Exrx.*, 1912, S.C. 892.

[6] *Morrison* v. *Morrison's Exrx.*, *supra*.

superior, until these obligations were implemented.[1] And in virtue of his infeftment in the lands, a creditor has probably the right to enforce a servitude which the debtor has acquired by contract with a third party.[2] But he has no general title to sue on contracts made by the debtor in relation to the subjects of the security, unless these are contracts made in the ordinary course of management. Thus he cannot insist upon implement of a contract for the sale of the subjects which has been concluded by the debtor, nor sue the purchaser for damages for failure to implement such a sale.[3] He has no title to sue on the contract between his debtor and the superior, and therefore cannot insist on an allocation of the feu-duty.[4] While a debtor, if left in possession, even although the security may take the form of an *ex facie* absolute conveyance, has power to grant ordinary leases,[5] a creditor is not bound by, or entitled to sue on, contracts made by the debtor which are not acts of ordinary administration, such as a lease of minerals of unusual duration and containing exceptional clauses,[6] or a covenant with a tenant restricting the use to be made of other subjects.[7] In *Heron* v. *Martin*,[8] *A.*, the owner of property over which he had granted a bond, entered into a contract with a neighbouring proprietor under which each undertook obligations for the purpose of forming an access, partly on one property, partly on the other. *A.* having failed to implement his obligations under this contract, the neighbouring proprietor brought an action for its reduction. It was held that the bondholder had no title to object; the contract was one which he had no title to enforce, and by which he was not bound. A bondholder, however, has a title to reduce any feu or lease subsequently granted which impinges on his security.[9] On the principle that when a bondholder exercises a power of sale his redeemable right becomes irredeemable as at the date of the bond, a purchaser at the sale may reduce any feu to which the bondholder has not consented, and which is subsequent to the date of the registration of the bond.[10]

Title of Joint Contractors.—Assuming, then, as a general rule, that the title to sue on a contract *primâ facie* rests only with the contracting parties, we may proceed to consider the title of the parties themselves, when more than one person is concerned on either side of a contract: of their representatives after their death: of their trustees in bankruptcy; of their assignees; of their successors in title; and, finally, of third parties whose interests the contract is designed to secure.

Where only two parties are engaged in a contract, each has a title to sue the other. The cases in which that title may be lost or limited, by a change of circumstances or by want of interest, will be considered later.[11] The rules with regard to an action at the instance of one out of several creditors have been already detailed.[12]

Title of Mandatary. There would seem to be no general incompetency

[1] *Arnott's Trs.* v. *Forbes*, 1881, 9 R. 89.
[2] *Heron* v. *Martin*, 1893, 20 R. 1001, per Lord Low (Ordinary).
[3] *Smith* v. *Soeder*, 1895, 23 R. 60, per Lord Young, at p. 66. Cp. *Gibbs* v. *British Linen Co.*, 1875, 4 R. 630.
[4] *Campbell* v. *Deans*, 1890, 17 R. 661.
[5] *Edinburgh Entertainments Co.* v. *Stevenson*, 1926, S.C. 363.
[6] *Reid* v. *M'Gill*, 1912, 2 S.L.T. 246. See *Morier* v. *Brownlie & Watson*, 1895, 22 R. 67.
[7] *Mackenzie* v. *Imlay's Trs.*, 1912, S.C. 685.
[8] 1893, 20 R. 1001.
[9] Ersk. iv. 1, 20; *Edinburgh Entertainments Co.* v. *Stevenson*, 1926, S.C. 363; *Soues* v. *Mill*, 1903, 11 S.L.T. 98 (O.H., Lord Kyllachy); *Alston* v. *Nellfield, etc., Co.*, 1915, S.C. 912.
[10] *Cumming* v. *Stewart*, 1928, S.C. 296.
[11] *Infra*, Chap. XIV.
[12] *Supra*, p. 202.

in a party to a contract suing by a mandatary, *i.e.*, by a person to whom he has given authority to sue without conveying or assigning to him the contractual right which forms his own title. It is true that in 1840 the title of such a mandatary was doubted by Lord Chancellor Cottenham;[1] but no adverse opinion was expressed, and both before and since that date the title of parties authorised to sue on behalf of unincorporated bodies has been sustained,[2] and there would seem to be no difference in principle between suing on behalf of an unincorporated body and suing on behalf of an individual. But the defender may have the right to object if the particular mandatary selected is a person not likely to be able to pay any expenses that may be awarded. In *Pagan & Osborne* v. *Haig*[3] two persons sued "as specially authorised by and acting on behalf of" the shareholders and subscribers to the Fife Fox Hounds, an unincorporated body. Their title was sustained; but it was observed that a different result might have been arrived at had it been shown that they were not solvent and suitable persons to conduct the litigation.

Title of Representatives. On the death of a party to a contract, the right to sue may pass to his representatives. As regards ordinary debts, it is a proposition too clear to require authority that on the death of the creditor the right to exact payment passes to his heir, executor, or legatee, as the case may be.[4] But there is more difficulty with respect to claims of damages for breach of contract, and contracts involving obligations for the future.

It seems to be generally admitted, even by judges most inclined to limit the transmissibility of such claims, that in contracts which may be termed commercial the right to sue for damages for breach passes to the representatives of the injured party.[5] It is established that claims for personal injury resulting from delict or negligence do not pass to the executor of the injured person,[6] unless he has commenced an action during his lifetime,[7] made a definite claim against the wrongdoer,[8] or assigned his right;[9] and it is probably the law that claims for actual physical injury, even although the act causing it may be a breach of contract, also die with the person, except, perhaps, where the injury has occasioned expense or loss of some pecuniary advantage.[10]

[1] *Creighton* v. *Rankin*, 1838, 16 S. 447; affd. 1840, 1 Rob. 99, at p. 128. The Court of Session had sustained the title of a mandatary for a body of road trustees.

[2] *Bow* v. *Cowan's Hospital*, 1825, 4 S. 276; *Cheyne & Mackersy* v. *Little*, 1828, 7 S. 110; *Jameson* v. *Watson*, 1852, 14 D. 1021; *Pagan & Osborne* v. *Haig*, 1910, S.C. 341.

[3] *Supra*. See also *Whyte* v. *Maxwell*, 1850, 12 D. 955.

[4] For what is heritable or moveable in succession, see Bell, *Prin.*, sec. 1476 *et seq.*; M'Laren, *Wills and Succession*, 3rd. ed., i. 134. In general, action for the recovery of debts must be at the instance of an executor; a residuary legatee has no title to sue (*Young* v. *Ramage*, 1838, 16 S. 572; *Hinton* v. *Connell's Trs.*, 1883, 10 R. 1110). Nor, where the subject sued for was a moveable debt, could the combined characters of heir and universal legatee qualify a title (*Malcolm* v. *Dick*, 1866, 5 M. 18). But the person to whom a specific thing or specific claim is left by will has a title to sue for it without confirmation as executor (Act 1690, c. 26; *Gordon* v. *Campbell*, 1729, M. 14384; *Bell* v. *Willison*, 1831, 9 S. 266; *Lyle* v. *Falconer*, 1842, 5 D. 236; *Innerarity* v. *Gilmore*, 1840, 2 D. 813). In *Morrison* v. *Morrison's Exrx.* (1912, S.C. 893) it was held that one of the heirs *in mobilibus* had no title to sue for the recovery of a debt due to the deceased, although he averred that the executor, being personally interested, refused to take action. He was entitled to sue in the name of the executor, on consigning a sum to meet possible liability for expenses.

[5] See opinion of Lord President (Dunedin) in *Riley* v. *Ellis*, 1910, S.C. 934.

[6] *Bern's Exr.* v. *Montrose Asylum*, 1893, 20 R. 859; and see comments on this case and on *Auld* v. *Shairp*, 1874, 2 R. 191, in *Riley* v. *Ellis*, *supra*; English law in Leake, p. 923 *et seq.*

[7] *Neilson* v. *Rodger*, 1853, 16 D. 325.

[8] *Leigh's Exrx.* v. *Caledonian Rly. Co.*, 1913, S.C. 838.

[9] *Traill & Sons* v. *Dalbeattie*, 1904, 6 F. 798.

[10] There is no direct authority, but the reason on which the decision in *Bern's Exr.* v. *Montrose Asylum* (1893, 20 R. 859) was founded—that there was no precedent for such an action—applies. The exception suggested is founded on *Bradshaw* v. *Lancashire and Yorkshire Rly. Co.*, 1875, L.R. 10 C.P. 189.

In *Riley* v. *Ellis* the Lord President (Dunedin) gave an opinion that a claim for damages for wrongful dismissal would not transmit to the executors of the deceased, but this view is negatived by the opinions of the majority of the Court, and, it is submitted, is based on grounds which would exclude the transmission of any right of action.[1] It is doubtful whether the Scottish Courts would follow the English rule that an action of damages for breach of promise of marriage, as a claim, though founded on contract, in many respects resembling claims founded on delict, does not transmit to the executors of the injured party.[2]

***Delectus personæ* Limiting Title.**—If a contract involves obligations to be performed in future, the benefit of it may nevertheless transmit to the personal representatives of one of the parties, but this, if it be the rule, is subject to very important exceptions. The contract may be read, from the special terms used, or from the general law applicable to it, as conferring a title to sue upon the representatives of the deceased in a particular capacity—a subject to be considered immediately. Or it may be held that the intention of the parties was that it should be binding only during their joint lifetime, though the obligation involved may be one that anyone could perform.[3] And that intention will be presumed if the contract is one which involves *delectus personæ*—if one or other of the parties was chosen for his special skill or fitness for the work involved. The meaning of *delectus personæ*, and its result in rendering a contract unassignable, is considered elsewhere,[4] and it may suffice here to mention certain cases in which the transmissibility to representatives has been in question.

Contracts of Service.—In contracts of service there is an obvious *delectus personæ* in the choice of the servant. Though not so obvious, in ordinary contracts of service there is also *delectus personæ* in the case of the employer, so that his death puts an end to the contract, and neither right nor liability transmit to his representatives.[5] In *Hoey* v. *MacEwan & Auld* the same rule was applied to the dissolution of a partnership by the death of one of the partners. Hoey was engaged as a managing clerk for a period of five years by a firm of which MacEwan and Auld were the partners. While this engagement had still four years to run MacEwan died, and Auld refused to keep Hoey in his service. In an action directed against Auld and also against the trustee under MacEwan's trust disposition and settlement, it was held that the death of MacEwan, dissolving the firm, put an end to the

[1] *Riley* v. *Ellis*, 1910, S.C. 934. The Lord President stated (p. 942) that it could not be held that a dismissal was wrongful unless it was proved that the servant, if not dismissed, would have continued in the service. But surely it must be assumed, in the absence of any evidence to the contrary, that a person is willing to fulfil his contract if he has given no indication that he is not. Take the case of a contract to supply goods to *A.*, of a failure to perform it, and of *A.'s* subsequent death without raising action. It is submitted that action could be raised by *A.'s* executor. Yet *A.* may have secretly made up his mind that if the goods were tendered he would refuse to accept them. The actual question in the case was the competency of arrestment, and, from the opinions of Lord Dunedin and Lord Shaw in *Caldwell* v. *Hamilton* (1919, S.C. (H.L.) 100) it must now be held that a claim for damages for wrongful dismissal is not arrestable, and that the decision in *Riley* v. *Ellis* was wrong. But it may still be open to decide that such a claim, though not arrestable, would transmit to an executor. It has been held in England that a claim for damages for wrongful dismissal passes to assignees in bankruptcy, *Beckham* v. *Drake*, 1849, 2 H.L.C. 579.

[2] *Chamberlain* v. *Williamson*, 1814, 2 M. & S. 408; approved in *Finlay* v. *Chirney*, 1888, 20 Q.B.D. 494. The point decided in the latter case—that the death of the party breaking the promise precludes action—is not law in Scotland (*Liddell* v. *Easton's Trs.*, 1907, S.C. 154).

[3] *James* v. *Morgan* [1909], 1 K.B. 564, and *Peters* v. *Douglas*, 1912, 2 S.L.T. 54, are examples.

[4] See Chap. XXIV.

[5] *Cutler* v. *Littleton*, 1711, M. 583 (apprentice); *Hoey* v. *MacEwan & Auld*, 1867, 5 M. 814; *Ross* v. *Macfarlane*, 1894, 21 R. 396; *Brace* v. *Calder* [1895], 2 Q.B. 253.

contract of employment, and therefore that Hoey had no claim for damages. But a distinction was taken between the case of ordinary service and a contract for the performance of a particular piece of work—for instance, a contract to build a house. In that case, though the death of the builder might terminate the contract, that of the employer would not. The rights and liabilities under the contract would transmit to the owner of the subjects on which the work was to be performed.[1] And from English authority it would appear that in ordinary commercial contracts—to execute building or engineering work, to supply or accept goods—the title to sue passes to the representatives of the contracting parties, though from the terms of the contract it may not be assignable *inter vivos*.[2]

Contracts of Partnership.—The contract of partnership, obviously involving *delectus personæ*, is dissolved by the death of any partner, in the absence of agreement to the contrary.[3]

Contracts of Lease.—In certain early cases it was held that the right of a tenant under a lease fell on his death, in respect of the element of *delectus personæ* involved :[4] but it has long been settled law that the tenant's right under a lease transmits to his heir, whether the lease be assignable *inter vivos* or not, in the absence of any clause of substitution or express provision to the contrary.[5]

Agreements to Submit to Arbitration.—An agreement to refer a particular question to arbitration falls by the death of any of the parties to it.[6] But this rule does not hold when the agreement is merely incidental to a contract otherwise transmissible to representatives, such as a clause of reference in a lease.[7] And where the members of a firm nominated an arbiter " with the view of winding up the whole affairs of the company, and dividing the assets thereof among the partners and their heirs," without mention of any pending dispute, it was held that the intention of the contract was that it should remain binding notwithstanding the death of one of the partners.[8]

Title of Trustee in Sequestration: Liquidator.—The appointment of a trustee in sequestration vests him with the title to sue on all obligations exigible by the bankrupt. The Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), provides (sec. 70) that the confirmation by the Sheriff of the election of a trustee and the consequent issue of an act and warrant in the statutory form " shall entitle the trustee to recover any property belonging or debt due to the bankrupt, and to maintain actions, in the same way as the bankrupt might have done if his estate had not been sequestrated."

Similar statutory provisions confer a title to sue on the liquidator of a company. The Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), enacts (sec. 151) : " The liquidator in a winding up by the Court shall have

[1] *Hoey* v. *MacEwan & Auld*, 1867, 5 M. 814, per Lord President Inglis.

[2] *Wentworth* v. *Cock*, 1839, 10 A. & E. 42, where the distinction between assignability and transmissibility is drawn ; *Siboni* v. *Kirkman*, 1836, 1 M. & W. 418 ; *Tolhurst* v. *Associated Portland Cement Co.* [1903], A.C. 414, per Lord Lindley.

[3] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 30. As to the construction of clauses giving the heir of a deceasing partner a right to become a partner, see *Warner* v. *Cunningham*, 1815, 3 Dow, 76 ; *Hill* v. *Wylie*, 1865, 3 M. 541.

[4] *E.g.*, *Drum* v. *Niven*, 1609, M. 10320.

[5] Bell, *Prin.*, 1219 ; Rankine, *Leases*, 3rd ed. 157. Probably it would be held that if the lease involved the performance of some particular service, *e.g.*, the lease of an inn or public-house, exclusion of the tenant's heir was implied (see *Earl of Elgin* v. *Walls*, 1833, 11 S. 585).

[6] *Robertson* v. *Cheyne*, 1847, 9 D. 599. Not if it takes the form of a judicial reference (*Watmore* v. *Burns*, 1839, 1 D. 743).

[7] *Caledonian Rly. Co.* v. *Lockhart*, 1857, 19 D. 527 ; affd. 1860, 3 Macq. 808 ; *Alexander's Trs.* v. *Dymock's Trs.*, 1883, 10 R. 1189.

[8] *Orrell* v. *Orrell*, 1859, 21 D. 554.

power" . . . "in the case of a winding up in Scotland or Ireland with the sanction of the Court—(*a*) to bring or defend any action or other legal proceeding in the name and on behalf of the company." By subsec. (4) the Court may provide by any order that the power may be exercised without the sanction or intervention of the Court. In the case of a voluntary winding up it is provided (sec. 186 (4)): "The liquidator may, without the sanction of the Court, exercise all powers by this Act given to the liquidator in a winding up by the Court." In the case of a voluntary liquidation being placed under the supervision of the Court (sec. 203) "the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily."

The question whether a trustee or liquidator may adopt and carry out contracts involving obligations for the future, entered into by the bankrupt or company, is considered in a subsequent chapter.[1]

Title of Assignee.—If the rights under a contract are assignable, the assignee obtains a title to sue.[2] He may sue either in his own name or in that of the cedent,[3] and may sist himself as a pursuer in an action brought by the cedent.[4] It was held that where an action was commenced by a party who had no title to sue, an assignation of the right *pendente processu* would not cure the defect,[5] but the Court has now power, in the case of a *bona fide* mistake, to allow a new pursuer to be sisted.[6] And where the title to sue rests with several persons, the objection that the action is at the instance of one only may be met by an assignation by the others. Thus where *A.* sued in virtue of a lease in which he and *B.* were joint tenants, the objection that he had no title to sue alone was met by the production of an assignation by *B.* of his rights under the lease.[7]

Title from Ownership.—Where a contract relates to a particular estate or thing, there are many cases in which it is read as conferring a title to sue on the successor of the original contracting party in the ownership of that estate or thing. The rights and liabilities under the contract may be regarded as so attached to the subject with which it is concerned that without any express assignation they pass with its transfer to the transferee. But such a connection of subject and contract must depend upon some special rule; it is not a general principle that the mere transfer of property implies that the title to sue on contracts relating to that property is also transferred.

In general, the acquisition of property does not carry with it any right to sue on contracts to which the acquirer was not a party. A purchaser, as such, has no title to sue for damages for an injury previously done to the thing purchased. Thus the purchaser of a ship could not sue for damages for a prior collision.[8] The transferee of shares acquires no title to claim damages from those responsible for fraudulent statements in the prospectus.[9] The assignee of a decree for expenses has no title to sue a party alleged to have

[1] *Infra*, Chap. XXIV.

[2] As to the assignability of contracts, see *infra*, Chap. XXIV.

[3] Bell, *Prin.*, sec. 1130; Mackay, *Manual of Practice*, 154; *Fraser* v. *Duguid*, 1838, 16 S. 1130; *Traill* v. *Aktieselskabet Dalbeattie*, 1904, 6 F. 798, per Lord Kinnear, at p. 807.

[4] *Fraser* v. *Duguid*, *supra*.

[5] *Symington* v. *Campbell*, 1894, 21 R. 434.

[6] *Morrison* v. *Morrison's Exrx.*, 1912, S.C. 892; C.A.S., 1913, Book B., sec. 1.

[7] *District Committee of Middle Ward of Lanarkshire* v. *Marshall*, 1896, 24 R. 139.

[8] *Symington* v. *Campbell*, 1894, 21 R. 434. See *Blumer & Co.* v. *Scott & Sons*, 1874, 1 R. 379, narrated *infra*, p. 225.

[9] *Peek* v. *Gurney*, 1873, L.R. 6 H.L. 377.

been *dominus litis*.[1] Where a tenant had undertaken to lay a certain quantity of lime on the land annually, and failed to do so, it was held that a singular successor of the landlord had no title to call him to account in respect of the years before his own title to the subjects had been acquired.[2] Another illustration of the principle that rights under a contract do not in general pass with the ownership of the property to which the contract relates is a case where *A.* was induced by fraud to purchase a brewery, but succeeded in reselling it at a profit to *B.* without the use of any fraudulent means, and it was held that *B.* had no title to sue in a reduction of the original sale to *A.*[3]

Title to Sue does not Run with Moveables.—With certain exceptions in shipping law, the title to sue cannot run with moveables.[4] Thus where *A.* sold iron to *B.*, and gave him a scrip note, undertaking to deliver it to the bearer, it was held that a subsequent holder of the note, in a question whether *A.* was bound to deliver a particular kind of iron, could not found on the contract between *A.* and *B.* The delivery of the scrip note did not amount to an assignation of the contract between *A.* and *B.*; and, on the assumption that it carried the right to demand the iron, the transference of that right did not carry with it the terms of the contract on which it was originally founded.[5] In *Blumer & Co.* v. *Scott & Sons*,[6] *A.* sold to *B.* an unfinished ship, undertaking to have engines fitted to *B.'s* satisfaction. For this purpose *A.* employed a firm of ship engineers, who were aware of the fact that the ship on which they were to work had been sold to *B.* The ship engineers failed to have the engines ready within the time fixed by the contract. *B.* sued them for damages, and was held to have no title to sue. He was not a party to the contract which they had failed to perform, and no right of action on that contract ran with the ownership of the vessel to which it related.

Exceptions in Shipping Law. In shipping law it is not universally true that the title to sue on contracts does not run with the subject to which they relate. It is an established rule that the right to freight, and therefore, of course, the right to sue for it, is vested in the party who is the owner of the ship when the goods arrive at their destination, though he may be no party to the contract of carriage; and therefore if a ship is sold during her voyage, or abandoned to the underwriters as a total loss, the right to sue for freight passes, as an appurtenant of the ship, to the purchaser or abandonees.[7]

The transfer of a bill of lading forms, under statutory provisions, an exception to the rule that contracts do not run with the ownership of moveables. At common law, at least in England—the common law of Scotland is doubtful[8]—the indorsement of a bill of lading, while it transferred the property of the goods to the indorsee, did not vest in him the right to sue on

[1] *Rose* v. *Stevenson*, 1888, 15 R. 336.
[2] *Hamilton* v. *Fleming*, 1793, Hume, 787.
[3] *Edinburgh United Breweries* v. *Molleson*, 1893, 20 R. 581; affd. 1894, 21 R. (H.L.) 10.
[4] As to contractual liabilities running with moveables, see *infra*, p. 266.
[5] *Mackenzie* v. *Dunlop*, 1853, 16 D. 129; 1856, 3 Macq. 22.
[6] 1874, 1 R. 379.
[7] Carver, *Carriage by Sea*, 7th ed., secs. 591, 600; Maclachlan, *Merchant Shipping*, 6th ed., 80; *Keith* v. *Burrowes*, 1877, 2 App. Cas. 636; *Stewart* v. *Greenock Marine Insurance Co.*, 1846, 8 D. 323; affd. 1848, 1 Macq. 328; *Simpson* v. *Thomson*, 1877, 5 R. (H.L.) 40, per Lord Blackburn, p. 48.
[8] The statement of the common law in *Craig & Rose* v. *Delargy*, 1879, 6 R. 1269, is questioned by Lord Trayner in *Delaurier* v. *Wyllie*, 1889, 17 R. 167, at p. 186. See also *Hunter, Craig & Co.* v. *Roper & Co.*, 1909, 1 S.L.T. 41 (O.H., Lord Salvesen).

the contract under which the goods were carried. This, however, has been altered by the Bills of Lading Act, 1855, and now the indorsee has the same right of action as if the contract contained in the bill of lading had been made with himself.[1]

Contracts Running with Lands.—Contracts relating to heritable property may be read as conferring a title to sue, and also as imposing a liability to be sued, upon the parties to the contract and their successors in their relation to the property in question, and not on the parties and their representatives. To adopt a convenient expression, which has been borrowed from the law of England, contracts may "run with the lands," and not with the succession of the contracting parties. In dealing with such questions it is convenient to take together cases relating to the right of successors to sue, and cases relating to their liability to be sued, in respect of the obligations undertaken respectively by the original contracting parties. It is not easy to state definitely what conditions must co-exist in order to make a contract run with the lands, and in attempting to explain the subject a distinction must be drawn between the different relations which the original contracting parties may have to each other. These relations may be those of superior and vassal, of disponer and disponee, or of landlord and tenant.

Superior and Vassal.—The relationship of superior and vassal is that most favourable to the construction of an obligation as running with the lands, and the general rule may be given in the words of Lord Kinnear: "Every continuous obligation in a feu-contract or feu-charter, in the absence of special stipulation to the contrary, must be transmissible and enforceable against the vassal in the feu, and not transmissible or enforceable against the personal representatives of the deceased vassal, who are not themselves vassals in the feu."[2] So an obligation on the vassal to pay feu-duty,[3] to erect buildings of a specified value and character,[4] to keep existing buildings insured and replace them if destroyed,[5] to erect a railing and lay out the foot-pavement *ex adverso* of the feu,[6] to abstain from carrying on certain trades;[7] the obligation, on the part of the superior, to relieve the vassal of all augmentation of stipend[8] or public burdens,[9] have all been held to run with the lands, and to be binding on, and enforceable by, the singular successors of the original superior and vassal. So a right in the vassal to fish for trout in a loch belonging to the superior,[10] or in the superior to shoot over the lands feued,[11] have been recognised as rights which pass to the singular successors of the vassal or superior, as the case may be. It is immaterial that the particular obligation which it is proposed to enforce does not appear in the title under which the singular successor holds, for, in questions between superior and vassal, the ultimate appeal must be to the original

[1] 18 & 19 Vict. c. 111, sec. 1.

[2] *Macrae* v. *Mackenzie's Trs.*, 1891, 19 R. 138, 145. See also opinion of Lord President Inglis in *Dundee Police Commissioners* v. *Straton*, 1884, 11 R. 586, 590.

[3] Bell, *Prin.*, sec. 700.

[4] *Tailors of Aberdeen* v. *Coutts*, 1840, 1 Rob. 296; 3 Ross, *L.C.* 269; *Macrae* v. *Mackenzie's Trs.*, *supra*; *Rankine* v. *Logie Den Land Co.*, 1902, 4 F. 1074.

[5] *Clark* v. *Glasgow Assurance Co.*, 1850, 12 D. 1047; revd. 1854, 1 Macq. 668; *Marshall* v. *Callander, etc., Hydropathic Co.*, 1895, 22 R. 954; affd. of consent, 23 R. (H.L.) 55.

[6] *Tailors of Aberdeen* v. *Coutts*, *supra*.

[7] *Earl of Zetland* v. *Hislop*, 1881, 8 R. 675; revd. 1882, 9 R. (H.L.) 40.

[8] *Stewart* v. *Duke of Montrose*, 1860, 22 D. 755; affd. 1863, 1 M. (H.L.) 25; *M'Callum* v. *Stewart*, 1868, 6 M. 382; affd. 1870, 8 M. (H.L.) 1; *Hope* v. *Hope*, 1864, 2 M. 670.

[9] *Latto* v. *Magistrates of Aberdeen*, 1903, 5 F. 740, at p. 755.

[10] *Patrick* v. *Napier*, 1867, 5 M. 683.

[11] *Hemming* v. *Duke of Atholl*, 1883, 11 R. 93, per Lord Craighill, at p. 99.

charter, unless it can be shewn that its terms have been intentionally altered.[1]

Personal Conditions in Feus. It is clear that conditions may be inserted in a feu-contract or feu-charter which will be regarded as merely personal obligations between the original contracting parties, and which will not transmit to or against their singular successors — will not, in other words, run with the lands. For any stipulation, however remote from its main object, may be inserted in a feu-contract—to take an extreme case, a promise to marry — and it needs no authority to prove that singular successors can have no concern with such extraneous and collateral agreements. But the reports are not rich in illustrations of the kind of agreements which will not run with the relationship of superior and vassal. It is probably safe to say, with Lord M'Laren, that it must be an obligation which has some natural relation to the lands.[2] From the opinions in a leading case, it may be assumed that an obligation to pay a sum of money indefinite in amount (on the ground that no indefinite burden can be laid upon land) would not bind the singular successors of a vassal who might undertake it.[3] On the same authority, an obligation upon the vassal, his heirs and singular successors, within six months of their acquiring right to the subjects, to grant a personal obligation for performance of the conditions of the feu cannot be enforced against a singular successor. In *Magistrates of Edinburgh* v. *Begg*[4] a feu-charter laid on the vassal an obligation to repay to the superior a portion of the cost of laying a roadway and drains, when that was done. Three years after the roadway and drains were formed the subjects were disponed to Begg. It was held that the obligation to pay the share of the cost has not transmitted against him, partly on the ground that the obligation was to pay a sum of money indefinite in amount, partly on the ground that it was not intended to be transmissible.[5]

The terms in which an obligation is undertaken in a feu-contract may lead to the conclusion that it is not transmissible, though there may be nothing in its nature or content to stamp it as merely a personal obligation. Thus a Crown vassal conveyed certain subjects to the King, "and his royal heirs and successors, to remain inseparably annexed with the Crown of these realms," and undertook to relieve "His Majesty, and his royal heirs and successors," of parochial and other burdens. Under the authority of a statute (5 & 6 Vict. c. 94) the lands thus conveyed were disponed to a subject-proprietor, and the obligation of relief was expressly assigned to him. It was held that the terms of the conveyance and of the obligation of relief shewed that it was intended to be operative while the lands remained in the hands of the Crown, and was not transmissible to a subject-proprietor.[6]

[1] Craig, *Jus Feudale*, ii. 12, 8; Ersk. ii. 3, 20. Cp. *Durie's Trs.* v. *Earl of Elgin*, 1889, 16 R. 1104, where, as the origin of the title was merely an obligation to grant a charter, it was held that this rule did not apply.

[2] See opinion of Lord M'Laren, *Macrae* v. *Mackenzie's Trs.*, 1891, 19 R. 138, at p. 149.

[3] *Tailors of Aberdeen* v. *Coutts*, 1840, 1 Rob. 296; 3 Ross, *L.C.* 269. The holding in this case was burgage, and the question was therefore between the singular successors of disponer and disponee who did not stand to each other in the relation of superior and vassal. But the rules laid down as to the obligations which will not transmit to singular successors are stated to apply to the case of superior and vassal.

[4] 1883, 11 R. 352.

[5] The Lord Ordinary (M'Laren) also proceeded on the ground that the obligation, to be transmissible, must be one as to the fulfilment of which a singular successor could satisfy himself, either from the titles or from inspection of the subjects. Thus he held that an obligation to form the roadway would bind a singular successor, though an obligation to pay part of the cost of the roadway, when formed by the superior, would not.

[6] *Orr Ewing* v. *Earl of Cawdor*, 1884, 11 R. 471; affd. 1884, 12 R. (H.L.) 12; cp. *Baird's Trs.* v. *Innes*, 1851, 13 D. 982.

Transmissibility on Tenure and Contract.—The transmissibility against singular successors of the continuing obligations imposed by a feu-charter or feu contract rests both on principles of tenure and principles of contract. The law implies that anyone accepting a disposition of land places himself, in questions with the superior, in the position of the vassal from whom he takes—acquires his rights of action and is subject to his liabilities, apart from any question of contract between him and the superior. Such obligations are essential conditions of the feu-right, and pass with it; or, to put it in the words of Lord Deas, in a leading case relating to an obligation of relief from augmentations of minister's stipend: "The superior and vassal have each a sasine in the lands and teinds, although the right of the one is qualified by the right of the other. Between the parties so situated I cannot regard a stipulation in the original grant, that the one shall relieve the other of stipend, otherwise than as an inherent condition of the right, which passes to and upon the singular successors of each, along with the superiority on the one hand, and the *dominium utile* on the other."[1] Thus the disponee of the original vassal has clearly no contract with the superior, express or implied, if he has not entered with him, but nevertheless is liable in the obligations imposed by the original feu-contract. At all events, if he has taken infeftment he is liable for the feu-duty, and in an obligation to relieve the superior of sums due to an over-superior.[2] In *Clark* v. *Glasgow Assurance Co.*[3] a feu-contract bound the vassal to maintain and uphold a mill then existing on the lands, and to keep it constantly insured for £900. The mill was burned when it was in the possession of the defenders, who were singular successors of the vassal, were infeft, but had not entered with the superior. In an action raised by the superior the judges differed on the question whether the obligation imposed a liability to rebuild the mill, or merely to expend £900 in repairing it, but were unanimous in holding that the obligation ran with the lands, and was prestable by the defenders, although they had not entered with the superior.

It is probably the law, though it does not seem to be absolutely settled, that obligations of the class referred to above pass to a disponee of the subjects on his entering into possession, even although he is not infeft in the disposition in his favour.[4]

It is decided that if the original feuar, without taking infeftment, assigns his right to a third party, the assignee incurs the obligations, and can exercise the rights, created by the feu-contract.[5]

Where the disponee of the original vassal has entered with the superior, his rights and liabilities in respect of the conditions of the feu-contract may be rested on principles of contract, as well as on principles of tenure. Thus where the disponee of a vassal obtained from his author a title which did not incorporate building restrictions imposed by the superior in the original charter, but subsequently obtained a charter of confirmation from the superior, in which he was taken bound to observe these restrictions, it was held that the question of his liability to observe them was one of direct

[1] *Stewart* v. *Duke of Montrose*, 1860, 22 D. 755, at p. 805; affd. 1863, 1 M. (H.L.) 25. See also opinion of Lord Watson in *Earl of Zetland* v. *Hyslop*, 1882, 9 R. (H.L.) 40, at p. 48.

[2] Bell, *Prin.*, sec. 700; *Hyslop* v. *Shaw*, 1863, 1 M. 535.

[3] 1850, 12 D. 1047; revd. 1854, 1 Macq. 668. The fact that the defenders had not entered with the superior is brought out in the Court of Session report.

[4] Bell, *Prin.*, sec. 700; *Hyslop* v. *Shaw*, 1863, 1 M. 535; *Marshall* v. *Callander, etc., Hydropathic Co.*, 1895, 22 R. 954, per Lord Kyllachy (Ordinary), at p. 964.

[5] *Preston* v. *Earl of Dundonald's Creditors*, 1805, M., App. *v.* Personal and Real, No. 2, 3 Ross, *L.C.* 289.

contract between him and his superior, and that it was unnecessary to consider whether the restrictions had been made real conditions of the feu so as to be binding on all singular successors of the original vassal, whether they entered with the superior or not.[1] It has been laid down that "one will find all through the cases that it is always recognised that every successive vassal is in the relation of personal contract to the superior for the time being, over and above his relation depending on tenure."[2] It is conceived that the meaning of this is that each successive vassal stands in a contractual relation with the superior with regard to those obligations which, apart from contract, would be recognised as running with the lands—that such obligations are, in questions such as the nature of the interest necessary to support them, to be regarded as immediately contractual—not that each successive vassal, on entering with the superior, incurs all the liabilities imposed on the original vassal. For, as already explained, the authorities are clear to the effect that there may be obligations inserted in a feu contract which will not transmit against a singular successor.[3]

Disponer and Disponee.—In considering the incidence of title and liability in obligations undertaken in connection with a disposition of lands, where no relationship of superior and vassal is created, it is well to separate the case of obligations undertaken by the disponer and that of obligations undertaken by the disponee.

Obligations by Disponer. It is probably the rule that the right to sue on the obligation of warrandice undertaken by a disponer passes to singular successors of the disponee, as an inherent part of the title or as carried by the assignation to writs, without any special assignation.[4] But if any further obligation is undertaken by a disponer which has no relation to other lands belonging to him, such as an obligation to relieve the disponee of public burdens, or of augmentations of minister's stipend, it is established law that the right to sue upon it does not run with the lands, but that it may be vested in a singular successor by an express assignation.[5] To make it possible for obligations of this kind to run with the lands without express assignation, a continuity of relationship between the original obligant and the singular successor, such as that of superior and vassal, is required.

Servitudes. If the obligation undertaken by the disponer is to afford the disponee some right or privilege over other property belonging to himself, and that right or privilege is one which is recognised by law as a servitude,

[1] *Magistrates of Edinburgh* v. *Macfarlane*, 1857, 20 D. 156.

[2] Per Lord President (Dunedin) in *Maguire* v. *Burges*, 1909, S.C. 1283, at p. 1289. In this opinion the Lord President holds that the provisions of the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), whereby a vassal is impliedly entered with the superior, by registration of his title in the Register of Sasines, have made no difference in the law as to the contractual relationship between a superior and successive vassals. An opposite view was taken in *Liddall* v. *Duncan* (1898, 25 R. 1119), where it was held that though a vassal, who, under the old system, obtained a charter of confirmation, became bound by contract to the superior, a vassal who was impliedly entered under the new system did not; and on this ground, and on this ground only, the case was distinguished from *Magistrates of Edinburgh* v. *Macfarlane* (1857, 20 D. 156).

[3] *Supra*, p. 227.

[4] Stair (ii. 3, 46) and Erskine (ii. 3, 39) differ on this point, and it has never been definitely decided. The statement in the text is supported by *Christie* v. *Cameron*, 1898, 25 R. 824; by the opinion of Lord Fullerton in *Spottiswoode* v. *Seymer*, 1853, 15 D. 458; by the opinions, in the House of Lords, in the cases cited in the next note; and by the analogy of the English law (Leake, *Contracts*, 7th ed., p. 912).

[5] *Maitland* v. *Horne*, 1841, 3 D. 435; revd. 1842, 1 Bell's App. 1; *Marquis of Breadalbane* v. *Sinclair*, 1844, 6 D. 378; revd. 1846, 5 Bell's App. 353; *Spottiswoode* v. *Seymer*, 1853, 15 D. 458; *Johnston* v. *Irons*, 1909, S.C. 305; *Speirs* v. *Morgan*, 1902, 4 F. 1069 (relief of casualties). A form of assignation is provided by the Conveyancing Act, 1874, sec. 50, Sched. M.

the right to exercise it will pass to the singular successors of the disponee in the dominant tenement, the obligation to submit to it will be transferred against the singular successors of the disponer in the servient.[1] So, also, where the proprietor of an estate which was subject to thirlage agreed with the proprietor of the mill to which he was thirled to commute the burden for an annual payment, it was held that this agreement (which was recorded in the Register of Sasines) ran with the lands, and was binding on singular successors of the original parties.[2] And where, by a disposition of minerals reserving the surface, a right is conferred on the mineral owner to bring down the surface on payment of surface damages at a fixed rate, this agreement forms a right and burden analogous to a servitude, and may be enforced by the owner of the minerals in a question with a singular successor in the ownership of the surface, although no reference to it appears in the title of the latter.[3] But, with this exception, if the right conferred on the disponee is one which is not recognised as a servitude, for instance, a right of fishing in lands retained by the disponer, it is regarded as merely a personal obligation on the disponer's part, which will not be binding in a question with his singular successors.[4]

Obligations by Disponee: Real Burden.—Turning to the case of obligations undertaken by the disponee of lands, these may either involve the payment of a sum of money, or an obligation to do, or abstain from doing, something on the lands disponed. Where the obligation is for payment of a fixed sum, it is usually declared to be a real burden on the lands; and, provided that the conveyancing requisites for the constitution of a real burden have been duly observed, a singular successor of the disponee will be affected thereby in so far as the lands may be attached by the creditor in the burden.[5] But a real burden, as such, infers no personal obligation,[6] and though a personal obligation for payment may be granted by the disponee, it does not follow that it will run with the lands disponed and affect subsequent owners thereof with a personal liability for payment.

Ground Annuals.—Where a real burden on lands involves a continuous obligation for payment of an annual sum, it might be thought to be reasonable, and would certainly be convenient, to hold that any personal obligation for payment should pass with the ownership of the lands, and that each successive owner, as he has notice in the title of the existence of the burden, and as he may in practice be forced to pay it by proceedings directed against the lands, should also be subject to a personal action for payment. And such was the conclusion arrived at in the Court of Session, where the question was raised as to the incidence of liability for payment of a ground annual, declared to be a real burden in a disposition of lands which, as the holding was burgage, did not create the relationship of superior and vassal between the disponer and the disponee.[7] But in successive appeals to the House of

[1] Ersk. ii. 9; Bell, *Prin.*, sec. 979; *Gould* v. *M'Corquodale*, 1869, 8 M. 165. As to the essential requisites of a servitude, see Rankine, *Land-Ownership*, 4th ed., 417 *et seq.*

[2] *Gordon's Trs.* v. *Thompson*, 1910, S.C. 22.

[3] *Smith Sligo* v. *Dunlop & Co.*, 1885, 12 R. 907, and an unreported case referred to at p. 911.

[4] *Patrick* v. *Napier*, 1867, 5 M. 683; *Scott* v. *Howard*, 1881, 8 R. (H.L.) 59, per Lord Watson, at p. 65.

[5] As to the constitution and effect of a real burden, see Stair, ii. 3, 55, and iv. 35, 24; Ersk. ii. 3, 49; Bell, *Prin.*, sec. 917; Bell, *Com.*, i. 726; Menzies, *Conveyancing*, 2nd ed., 856; Gloag and Irvine, *Rights in Security*, 166.

[6] Stair, ii. 3, 58; Bell, *Com.*, i. 732; *Scottish Drainage and Improvement Co.* v. *Campbell*, 1887, 15 R. 108; affd. 1889, 16 R. (H.L.) 16.

[7] *Peddie* v. *Gibson* (*Soot's Trs.*), 1846, 8 D. 560.

Lords this decision was overruled: and it was settled, in the earlier cases, that the original obligant continued liable although he had parted with the lands;[1] in the later, that his singular successors incurred no personal liability.[2] The want of any privity of tenure between the creditor in the burden and the singular successor, together with the obvious fact that there was no contract between them, were held to form insuperable obstacles to the transmission of the personal obligation.

Obligations *ad factum præstandum*. A disposition, again, may impose upon the disponee an obligation to do something on the lands, or to abstain from doing something. Obligations of this character, though they may be called real burdens, are more properly inherent conditions of the right which is granted.[3] The question how far they are binding on singular successors is not free from difficulty. The burden must be so precise that its ambit and extent may be ascertained from the deeds recorded, without extrinsic proof: and so where a building restriction was laid on lands not otherwise described than as a lawn,[4] or where a right to erect a building was reserved in an unspecified part of a particular area,[5] it was held that singular successors were not affected. It would appear to be decided that if the obligation in question is to do an act which can be done once for all, and which has no relation to other lands possessed by the disponer, no personal liability can transmit against the singular successors of the disponee.[6] Thus, in *Marshall's Tr.* v. *M'Neill & Co.*, *A.* disponed lands to *B.* subject to a ground annual and to an obligation, declared to be for the purpose of securing payment, to erect houses of a certain value and to maintain them in future. *B.* conveyed the lands to *C.* by a disposition which referred to the contract of ground annual. It was held that *C.* was not personally liable to erect the buildings, on the ground that the principles laid down in *Royal Bank* v. *Gardyne*[7] applied not only to the obligation to pay the ground annual, but to any obligation *ad factum præstandum* in every case where there was no continuing relationship or privity of tenure between the disponer and the singular successors of the disponee.[8]

If in similar circumstances the obligation was of a continuous nature, *e.g.*, to maintain buildings in repair, there would seem to be no direct

[1] *Millar* v. *Small*, 1849, 11 D. 495; revd. 1853, 1 Macq. 345; *Elmsley* v. *Brown*, 1852, 14 D. 675; revd. 1855, 2 Macq. 40.

[2] *Royal Bank* v. *Gardyne*, 1851, 13 D. 912; revd. 1853, 1 Macq. 358. It is difficult to see how, consistently with this decision, it could be held in *Magistrates of Arbroath* v. *Dickson* (1872, 10 M. 630) that an agreement, in a disposition of lands held burgage, to pay an annual sum in name of feu-duty, was transmissible as a personal obligation against singular successors in the lands. But the question of personal liability there does not appear to have been argued.

[3] See opinion of Lord Deas in *Marquis of Tweeddale's Trs.* v. *Earl of Haddington*, 1880, 7 R. 620, 630; of Lord President Inglis in *Magistrates of Arbroath* v. *Dickson*, 1872, 10 M. 630, at p. 635; and of Lord Kinnear in *Campbell's Trs.* v. *Corporation of Glasgow*, 1902, 4 F. 752, 758; *Anderson* v. *Dickie*, 1914, S.C. 706; affd. 1915, S.C. (H.L.) 79.

[4] *Anderson* v. *Dickie*, *supra*.

[5] *Scottish Temperance Life Assurance Co.* v. *Law Union Assurance Co.*, 1917, S.C. 175.

[6] *Marshall's Tr.* v. *M'Neill & Co.*, 1888, 15 R. 762; *Corbett* v. *Robertson*, 1872, 10 M. 329.

[7] 1853, 1 Macq. 358; *supra*, note 2.

[8] *Marshall's Tr.* v. *M'Neill & Co.*, *supra*. The apparently adverse authority of *Tailors of Aberdeen* v. *Coutts* (1840, 1 Rob. 296; 3 Ross, *L.C.* 269), where it was held that an obligation to erect buildings, contained in a disposition of lands held burgage, transmitted against singular successors, is explained by Lord Shand (p. 770) on the ground that that case was "regarded in the same light as a case of superior and vassal, or of conterminous vassals." And it certainly appears that the judges in the House of Lords, in *Coutts'* case, failed to appreciate the nature of the title with which they were dealing, and treated the opinion of the consulted judges (usually referred to as the opinion of Lord Corehouse) as dealing directly with the case in hand, though it is really an opinion on a hypothetical case of similar restrictions imposed in a contract between superior and vassal,

authority, but it is difficult to see how, on the principles developed in *Marshall's Tr.* v. *M'Neill & Co.*,[1] such an obligation could be binding on singular successors.

Obligations by Disponee: Servitudes.—If the obligation imposed on the disponee has a relation to lands retained by the disponer, it may amount to the imposition of a servitude, and, if duly constituted as such, will certainly transmit against singular successors of the disponee.[2] And if by a disposition a servitude is created in favour of the disponee, and a corresponding obligation is laid upon him—as where a right to use a canal was granted and an obligation to pay part of the cost of maintaining it was imposed—a singular successor of the disponee, if he asserts his right to take advantage of the servitude, subjects himself to the corresponding obligation, even although, if the obligation stood alone, it would be of a character which would not transmit against singular successors.[3]

Building Restrictions.—If building restrictions are imposed in a disposition of lands and duly inserted in the title, they are binding on singular successors of the disponee to the same extent as they would be if inserted in a feu-contract.[4] But if the disponer proposes to enforce restrictions on a singular successor of the disponee, with whom, from the nature of the case, he has no contractual relation, he must qualify an interest in respect of ground reserved by him in the neighbourhood, and loses all right to sue if he parts with that ground.[5] And such restrictions cannot be enforced by a singular successor of the disponer, unless the right to enforce them is expressly assigned.[6]

The question whether a positive obligation imposed on a disponee, not amounting to a recognised servitude, if it is imposed for the benefit of subjects reserved by the disponer, can be made available against a singular successor of the disponee, was raised but not decided in *Campbell's Trs.* v. *Corporation of Glasgow*.[7]

Effect of Notice.—In all these questions with singular successors of disponer and disponee, and likewise in questions between superior and vassal, as to the right to sue and the incidence of liability, the appeal is to the legal rights of parties as depending on the construction of their titles, not to equitable considerations depending on notice. A purchaser may be aware that a right is claimed over the subjects, and that the seller has by contract bound himself to observe it; he is not, therefore, under any obligation to treat it as a real and transmissible burden, or barred from maintaining that it is not, either from its nature or from the method of its constitution, binding on him as a singular successor.[8] The principle was well put by Lord Barcaple

[1] 1888, 15 R. 762.

[2] *Cooper & M'Leod* v. *Edinburgh Improvement Trs.*, 1876, 3 R. 1106.

[3] *Tennant* v. *Napier Smith's Trs.*, 1888, 15 R. 671.

[4] *Assets Co.* v. *Ogilvie*, 1897, 24 R. 400; *Braid Hills Hotel Co.* v. *Manuel*, 1909, S.C. 120; *Nicholson* v. *Glasgow Blind Asylum*, 1911, S.C. 391.

[5] *Mactaggart* v. *Harrower*, 1906, 8 F. 1101. As to the general question of interest to enforce building restrictions, see *infra*, p. 255.

[6] *North British Rly.* v. *Birrell's Trs.*, 1916, 1 S.L.T. 46 (O.H., Lord Cullen). The point was not raised in the later stages of the case; 1918, S.C. (H.L.) 33.

[7] 1902, 4 F. 752.

[8] *Patrick* v. *Napier*, 1867, 5 M. 683; *Morier* v. *Brownlie & Watson*, 1895, 22 R. 67; *Campbell's Trs.* v. *Corporation of Glasgow*, 1902, 4 F. 752; *Anderson* v. *Dickie*, 1914, S.C. 706; affd. 1915, S.C. (H.L.) 79. It is conceived that the law, as laid down in the text, is not affected by the decision of the Judicial Committee in *Lord Strathcona S.S. Co.* v *Dominion Coal Co.* [1926], A.C. 108. It was there held that the purchaser of a ship, who had notice that she was already under charter, could be restrained from using her in any way inconsistent with the charter. Lord Shaw, who delivered the Judgment of the Board, refers, in addition to certain English cases, to *Earl of Zetland* v. *Hislop* (1882, 9 R. (H.L.) 40

in a case where the question was whether a lease of shootings was binding on a singular successor of the lessor. "It is averred by Mr Birkbeck that Mr Ross purchased the estate in the full knowledge of the lease and minute of agreement of lease. The Lord Ordinary is of opinion that this is not a relevant averment in a case of this kind. If he is right in holding that the lease, as a lease of game, is not effectual against a purchaser, it is difficult to see how that essential invalidity can be cured by the purchaser's knowledge. In that view, the granting of such a lease to subsist against singular successors was an attempt to create a real, though temporary, right in the lands, which the law refuses to recognise, and which, therefore, a purchaser is entitled to ignore." [1]

Landlord and Tenant. - Obligations may run with the lands in a question between landlord and tenant, and their respective successors. At common law lease was regarded as a purely personal contract, binding on the contracting parties and their heirs. The tenant obtained no real right in the lands, and was not entitled to maintain his possession in a question with the singular successors of the landlord. An early statute established the right of the tenant against singular successors.[2] And it has been held to imply, though it does not expressly enact, that the singular successor, as he is bound by the lease, has a title to enforce its obligations against the tenant.[3]

Conditions of Lease: Singular Successors. Where the conditions necessary to confer on the tenant a real right under the Act 1449 are fulfilled, all the ordinary obligations contained in the lease are binding on, and may be enforced by, the assignee of the tenant, or the singular successor of the landlord. So a purchaser of lands has a title to enforce obligations by the tenants in relation to the rotation of crops, or their undertaking to leave premises in a prescribed state of repair.[4] In *Huber* v. *Ross* [5] it was held to be beyond dispute that a purchaser took under all the conditions of the lease which the law would imply, *e.g.*, the obligation not to interfere, by building operations, with the business carried on by the tenant. But singular successors are not bound by private agreements between landlord and tenant which do not appear in the lease. Thus where a landlord in a letter subsequent to the lease undertook to allow the tenant £200 at the end of the lease in consideration of his improvements, it was held that this letter, being, in the words of the Lord Justice-Clerk, "altogether extrinsic," did not bind the landlord's singular successors, and did not justify the tenant in retention of his rent in a question with a trustee for the landlord's creditors who had entered into possession.[6] And a similar decision was pronounced in a case

as a case where restrictions were held binding on a singular successor, but overlooks the consideration that the parties were superior and vassal, and that there is a continuous contractual relation between a superior and each successive vassal (*supra*, p. 228). As to the Lord Strathcona case, sec. 46 *Law Quarterly Review*, p. 139.

[1] *Birkbeck* v. *Ross*, 1865, 4 M. 272, per Lord Barcaple (Ordinary), at p. 276.

[2] Act 1449, c. 17. The Act does not apply to a lease of shootings (*Pollock, Gilmour & Co.* v. *Harvey*, 1828, 6 S. 913), even if a house is included (*Birkbeck* v. *Ross*, 1865, 4 M. 272), except in the case where the value of the land is solely for sport, and the subjects let are the lands, not merely the right of shooting over them (*Farquharson*, 1870, 9 M. 66); nor of trout fishing (*Earl of Galloway* v. *Duke of Bedford*, 1902, 4 F. 851). In these cases the tenant cannot maintain his right against a singular successor, whether the latter had notice of the lease or not (*Birkbeck* v. *Ross*, *supra*).

[3] *Hall* v. *M'Gill*, 1847, 9 D. 1557.

[4] Generally, these conditions are—(1) that the lease, if for more than a year, be in writing; (2) that the tenant has entered into possession; (3) a definite ish, or term of endurance; (4) a provision for rent. The law is fully considered in Rankine, *Leases*, Chap. V.

[5] 1912, S.C. 898.

[6] *Turner* v. *Nicolson*, 1835, 13 S. 633.

where a landlord had undertaken by a separate obligation to grant a new lease at the expiry of the old.[1]

While the ordinary obligations in a lease run with the lands, obligations may be undertaken by landlord or tenant in a lease which are purely personal, and by which only the contracting parties and their heirs are affected. The rule is usually stated that those obligations only which are *inter naturalia* of the lease are binding upon singular successors. As interpreted, it would appear that the rule means that in order to run with the lands the obligation must be one of common occurrence in that particular class of lease. Thus a lease for 999 years contained an obligation to grant a feu on application being made for it. It was held that this obligation was not binding on a singular successor of the landlord, but Lord Moncreiff was of opinion that proof that such clauses were customary in leases of long duration might, if available, have led to a different result.[2] The cases noted below, in which it was held that a particular obligation was,[3] or was not,[4] *inter naturalia* of the lease, supply illustrations, but do not, it is submitted, justify the statement of any more definite rule.[5]

Jus quæsitum tertio.—In certain cases one who is not the representative of a party to the contract, an assignee, or a successor in title, may have a title to sue on the contract on the ground that it was entered into for his behoof. Such cases are spoken of as cases of *jus quæsitum tertio*. This

[1] *Jacobs* v. *Anderson*, 1898, 6 S.L.T. 234. But where an obligation, which did not appear in the lease, was imposed by a local custom, it was held that a singular successor was bound by it (*Bell* v. *Lamont*, 14th June 1814, F.C.).

[2] *Bisset* v. *Magistrates of Aberdeen*, 1898, 1 F. 87.

[3] Compensation for improvements (*Arbuthnot* v. *Colquhoun*, 1772, M. 10424 and 15220; *Fraser* v. *Maitland*, 1824, 2 S. App. 37; *Stewart* v. *M'Ra*, 1834, 13 S. 4); obligation to place fences, etc., in tenantable repair (*Barr* v. *Cochrane*, 1878, 5 R. 877; *Waterson* v. *Stewart*, 1881, 9 R. 155); right to sink pits, and clause referring disputes to arbitration in mining lease (*Montgomerie* v. *Carrick*, 1848, 10 D. 1387); rights of pasturage and taking peats, in leases for 99 years, granted in founding a new town (*Campbell* v. *M'Lean*, 1867, 5 M. 636; affd. 1870, 8 M. (H.L.) 40). When a tenant had a claim for a building which he had erected, and it was agreed that payment should be postponed until the expiry of a new lease, the Lord Ordinary (Hunter) held that this agreement did not run with the lands, on the ground that the payment to which it related was an ascertained debt of the landlord's (*Purres' Trs.* v. *Traill's Trs.*, 1914, 2 S.L.T. 425). But in *Buchanan* v. *Taylor* (1916, S.C. 129), where a similar arrangement had been made with regard to a sum payable by the tenant, the same judge decided that the right to payment passed to a singular successor of the landlord. It is very difficult to see any distinction in principle between the two cases.

[4] *Lundy* v. *Smith of Lundy*, 1610, M. 15166; and *Ross* v. *Duchess of Sutherland*, 1838, 16 S. 1179 (reduction of rent in return for personal services); *Bisset* v. *Magistrates of Aberdeen*, 1898, 1 F. 87 (narrated in text). A lease for a definite period, with a clause conferring on the tenant a right to renewal at the end of that and subsequent periods, is a doubtful point, when the question is with a singular successor of the landlord. It is valid for the original period (*Campbell* v. *M'Kinnon*, 1867, 5 M. 636; affd. 1870, 8 M. (H.L.) 40. The right to renewal was sustained in *Wight* v. *Earl of Hopetoun*, 1763, M. 10461, and in *Scott* v. *Straton*, 1772, 3 Paton 666; but the former case was doubted by Lord Trayner in *Bisset* v. *Magistrates of Aberdeen*, the latter seems to have been decided on the ground that the singular successor had homologated the tenant's right. See Rankine, *Leases*, 3rd ed., p. 139. Cases on the question whether obligations in leases granted by an heir of entail in possession are binding on a succeeding heir (*Earl of Galloway* v. *Duke of Bedford*, 1902, 4 F. 851; *Gillespie* v. *Riddell*, 1908, S.C. 628; affd. 1909, S.C. (H.L.) 3) are not authorities as to the rights of singular successors. They proceed on the ground that the obligations in question, if allowed to affect succeeding heirs, would amount to contraventions of the fetters of the entail (*Panton* v. *Mackintosh*, 1908, S.C. 647).

[5] Numerous English cases on the question whether a particular obligation in a lease runs with the lands will be found collected in 1 Smith, *L.C.*, 12th ed., 62, notes to *Spencer's* case. But the English law on this subject proceeds so much on specialties, and on the interpretation of statutes (*e.g.*, 32 Hen. VIII. c. 34) which are not applicable to Scotland, that it is difficult to see how they can be authorities here. "There is no branch of our law so technical as that relating to covenants running with the lands" (Buckley, L.J., in *Dewar* v. *Goodman* [1908], 1 K.B., at p. 106).

phrase is used in two senses. The *jus* may be the right to sue on a contract, it may also be the right to property derived from a contract. The question whether *C.* has a *jus quæsitum* in a contract between *A.* and *B.* may be whether *C.* has a right to sue the debtor in that contract, it may also be whether *C.* has a right to the money or property which that debtor has undertaken to pay or deliver. The fact that *A.* and *B.* expressly provide that *C.* shall have a title to sue, or agree to pay to *C.*, while it may be conclusive as to *C.'s jus quæsitum* in the former sense of the term, *i.e.*, conclusive as to his title to sue, leaves open the question as to his *jus quæsitum* in the latter sense, *i.e.*, whether the money or property for which he sues belongs to him or not. That question has been considered in a prior chapter,[1] it is now proposed to take the phrase *jus quæsitum* in the former sense, and to ask in what cases a man acquires the title to sue on a contract to which he was not a party.

Conditions for Title of *tertius*.- On this question the classical passage is in Stair: "It is likewise the opinion of Molina, and it quadrates with our customs, that where parties contract, if there be any article in favour of a third party, *est jus quæsitum tertio*, which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform."[2] It has been authoritatively laid down that to render this passage applicable, and to give a *tertius* a title to sue, while he need not be named in the contract, he, or a particular class of which he is a member, must be referred to. A member of the public, as such, acquires no right to sue merely on the ground that the contract contains provisions which, if carried into effect, would be beneficial to him.[3] On this ground, it may be suggested, the Scotch Courts would follow the English decision that where the owner of a motor car had insured against third party risks, a person who had been injured by him had no title to sue the insurance company, and, in the bankruptcy of the insurer, had no specific or preferable claim to the money which the company had paid.[4]

It would seem impossible to state with any exactitude the conditions which will confer a *jus quæsitum tertio*. It has indeed been suggested that *C.* has a title to sue on a contract between *A.* and *B.* if the contract is for his benefit, and if it cannot be revoked by the contracting parties.[5] But this is an argument in a circle, because the only reason against the revocation of a contract by mutual consent is that a third party has acquired a right under it.

Intention to Benefit *tertius*.- It is a question of the intention of the contracting parties. Was their object, in entering into the contract, to secure a benefit to a third party, or was the benefit which the fulfilment of the contract would secure to a third party merely the incidental result of an advantage which one or other of them proposed to secure to himself? So if it can be shewn that *A.* has no personal interest in compelling the fulfilment of obligations undertaken to him by *B.*, the inference is comparatively easy that *C.*, who has an interest in the matter, has a title to sue on the contract.

[1] *Supra*, p. 68.

[2] Stair, i. 10, 5; More's *Notes to Stair*, i. lxii. See explanation of Stair's *dictum* in *Finnie* v. *Glasgow and South-Western Rly. Co.*, 1857, 3 Macq. 75, per Lord Wensleydale, at p. 89; and by Lord Dunedin in *Carmichael* v. *Carmichael's Exrx.*, 1920, S.C. H.L. 195.

[3] *Finnie* v. *Glasgow and South-Western Rly.*, 1857, 3 Macq. 75, per Lord Cranworth, *L.C.*, at p. 88; Lord Wensleydale, at pp. 89-90.

[4] *In re Harrington Motor Co.* [1928], 1 Ch. 105; *Hood's Trs.* v. *Southern Union Insurance Co.* [1928], 1 Ch. 793.

[5] *Blumer & Co.* v. *Scott & Sons*, 1874, 1 R. 379, per Lord Ardmillan, at p. 387.

Thus in cases of building restrictions it has been pointed out that it is more easy to infer a mutual right to enforce restrictions in disponees from a common author than in co-feuars, because the disponer of lands, having no further interest in them, may be assumed to have imposed restrictions in the interests of others, whereas a superior, having a continual relation to the lands he has feued, may have imposed the restrictions in his own interests.[1]

Parole Evidence of Intention. When the contract is in writing the question whether the contracting parties intended that a third party should have a title to sue upon it is one to be decided on a construction of its terms, and parole evidence of actual intention is incompetent.[2] "The case of *Hislop* v. *Macritchie's Trs.*" . . . "settled that the title of a *tertius*—that is to say, anyone not a party to the original contract—must depend upon an agreement between the parties to the contract that the *tertius* should have such a title, and therefore that there must be some evidence in the title itself that it is intended that the restrictions shall be enforceable by a *tertius*." [3]

Express Provision that Third Party may Sue. The most unequivocable indication of an intention that a third party should have a *jus quæsitum* under a contract is an express provision that he should have a title to enforce it, and it is conceived that there is no principle of the law of Scotland which should prevent a stipulation of this kind having the effect intended.[4] So where the disponer of a piece of ground laid the disponee under restrictions expressed to be "in favour of me and my successors, proprietors of the ground on the east and west side thereof," it was held that a singular successor of the disponer could enforce the restrictions, though the right to do so was not expressly assigned to him.[5] Again, if two parties make a third the creditor in a debt due by one of them he has a title to sue for payment, though he is a stranger to the contract out of which the debt arises, and though he may have no right to keep the money. Thus where a deposit receipt for money deposited by *A.* is made payable to *B.*, he has a right to sue the bank, although, without some further proof of donation, he may be unable to establish any right to the money.[6]

***Tertius* having Sole Interest.** Almost as clear a case for the admission of *jus quæsitum tertio* is where *A.* by contract obliges *B.* to do something for *C.*, when his own interest in the fulfilment of these obligations is non-existent or negligible. Apart from cases as to the right to enforce building restrictions —which will be noticed later [7]—the following illustrative cases may be mentioned :—

[1] *Nicholson* v. *Glasgow Blind Asylum*, 1911, S.C. 391, per Lord President Dunedin, at pp. 400, 401.

[2] *Hislop* v. *Macritchie's Trs.*, 1881, 8 R. (H.L.) 95, per Lord Watson.

[3] Per Lord President Dunedin, *Nicholson* v. *Glasgow Blind Asylum*, 1911, S.C. 391.

[4] Such a provision would not give a *tertius* a title to sue in England; *Tweddle* v. *Atkinson*, 1861, 1 B. & S. 393. "Our law knows nothing of a *jus quæsitum tertio* arising by way of contract" (Lord Haldane, *L.C.*, *Dunlop Pneumatic Tyre Co.* v. *Selfridge* [1915], A.C. 847, 853). But while English law does not recognise that *C.* may have a title to sue on a contract under which *A.* and *B.* agree to pay to him, yet if the contract is to make him the recipient of a specified fund, as distinguished from a particular sum of money, *C.* may have a title to sue as *cestui que trust* (*Gandy* v. *Gandy*, 1885, 30 Ch. D. 57; *Kelly* v. *Larkin* [1910], 2 Ir. R. 550). In *Affréteurs Réunis* v. *Walford* ([1919], A.C. 801), a charter party provided that the shipowner should pay a commission to the shipbroker. It was held that the shipbroker had no title to sue, but that the charterer could sue as trustee for him. In Scotland, it is submitted, the ship-broker would have a *jus quæsitum tertio*, which would give him a title to sue.

[5] *Braid Hills Hotel Co.* v. *Manuel*, 1909, S.C. 120.

[6] *Dickson* v. *National Bank*, 1917, S.C. (H.L.) 50, per Lord Dunedin.

[7] *Infra*, p. 243.

Where *A.*, in an offer (which was accepted) to purchase an hotel from *B.*, stated that in the event of acceptance he "would be pleased to give £100" to *B.'s* wife, the Court, holding that this offer was part of the contract, and not merely an indication of an intention which *A.* was at liberty to alter, sustained an action at the instance of *B.'s* wife.[1] Where, in an excambion of lands between *A.* and *B.*, it was agreed between them that the tenants should not be removed during the currency of their leases, it was held that a tenant might found on this agreement in defence to an action of removing.[2] Where an association of underwriters took from a new member a guarantee for underwriting transactions to be undertaken by him, it was held that creditors in obligations underwritten by him had a title to sue the guarantor.[3] When a contract of marine insurance provided that the ship insured should render assistance to any other ship insured in the same company it was read as giving each ship insured in that company a contractual right to assistance from any other, and therefore as excluding any claim for salvage.[4] Where a lease of minerals bound the tenants to pay the owner of the surface for any damage due to subsidence, a subsequent feuar from the landlord, under a feu-contract which excluded any recourse against his superior, had a title to sue the tenants under their obligation in the lease.[5] Where the rules of a trade union provided for the payment of benefits to dependants of members who had become insane, it was found that a dependant had a *jus quæsitum* under the rules, and that a power in the executive to alter them could not be exercised after the right to sue had actually emerged.[6] Where a provisional committee engaged in promoting a charitable society received an offer of a subscription, it was held that the society, when formed, had a title to sue for it.[7] "That," said Lord Kinnear, "is an express stipulation in favour of a third party—that is, the society—definitely described, and is in effect an agreement between the two parties to the contract that a stipulation shall be performed with that third party, and the rule in such a case is, that though the person in whose favour the stipulation is made is not a party to the agreement, or at the time assenting to it, he may afterwards adopt the agreement in his favour and sue upon it."[8]

General Rule of *jus tertii*.—On the other hand, if two parties enter into a contract to secure their own purposes, the mere fact that a third party is interested in the fulfilment of the obligations undertaken by one of them will not give him any title to sue. A *jus quæsitum tertio* is the exception, not the rule. So to entitle one feuar to enforce building restrictions imposed by a superior on another feuar, something more is required than the mere fact that the enforcement would be beneficial to him.[9] A third party cannot

[1] *Lamont* v. *Burnett*, 1901, 3 F. 797. The Court read the offer as equivalent to an offer to pay £7100 for the hotel—£7000 to be paid to *B.*, £100 to *B.'s* wife.

[2] *Wood* v. *Moncur*, 1591, M. 7719.

[3] *Rose, Murison & Thomson* v. *Wingate, Birrell & Co.'s Tr.*, 1889, 16 R. 1132 (Outer House). The association gave its consent and concurrence to the action, but, in the opinion of the Lord Ordinary (Kyllachy), this was not necessary.

[4] *Clan Steam Trawling Co.* v. *Aberdeen Steam Trawling Co.*, 1908, S.C. 651.

[5] *Dryburgh* v. *Fife Coal Co.*, 1905, 7 F. 1083.

[6] *Love* v. *Amalgamated Society of Lithographic Printers*, 1912, S.C. 1078.

[7] *Morton's Trs.* v. *Aged Christian Friend Society*, 1899, 2 F. 82. See also *Costin* v. *Hume*, 1914, S.C. 134. In a subsequent case, on very similar facts, it was held that the offer could only be enforced, if it could be enforced at all, by the party to whom it was actually made, not by the trustees of the fund to which the subscription was destined (*Cambuslang West Church Committee* v. *Bryce*, 1897, 25 R. 322). The reconciliation may be on the ground, suggested by Lord Moncreiff, that there was no averment that the offerer intended to be bound to the actual pursuers.

[8] *Morton's Trs.* v. *Aged Christian Friend Society*, 1889, 2 F. 82, at p. 87. [9] *Infra*, p. 243.

interdict a particular act on the ground that it is contrary to the provisions of a partnership deed or *ultra vires* of a company or public body.[1] The articles of association of a company form a contract between the company and its members, under which no third party acquires any title to sue.[2] The acquisition of property does not necessarily confer a title to enforce prior contracts relating to that property.[3] Where two railway companies agreed to a maximum rate for goods traffic, it was held that the agreement did not give an individual trader any right to object to charges in excess of it. The tariff was fixed in the interest of the companies themselves, not with a view to benefit the senders of traffic.[4] A condition, in articles of roup, that if the highest bidder fails to find security within a certain number of days the next highest bidder shall be preferred, is a contract between the exposer and the highest bidder, which the next highest bidder has no title to enforce.[5] A landlord has no *jus quæsitum* in a contract between his tenant and a third party, though fulfilment of the contract might result in a permanent improvement of the subjects let.[6] Where a constable sued the surgeon of a police force it was held that the latter could not found on a bye-law under which no constable could bring an action against a member of the establishment without the written consent of the chief constable.[7] When a lender undertook, by contract with a party who proposed to lend to the same borrower, that he would not call up his money until a certain event had occurred, the borrower acquired no right under the contract.[8] An agreement by a shareholder for the sale of his shares is *jus tertii* to the liquidator of the company, who cannot insist on its being implemented so as to place the purchaser on the register as a contributory.[9]

Where, in a contract between *A.* and *B.*, it is provided that *A.* shall pay debts due by *B.*, it is conceived that, as a general rule, this contract does not confer any *jus quæsitum* on *B.'s* creditors, and therefore that they have no title to sue *A.* It was held in certain early cases that where *B.* sold property to *A.*, and took an obligation from him to apply the price to meet his (*B.'s*) creditors, these creditors did obtain a *jus quæsitum*, entitling them to sue *A.* for payment, and that *A.* could not urge in defence that he had altered his arrangement with *B.*, and made payment to him directly.[10] These cases carry the principle of *jus quæsitum* very far, as the object of the contract was clearly for the convenience of *B.* and not with the view of benefiting his creditors. They seem inconsistent in principle with later expositions of the law. Thus where a statute provided that the Corporation of Glasgow should relieve the heritors of a particular part of a parish from their liability for poor rates, it was held that the parochial board of that parish

[1] *Nicol* v. *Dundee Harbour Commissioners*, 1914, S.C. 374; 1915, S.C. (H.L.) 7. See opinion of Lord Salvesen.

[2] *East Lothian Bank* v. *Turnbull*, 1824, 3 S. 95; *Macandrew* v. *Robertson*, 1828, 6 S. 950; *Eley* v. *Positive Life Assurance Co.*, 1875, 1 Ex. Div. 88; *Hickman* v. *Kent Marsh Sheepbreeders' Association* [1915], 1 Ch. 881.

[3] *Supra*, p. 225.

[4] *Finnie* v. *Glasgow and South-Western Rly. Co.*, 1857, 3 Macq. 75. See also *Lochgelly Iron and Coal Co.* v. *North British Rly. Co.*, 1913, 1 S.L.T. 405 (H.L.), opinion of Lord Kinnear.

[5] *Walker* v. *Gavin*, 1787, M. 14193. Contrast *Hannay* v. *Stothert*, 1788, M. 14194, where the exposer had called upon the second highest bidder to implement the sale, and it was held that he was then entitled to insist upon it. See also *Paton* v. *Macpherson*, 1889, 17 R. 52.

[6] *Peddie* v. *Brown*, 1857, 3 Macq. 65.

[7] *A.* v. *B.*, 1907, S.C. 1154.

[8] *Lennie's Trs.* v. *Johnston*, 1914, 1 S.L.T. 47.

[9] *Myles* v. *City of Glasgow Bank*, 1879, 6 R. 718.

[10] *Oyilvie & Grant* v. *Ker*, 1664, M. 7740; *Carmichael* v. *Sands*, 1714, M. 7741; *Blair* v. *Graham*, 1714, M. 7744.

acquired no direct right of action against the Corporation.[1] Discussing the argument for the parochial board, the Lord Chancellor (Cottenham) said: "Now, that can only proceed on this, which is clearly unknown as a principle of the law of this country or the law of Scotland, namely, that a contract of indemnity between *A.* and *B.* is to be the foundation of a charge by the party intending to be actually indemnified against another party. If *A.* undertakes to indemnify *B.* against any liability to *C.*, it is clearly a strange principle to contend that *A.* is consequently liable to *C.*"[2] In *Henderson* v. *Stubbs*,[3] where a new company took over the business of another, and it was a condition of the contract that the new company should pay all the debts due by the old, it was held that this was an arrangement between the companies for their own convenience, under which the creditors of the old company acquired no right, and therefore that they had no title to sue the new company.

If *A.* purchases goods from *B.*, and then transfers them to *C.*, under an arrangement whereby *C.* undertakes to pay the price to *B.*, it would appear that *B.* may have a title to sue *C.*, at least if the arrangement was intimated to him. In *Leslie* v. *Magistrates of Dundee*[4] a committee had employed *L.* to prepare plans for a scheme for the supply of water to Dundee. They subsequently made an arrangement with the town council, by which they assigned the "documents connected with the scheme, on condition of being relieved of the expenses already incurred." The town council made use of the plans *L.* had prepared on the instructions of the committee, and it was held that *L.* had a title to sue them for his fees. Lord Fullerton put the general case as follows: "*C.* furnishes certain articles to *B.*, which *B.* makes over to *A.*, under condition that he shall relieve him of the payment of the price. This only means that *A.* shall settle with *C.*; and the slightest intimation of the transaction to *C.* would be sufficient to make a privity with him, and give him a direct claim against *A.* for the price."[5]

Cases of Breach of Contract.—A person who undertakes duties under a contract, and by failure to fulfil them properly causes loss, is not liable on the contract to a person with whom he did not contract, but on whom the loss has happened to light. If he is liable at all, it must be on the ground that he owed a duty to the party injured, and that his failure to perform that duty amounted to delict or negligence: all attempts in such cases to infer liability on the principle of *jus quæsitum tertio* have failed. That principle, though it may entitle a *tertius* to sue on nonfeasance of a contract, will not entitle him to damages for misfeasance, because the real foundation of his title to sue is that the debtor in the contract has agreed to be liable to him, and it is not to be presumed that the debtor in a contract has agreed to be liable to a *tertius* in respect of his defective performance. Thus the liability of a law agent for loss caused by his negligence or failure to exhibit ordinary pro-

[1] *Ewing* v. *Burns*, 1837, 15 S. 936; revd. 1839, M'L. & Rob. 435.

[2] *Ewing, supra*, at p. 455.

[3] *Henderson* v. *Stubbs*, 1894, 22 R. 51. See also *Welsh & Forbes* v. *Johnston*, 1906, 8 F. 453; *Taylor* v. *Thomson*, 1902, 9 S.L.T. 373. The introduction of a new partner into a firm may leave the firm as newly constituted (and therefore the new partner) liable for prior debts (*M'Keand* v. *Laird*, 1861, 23 D. 846; *Heddle's Exrx.* v. *Marwick & Hourston's Tr.*, 1888, 15 R. 698); but this rests on the ground that no real alteration in the firm has taken place, not on any *jus quæsitum* arising from a provision in the contract by which the new partner was introduced (*Stephen's Tr.* v. *Macdougall & Co.'s Tr.*, 1889, 16 R. 779. Opinion of Lord Adam in *Henderson* v. *Stubbs, supra*).

[4] 1840, 3 D. 164.

[5] *Leslie, supra*, 3 D. 171.

fessional skill—a liability which must rest on breach of contract—is to the person by whom, directly or indirectly, he has been employed, and to him alone.[1] This rule, which was exceedingly disputable on the earlier authorities,[2] was established by the decision of the House of Lords in *Robertson* v. *Fleming*.[3] There *A.*, who had arranged that certain persons should act as cautioners for him, employed a law agent to create a security in their favour over certain leasehold property belonging to him. The law agent omitted to intimate the security to the landlord, with the result that, on *A.'s* bankruptcy, it was found that the cautioners had no preference. They brought an action of damages against the law agent. On an issue putting the question whether the defender was employed "for behoof of" the pursuers, and whether he was guilty of professional negligence, a jury found for the pursuers and awarded damages. In a bill of exceptions the defender argued that the words in the issue "for behoof of" meant "for the benefit of" and not "by the authority of," and that it was incumbent on the pursuers to shew that the defender had acted on their employment or authority, not merely that he had acted for their benefit. The House of Lords, in effect, sustained this argument, and remitted the case for a new trial, with a declaration that the issue ought to have raised directly the question whether the defender was employed by the authority of the pursuers. The Lord Chancellor (Campbell) laid it down that the liability of a law agent, in such circumstances, was confined to the person who employed him: "I never had any doubt of the unsoundness of the doctrine, unnecessarily (and I must say unwisely) contended for by the respondent's counsel, that *A.* employing *B.*, a professional lawyer, to do any act for the benefit of *C.*—*A.* having to pay *B.*, and there being no intercourse of any sort between *B.* and *C.*—if, through the gross negligence or ignorance of *B.* in transacting the business, *C.* loses the benefit intended for him by *A.*, *C.* may maintain an action against *B.* and recover damages for the loss sustained. If this were law a disappointed legatee might sue the solicitor employed by the testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. I am clearly of opinion that this is not the law of Scotland, nor of England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science. The Scottish authorities, under the head '*Jus quæsitum tertio*,' have no application, for these contemplate a vested right absolutely acquired by a consummated transaction."[4]

The principle of the opinion just quoted was followed in *Tully* v. *Ingram*.[5] There an uncle employed a law agent to purchase a house to be presented to his nephew. The law agent omitted to notice a bond. In an action by the nephew the Court, coming to the conclusion on the evidence that the law agent was employed solely by the uncle, held that the nephew had no title to sue. Damages for professional negligence could be claimed only by the law agent's employer.

[1] *Robertson* v. *Fleming*, 1861, 4 Macq. 167; *Raes* v. *Meek*, 1888, 15 R. 1033; affd. 1889, 16 R. (H.L.) 31; *Tully* v. *Ingram*, 1891, 19 R. 65. These cases establish that a law agent owes no general duty; his liability for professional negligence rests solely on his contract. A medical man, on the other hand, owes a duty to his patient, and is liable to him for want of professional skill, irrespective of the question by whom he was employed (*Edgar* v. *Lamont*, 1914, S.C. 277).

[2] *Goldie* v. *Macdonald*, 1757, M. 3527; explained (misrepresented?) by Lord Cranworth in *Robertson* v. *Fleming*, 1861, 4 Macq. 167, at p. 190; *Goldie* v. *Goldie*, 1842, 4 D. 1489 (opinion of Lord Fullerton).

[3] 1861, 4 Macq. 167.

[4] 4 Macq., at p. 177.

[5] 1891, 19 R. 65.

But where a law agent is employed to carry out a transaction in which more than one party is interested, and no other agent is consulted, the inference may be drawn that he acts for all the parties, though his claim for remuneration may be only against one. If so, he will be liable in damages for professional negligence though the sufferer may not be the party who paid his account.[1]

Cases of Personal Injury.—If the negligent or defective performance of a contract results in personal injury, any action, so far as resting on contract, must be at the instance of the other party to the contract. So the liability of a landlord for injury resulting from the defective state of the premises let is a liability resting on his breach of an express or implied contract to keep the premises in proper repair: that contract is with the tenant, and other parties, *e.g.*, the tenant's wife or visitors, have no *jus quæsitum* under the contract which will entitle them to sue for damages for the injury which they may have sustained.[2] Where ship-carpenters, under a contract with ship-builders, laid a gangway from ship to dock, and a workman employed by a firm of ship-engineers was injured through its defective state, the Court, holding that no question of delict was involved, were clearly of opinion that the workman could not found any claim on the ground that the defects in the gangway involved a breach of the ship-carpenters' contract with the shipbuilders.[3]

Negligence as a Ground of Liability.—There are many cases in which a man has been found liable to third parties for injury resulting to them through his conduct in carrying out a contract, but the liability then rests upon delict or negligence. The mere fact that *A.*, in doing a particular act, is fulfilling his contract with *B.*, does not absolve him from the ordinary duty implied by law to abstain from injuring others by his act, nor from the duty to take reasonable care for the interests of third parties, provided, in the circumstances, he owed a duty to these third parties. But such a duty, with the liability thence resulting, does not arise from the contract, and would be the same whether the act causing the injury were a breach of contract or not. So in such cases the question is not whether the party injured has any title to sue on a contract to which he was not a party, but whether the person doing the injurious act owed any duty to him. In *Cramb* v. *Caledonian Rly. Co.*[4] bags of sugar had been conveyed in the same van with boxes of weed-killer which contained arsenic. The boxes leaked, with the result of contaminating the sugar, and causing arsenical poisoning in the persons who ultimately partook of it. In an action of damages at the instance of one of these persons against the railway company, the Lord President (Robertson) points out very clearly that such an action had nothing to do with contract. "In considering the case of the *Caledonian Rly. Co.*, it is necessary again to emphasise the fact that the action against them is brought by persons entirely unconnected with them by contract, and of whom they had no knowledge. We are not considering, and we have no occasion and no means to determine, whether the railway company duly fulfilled the obligations incumbent on them as carriers of the bags of sugar. In the present

[1] See the explanation of *Lang* v. *Struthers*, 1827, 2 W. & S. 563, by Lord Chancellor Campbell, Lords Cranworth and Wensleydale in *Robertson* v. *Fleming*, 1861, 4 Macq. 167; *Williamson* v. *Begg*, 1887, 14 R. 720.

[2] *Cameron* v. *Young*, 1907, S.C. 475; affd. 1908, S.C. (H.L.) 7; *Cavalier* v. *Pope* [1906] A.C. 428.

[3] *Campbell* v. *A. & D. Morison*, 1891, 19 R. 282.

[4] 1892, 19 R. 1054.

action fault must be brought home to the railway company in the omission to perform some duty which they owed to all the world."

The discussion of the principles upon which it is determined whether in particular circumstances a duty to take reasonable care has arisen belongs to works dealing with reparation, tort, or negligence, and would be out of place in a work on contract.

Revocation of Contract Involving Benefit to Third Party.—It is not clear whether parties who have entered into a contract in terms adapted to confer a right to sue upon it on a *tertius* can revoke their contract so long as the *tertius* is not aware of it. There would seem in general to be no legal ground for holding that they may not do so. *A.*, who has made up his mind to bestow a benefit upon *C.*, may change his mind so long as he has made no intimation to *C.*;[1] it should not make any difference that he has contracted with *B.* to benefit *C.*, provided that *B.* is willing that the contract should be revoked.[2] The effect given to antenuptial marriage contracts, in so far as they confer a right on the children of the marriage, which the parents cannot gratuitously defeat,[3] is certainly adverse to this conclusion, but such contracts are of a nature so special, and so largely interpreted according to technical rules, that no conclusion as to the general law of contract can safely be drawn from them. The argument that Stair had laid down the rule that a provision for a *tertius* was enough to preclude revocation was considered and rejected in *Carmichael* v. *Carmichael's Exrx.*[4]

When the *tertius* has become aware of the contract, and has acted in reliance on it, the original parties cannot revoke it. So where building restrictions are imposed in a contract between superior and vassal, in such terms as to infer that they agree that other feuars should have a title to enforce these restrictions, they cannot be abrogated by the original parties after other feus have been granted.[5] Where a trust-deed for creditors has been intimated to them the trustees cannot revoke it.[6] Where *A.* wrote to *B.* that he would give 200 merks to a third party who proposed to marry his (*A.'s*) sister, and *B.* shewed the letter to the party in question, it was held, on the marriage taking place, that *A.* was liable for the 200 merks.[7] Where *A.* in a contract with an association of underwriters guaranteed the transactions of a member, and parties insuring risks with that member were aware of the guarantee, and contracted in reliance on it, it was held that they had a title to sue on the guarantee, and that the guarantor could not have withdrawn it while these risks were current.[8]

Reservation of Right to Revoke.—Where two parties contract in the apparent interests of a third, but expressly reserve their right to revoke the contract, that reservation, in feu-contracts imposing building restrictions, is a conclusive indication that no third party can have any *jus quæsitum* under the contract.[9] But this is not the rule in all contracts, for, as has been already stated, where the rules of a trades union provided benefits to the dependants of a member in the event of his becoming insane, with a power in the executive to alter the rules, it was held that a *jus quæsitum* was con-

[1] See *supra*, p. 19.
[2] *Baird* v. *Murray's Creditors*, 1744, M. 7737, seems to support this conclusion.
[3] *Supra*, p. 54.
[4] 1919, S.C. 636; revd. 1920, S.C. (H.L.) 195, narrated *supra*, p. 69.
[5] *Dalrymple* v. *Herdman*, 1878, 5 R. 847.
[6] *Supra*, p. 76.
[7] *Tunno & Brotherton* v. *Tunno*, 1681, M. 9438.
[8] *Rose, Murison & Thomson* v. *Wingate, Birrell & Co.'s Tr.*, 1889, 16 R. 1132.
[9] *Infra*, p. 246.

ferred, and that the power of revocation could not be exercised after the right to benefit had actually arisen by the insanity of the member.[1]

***Jus quæsitum tertio* in Building Restrictions.** The law on the question whether building restrictions can be enforced by one who was not a party to the contract by which they were imposed is sufficiently special to merit separate notice.

Interest to Enforce Restrictions. Where lands are feued or disponed, subject to restrictions as to building on them, or as to the character of the building to be erected, it may often happen that the party who has an interest to enforce the restrictions is not the superior or disponer who imposed them, but the owner of property in the neighbourhood. The same circumstances may arise where the feu-contract or disposition imposes on the feuar an obligation *ad factum prastandum*: for instance, the formation of a road or street.[2] But as, in either case, the obligation imposed is contractual, the neighbouring owner, not being a party to the contract, has *primâ facie* no title to sue upon it.[3] Mere interest confers no title; it is assumed throughout the cases that a party can never enforce restrictions imposed by a superior from whom his own title does not flow merely on the ground that the observance of these restrictions would be of advantage to him. To give a neighbouring proprietor a title to sue, he must shew that the original contract by which the restrictions were imposed was intended to be for his benefit, and to confer a *jus quæsitum* on him.

Restrictions in Titles with Common Author.— According to the *dicta* in some of the earlier cases[4] that intention was sufficiently indicated where several feus, all proceeding from a common superior, were subjected to the same, or similar, building restrictions. Each feuar then had a title to enforce the restrictions against any of the others. That simple and convenient rule can no longer be relied on since the decision of the House of Lords in *Hislop* v. *Macritchie's Trs.*,[5] now the leading case on the subject. There a superior had granted feus to various feuars for the erection of villas to form one side of a square. Each feuar was placed under building restrictions, similar though not uniform, but there was no reference to any common plan, and no undertaking by the superior in any of the feu-contracts to insert restrictions in the others. It was held that the restrictions were merely conditions as between the superior and the individual feuar, which the other feuars had no title to enforce. Lord Watson, in a passage often referred to in the subsequent cases, explained the law as follows: "The fact of the same condition appearing in feu-charters derived from a common superior, coupled with a

[1] *Love* v. *Amalgamated Society of Lithographic Printers*, 1912, S.C. 1078.

[2] *Fimister* v. *Milne*, 1860, 22 D. 1100; *Guthrie* v. *Young*, 1871, 9 M. 544; *Charlton* v. *Scott*, 1894, 22 R. 109. Cp. *Stevenson* v. *Steel Co. of Scotland*, 1896, 23 R. 1079; affd. 1899, 1 F. (H.L.) 91. In *Guthrie* v. *Young* (*supra*) it is laid down by Lord Benholme (9 M., at p. 547) that it is easier to infer a *jus quæsitum tertio* in the case of building restrictions than in the case of an obligation *ad factum præstandum*.

[3] See Rankine, *Land-Ownership*, 4th ed., 482 *et seq.* In England the law arrives at conclusions very similar to those reached in Scotland, but on the principle of an implied contract between disponees on a building estate, not on the principle of *jus quæsitum tertio* (see *Renals* v. *Cowlishaw*, 1878, 9 Ch. D. 125; 1879, 11 Ch. D. 866; *Mackenzie* v. *Childers*, 1889, 43 Ch. D. 265; *Tucker* v. *Vowles* [1893], 1 Ch. 195; *Rogers* v. *Hosegood* [1900], 2 Ch. 388; Key & Elphinstone, *Precedents in Conveyancing*, 11th ed., p. 384). The theory of implied contract between the feuars is relied on by Lords Ardmillan and Deas in *M'Gibbon* v. *Rankin*, 1871, 9 M. 423.

[4] *Heriot's Hospital* v. *Cockburn*, 1826, 2 W. & S. 293, per Lord President Hope, at p. 302; *Robertson* v. *North British Rly. Co.*, 1874, 1 R. 1213, per Lord Ardmillan, at p. 1218; *Dalrymple* v. *Herdman*, 1878, 5 R. 847, per Lord Mure, at p. 854.

[5] 1879, 7 R. 384; revd. 1881, 8 R. (H.L.) 95.

substantial interest in its observance, does not appear to me to be sufficient to give each feuar a title to enforce it. No single feuar can, in my opinion, be subjected in liability to his co-feuars, unless it appears from the titles on which he holds his feu that such similarity of conditions and mutuality of interest among the feuars either had been or was meant to be established. According to the tenor of the feu-disposition or feu-contract, as the case may be, the feuar and his superior are the only parties to it; and I am of opinion that no *jus quæsitum* can arise to any *tertius* except by the consent of both these contracting parties. That being so, unless the feuar, either in express words or by implication, gives his consent to the introduction of a *tertius*, the superior cannot as against him create any such interest by imposing the same conditions to which he has submitted upon another feu in his vicinity." [1]

Since *Hislop* v. *Macritchie's Trs.*[2] it may be taken as settled law that the combination of identity of restriction, a common author, and a substantial interest is not enough to confer a title to sue on a co-feuar or co-disponee; [3] and the question has been to determine what is sufficient to indicate that the feuar against whom the action is directed has, in Lord Watson's words, "given his consent to the introduction of a *tertius*." That is a question to be determined on the titles; the task is "to see whether you can gather from them that there has been the establishment of what may be called a community, and whether there has been an intention that this community should have interdependent rights as regards the members within it." [4]

Restrictions must be in Titles of Servient Owner.—The foundation of any action at the instance of a co-feuar must be that the restrictions which he proposes to enforce appear, or are referred to, in the title of the feuar against whom the action is directed. If that title is quite unrestricted, even though in granting it the superior committed a breach of contract with a prior feuar, that prior feuar can have no right to maintain that the restriction ought to have been imposed, and should be assumed to exist. Thus if a superior, in a feu-contract with *A.*, imposes building restrictions, undertaking to insert the same restrictions in all feus to be granted in future, and nevertheless grants to *B.* an unrestricted title, *A.'s* remedy is an action against the superior for damages for breach of contract; he cannot enforce against *B.* restrictions which the latter's title did not impose.[5] So, again, if restrictions are imposed in the original feu-contract, but there is no provision that they are to enter the record or to be engrossed in all future transmissions of the subjects, and if, in consequence, a singular successor of the original feuar obtains a title on which these restrictions do not appear, they cannot be enforced by a co-feuar.[6]

[1] *Hislop* v. *Macritchie's Trs.*, 1881, 8 R. (H.L.) 95, at p. 122. [2] *Supra.*

[3] *Calder* v. *Merchants' Company of Edinburgh*, 1886, 13 R. 623, per Lord President Inglis, at p. 634; *Braid Hills Hotel Co.* v. *Manuel*, 1909, S.C. 120, per Lord President Dunedin, at p. 125; *Thomson* v. *Mackie*, 1903, 11 S.L.T. 562; *Nicholson* v. *Glasgow Blind Asylum*, 1911, S.C. 391, per Lord President Dunedin, at p. 400.

[4] *Nicholson* v. *Glasgow Blind Asylum*, 1911, S.C. 391, per Lord President Dunedin, at p. 400.

[5] *Bannerman's Trs.* v. *Howard & Wyndham*, 1902, 39 S.L.R. 445; 10 S.L.T. 2; *Morier* v. *Brownlie & Watson*, 1895, 23 R. 67; *Walker & Dick* v. *Park*, 1888, 15 R. 477; *Nicholson* v. *Glasgow Blind Asylum*, 1911, S.C. 391; *Allan's Trs.* v. *Dixon's Trs.*, 1868, 7 M. 193 (interdict against superior). The effect of *mala fides* on the part of the subsequent feuar, *i.e.*, his taking an unrestricted title in the knowledge that the superior was bound to restrict it, was considered but not decided in *Walker & Dick* v. *Park* (*supra*). It was held immaterial in the circumstances of *Morier* v. *Brownlie & Watson* (*supra*).

[6] *Johnston* v. *Macritchie*, 1893, 20 R. 539; *Croall* v. *Magistrates of Edinburgh*, 1870, 9 M. 323.

Indications of Right in Co-feuar. - Assuming that the restrictions in question appear, or are referred to, in the title of the party against whom it is sought to enforce them, then the whole titles under which each party holds may be considered to decide whether there is sufficient indication of an intention that a *tertius* should have a title to sue.[1]

Such an intention may be most conclusively established by a direct statement that the restrictions are to be a real burden in favour of the owners of a specified piece of ground. In that case the successive owners of the piece of ground favoured will have a title to enforce the restrictions, without any express assignation to them of a right to sue.[2]

If a superior, in feuing, imposes restrictions, undertakes to insert the same restrictions in subsequent feus, and duly fulfils this obligation, a mutuality of title is established between the various feuars, on the principle that the first feuar, who stipulates that subsequent feuars should be restricted for his benefit, impliedly assents to their enforcing restrictions against him, and that the later feuar, taking with notice that the restrictions imposed on him have been imposed upon a whole area of which his lot forms a part, must be taken to have assented to the enforcement of the restrictions by all feuars within that area who can shew an interest.[3] But to establish mutuality the same, or substantially the same, restrictions must appear in each title. If the later feuar obtains an unrestricted title, or one with restrictions substantially different from those imposed on the first, he has no title to sue.[4]

Again, where a superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him, each sub-feuar or disponee will have a *jus quæsitum* to enforce those restrictions against the others.[5] It has been pointed out by Lord Dunedin that the implication of assent to enforcement by a co-feuar, arising from a provision of this nature, applies with special force to the case where it is originally imposed, not by a superior, but by a disponer of the subjects, because the latter, having no further interest in the subjects, must be supposed to be bargaining for the perpetuity of the restrictions in the interests of other disponees.[6]

Reference to Common Plan. - A reference to a common plan in the various feus, as indicating or containing the restrictions, generally infers mutuality, and a title in each feuar to enforce the restrictions on the others.[7] But a plan may be referred to merely for identification, in which case no mutuality can be inferred from the reference.[8] So where, in a feu-charter imposing restrictions, a common plan was referred to, but it was expressly provided that the reference was "for no other purpose whatever than as shewing the position of the ground feued," it was held that a co-feuar had no title to

[1] *Nicholson* v. *Glasgow Blind Asylum*, *supra*, per Lord Dunedin.

[2] *Braid Hills Hotel Co.* v. *Manuel*, 1909, S.C. 120. See also *Alexander* v. *Stobo*, 1871, 9 M. 599.

[3] *M'Gibbon* v. *Rankin*, 1871, 9 M. 423, as explained by Lord Watson in *Hislop* v. *Macritchie's Trs.*, 1881, 8 R. (H.L.), at p. 103; *M'Neill* v. *Mackenzie*, 1870, 8 M. 520; *Cochran* v. *Paterson*, 1882, 9 R. 634; *Johnston* v. *Walker's Trs.*, 1897, 24 R. 1061.

[4] *Botanic Gardens Picture House Co.* v. *Adamson*, 1924, S.C. 549.

[5] Per Lord Watson in *Hislop* v. *Macritchie's Trs.*, 1881, 8 R. (H.L.) 95, at p. 103, explaining *Robertson* v. *North British Rly. Co.*, 1874, 1 R. 1213. See also *Hill* v. *Millar*, 1900, 2 F. 799.

[6] *Nicholson* v. *Glasgow Blind Asylum*, 1911, S.C. 391, at pp. 401, 402.

[7] *Magistrates of Edinburgh* v. *Macfarlane*, 1857, 20 D. 156; *Johnston* v. *Walker's Trs.*, 1897, 24 R. 1061.

[8] *Free St Mark's Church* v. *Taylor's Trs.*, 1869, 7 M. 415; cp. *Barr* v. *Robertson*, 1854, 16 D. 1049; *Alexander* v. *Stobo*, 1871, 9 M. 599, per Lord Kinloch, at p. 609.

enforce the restriction.[1] The mere exhibition of a feuing plan, not referred to in the titles, does not amount to a contract, either between the superior and feuar,[2] or between co-feuars,[3] that the particulars apparent on the plan will be adhered to.

Reservation of Superior's Right. If the superior expressly reserves the right to dispense with the observance of the restrictions he imposes, no co-feuar can have any title to enforce them, as such a provision shews that it was not intended to confer a title upon a third party.[4] And where the feuar who was suing for the observance of restrictions had in his own title a clause by which the superior could relieve him of those imposed upon him, it was observed that this was an indication that he had no title to enforce the restrictions upon others.[5] But if the other conditions which admit a *jus quæsitum* exist, it is not excluded by a clause providing a penalty, to be exigible by the superior in the event of a contravention of the restrictions imposed.[6]

Where the feu-contract is in such terms as to infer that subsequent feuars will have a title to enforce restrictions, the superior and feuar cannot abrogate these restrictions by agreement between themselves, after other feus have been granted. Such an agreement will leave the title of the subsequent feuar unaffected.[7]

Consent and Concurrence of Superior. When the pursuer, as a co-feuar, is held to have no *jus quæsitum*, and therefore no title to sue, the consent and concurrence of the superior will not make the instance good.[8] Nor can the feuar insist on action by the superior to enforce the restrictions, or retain his feu-duty on the ground that they have been contravened.[9]

The law has been discussed, as it has chiefly been illustrated, with reference to the rights of feuars from a common superior. But it is established that the same rules apply where an estate is disponed in lots, without constituting the relations of superior and vassal between the original owner and the takers of the various lots.[10]

Assignation of Right to Enforce Restrictions.— Even when the titles do not confer a *jus quæsitum* upon adjoining feuars or disponees, they may have a title to sue as assignees of the party who originally imposed the restriction. In *Mactaggart & Co.* v. *Harrower* [11] *A.* disponed land to *B.*, subject to a restriction, expressed to be a real burden, against the erection of any other than self contained houses. This burden was not declared to be imposed in favour of any particular person or subject, but in point of fact *A.* was at the time the owner of adjacent ground. This ground he subsequently disponed in lots, expressly assigning to each disponee the benefit of the restriction imposed upon *B.* Under these assignations it was held that the dis-

[1] *Murray's Trs.* v. *St Margaret's Convent*, 1906, 8 F. 1109; affd. 1907, S.C. (H.L.) 8. This point was not in question in the House of Lords.

[2] *Heriot's Hospital* v. *Gibson*, 1814, 2 Dow 301.

[3] *Gordon* v. *Marjoribanks*, 1818, 6 Dow 87.

[4] *Earl of Zetland* v. *Hislop*, 1882, 9 R. (H.L.) 40, per Lord Watson, at p. 47; *Thomson* v. *Alley & M'Lellan*, 1882, 10 R. 433; *Turner* v. *Hamilton*, 1890, 17 R. 494.

[5] *Walker & Dick* v. *Park*, 1888, 15 R. 477, per Lord Justice-Clerk Moncreiff, at p. 485.

[6] *Dalrymple* v. *Herdman*, 1878, 5 R. 847.

[7] *Dalrymple* v. *Herdman*, 1878, 5 R. 847.

[8] *Hislop* v. *Macritchie's Trs.*, 1879, 7 R. 384; revd. 1881, 8 R. (H.L.) 95.

[9] *Heriot's Hospital* v. *Cockburn*, 1826, 2 W. & S. 293; *Hislop* v. *Macritchie's Trs.*, *supra*, per Lord Watson, 8 R. (H.L.), at p. 100.

[10] *Braid Hills Hotel Co.* v. *Manuel*, 1909, S.C. 120; *Nicholson* v. *Glasgow Blind Asylum*, 1911, S.C. 391.

[11] 1906, 8 F. 1101.

ponee had a title to enforce the restrictions. The question was raised, but not decided, whether an express assignation was required to carry the title to sue. In a subsequent case, where restrictions were declared to be a real burden or servitude "in favour of me and my successors, proprietors of ground on the east and west sides" of the subjects disponed, it was held that subsequent proprietors of the ground to the east and west had a title to enforce the restrictions, without any express assignation in their favour.[1]

[1] *Braid Hills Hotel Co.* v. *Manuel*, 1909, S.C. 120.

CHAPTER XIV

LACK OF INTEREST AS OBJECTION TO TITLE

Cases may occur in which an action, based on a contractual obligation, is met by the defence that the pursuer has no title to sue because he has no interest in obtaining the decree for which he seeks, and would not thereby obtain any advantage which the law can recognise as a legitimate motive for legal proceedings. If the action is for damages for breach of contract, such a defence is so far well-founded that no damages can be recovered if no loss has been sustained. This rule, with the question whether the absence of averments of loss renders an action based on breach of contract irrelevant, is discussed in another chapter.[1] In the present it is proposed to consider how far lack of interest in the desired result is a bar to an action.

General Rule. –If a party has undertaken to do, or abstain from doing, some particular act, and an action is raised by the other party to the contract for the purpose of compelling fulfilment, the obligant and defender cannot in any case maintain that the action is irrelevant because the pursuer omits to specify any benefit which he hopes to gain thereby. The pursuer has satisfied the requirements of relevancy by averring that the obligation he proposes to enforce has been undertaken; it lies on the defender to show why he should not fulfil his agreement.[2] In a case relating to the enforcement of building restrictions, Lord Watson explained the law in the following terms: "I agree with the Lord Ordinary in thinking that the case of *The Tailors of Aberdeen* v. *Coutts*[3] does determine that wherever a feu right contains a restriction on property, the superior, or the party in whose favour it is conceived, cannot enforce it unless he has some legitimate interest. But that case does not lay down the doctrine that an action at the superior's instance, which merely sets forth the condition of his feu right and its violation by his vassal, must be dismissed as irrelevant because the pursuer has failed to allege interest. *Primâ facie* the vassal, in consenting to be bound by the restriction, concedes the interest of the superior; and therefore, it appears to me, that the onus is upon the vassal who is pleading a release from his contract to allege and prove that, owing to some change of circumstances, any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist."[4]

Cases where Lack of Interest Irrelevant.– In the case from which this extract is taken the Court was dealing with a restriction of somewhat ancient date, and in a question with a singular successor of the original vassal, and Lord Watson's opinion, in so far as it recognises that interest on the part

[1] Chap. XXXVIII.

[2] *Magistrates of Edinburgh* v. *Macfarlane*, 1857, 20 D. 156; *Earl of Zetland* v. *Hislop*, 1881, 8 R. 675; revd. 1882, 9 R. (H.L.) 40; *Waddell* v. *Campbell*, 1898, 25 R. 456; *Menzies* v. *Caledonian Canal Commissioners*, 1900, 2 F. 953; *Royal Exchange Buildings (Proprietors of)* v. *Cotton*, 1912, S.C. 1151.

[3] 1840, 1 Robinson, 296; 3 Ross, *L.C.*, 149.

[4] Per Lord Watson, *Earl of Zetland* v. *Hislop*, 1882, 9 R. (H.L.) 40, at p. 47.

of the superior is necessary, must, as has been explained in a later case,[1] be taken as applying to the circumstances before him. Where the contract is *de recenti*, and the question is with the original contracting party, the general rule is that a party is entitled to enforce a contract whether he has any interest in doing so or not: that an obligant, in undertaking an obligation, has not only conceded the interest of the party with whom he contracts, but conclusively barred himself from disputing it. Where there has been no material change of circumstances since the date of the contract, the argument that action is precluded by want of interest is hardly stateable, except in cases of restrictive provisions in feus or leases. Thus where the purchaser of flour undertook to return the sacks the seller was not bound to accept other sacks of equivalent value.[2] When a contract provided that the goods supplied should be packed in a particular way the consignee was entitled to reject a consignment not so packed, in spite of evidence that it made no difference to the value.[3] When a contractual right of access was provided the Court refused to allow the granter to substitute an access equally convenient.[4] Even in the case of feus the original vassal is bound to observe all restrictions to which he has set his hand if there has been no change of circumstances. Thus, where it was part of the contract between superior and feuar that a particular kind of slate should be used in building, and the superior brought an action to interdict the use of another kind, the defence of want of interest, on the ground that the slates used were as good or better than those agreed upon, was held to be absolutely irrelevant, on the general ground, as put by Lord Kinnear, that a party who makes a contract is entitled to please himself and stipulate for what he desires.[5] At the same time, it is recognised, in the words of Lord Justice-Clerk Hope, that there may be extreme and absurd cases where the Court will decline to interfere, either on the principle *de minimis non curat prætor*, or on the presumed absence of serious consent.[6] And there is some authority for the proposition that an action for the enforcement of a negative servitude may be met by a plea that the pursuer has no interest in the matter and is acting *in æmulationem vicini*.[7]

It was observed by all the judges who took part in the decision in *Waddell* v. *Campbell* that proof of want of interest might be an effectual answer to an attempt by a superior to enforce building restrictions after the property had passed into the hands of a singular successor of the original vassal. This is in accordance with other authority;[8] and it may be presumed that Lord President Dunedin, in his opinion, in *Maguire* v. *Burges*,[9] in which he points out that the relations of a singular successor of the vassal to the superior are the same as those of the original vassal, did not intend to cast any doubt upon it. It has been suggested that it is easier, on the plea of want of interest,

[1] *Menzies* v. *Caledonian Canal Commissioners*, 1900, 2 F. 953.
[2] *Allason* v. *Watson*, 1757, M. 14246.
[3] *Moore* v. *Landauer* [1921], 2 K.B. 519.
[4] *Moyes* v. *M'Diarmid*, 1900, 2 F. 918.
[5] *Waddell* v. *Campbell*, 1898, 25 R. 456.
[6] *Magistrates of Edinburgh* v. *Macfarlane*, 1857, 20 D. 156, 171. In such cases the element of oppressive procedure would be important. See opinion of Lord Justice-Clerk (Inglis) in *Strang* v. *Stewart*, 1864, 2 M. 1015.
[7] *Gould* v. *M'Corquodale*, 1869, 8 M. 165, per Lord President Inglis, at p. 170; but is this consistent with *Waddell* v. *Campbell*, 1898, 25 R. 456.
[8] *Tailors of Aberdeen* v. *Coutts*, 1840, 1 Robinson, 296; 3 Ross, *L.C.*, 269; *Earl of Zetland* v. *Hislop*, 1882, 9 R. (H.L.) 40, per Lord Watson, at p. 47 (quoted *supra*); *Menzies* v. *Caledonian Canal Commissioners*, 1900, 2 F. 953, opinion of Lord Kincairney (Ordinary).
[9] 1909, S.C. 1283.

to get rid of restrictions on the use of the subjects than of restrictions as to the buildings to be erected.[1]

Actions in Interest of Third Party.—Where a contract is expressly in the interests of a third party the fact that one of the parties, who sues upon it, has no personal interest in the result, is no objection to his title. So where a proprietor undertook, in a letter addressed to a bishop, to endow a church, and to make the endowment a real burden on his lands, the bishop had a title to insist for fulfilment, and it was no objection that he had no personal interest to serve.[2] And an agent has a title to sue for damages for breach of contract, though the damage has been sustained by his principal and not by himself.[3]

Actions on *jus quæsitum tertio*.—Where an action to enforce a contract is not at the instance of a party thereto, but of one who has a title to sue on the principle, explained in the preceding chapter, of *jus quæsitum tertio*, a legitimate interest is of the essence of the pursuer's case, and must be relevantly averred. So if a co-feuar proposes to found on building restrictions contained in a contract with the superior to which he was not a party, he must set forth a legitimate interest.[4]

Meaning of Interest in Action by a *tertius*.—In such questions the word interest may be used in two senses. It may mean the ownership of a dominant tenement, which is necessary to the validity of a servitude, or it may mean some specific interest, some advantage which the co-feuar derives from the restriction in question, and which he would lose if it were violated. Lord Kinnear, in a recent case,[5] lays down the rule that the statement in the last paragraph is true only if the word interest is read in the former sense. The action was for the enforcement of a servitude *non altius tollendi*, put forward as an objection to an application, in the Dean of Guild Court, by the proprietor of the servient tenement, for a warrant to erect buildings in contravention of the servitude. The servitude was originally imposed by a common author, but the objector could point, not merely to his right as owner of the dominant tenement, but to an express assignation from the common author of the right to enforce it. It was therefore not really necessary to decide what interest would be required by a co-feuar, or by an owner of a dominant tenement as such, in a case where he had no contractual right assigned to him, and Lord Kinnear's observations on the point may be taken as *obiter*. Dealing with the argument that some specific interest was necessary, he said: "But then it was said that, besides the general interest which is necessary to support a servitude, or to support a right to enforce a building restriction which is founded on *jus quæsitum tertio*, or, again, to support a real burden, you must have, over and above, an interest which enables the complainer to shew that there is some special damage or injury to be done to his property in the actual circumstances of the case by the erection of the building of which he complains. I am not aware of any authority or any reason to support that argument. I think it was founded altogether upon a misleading practice of picking out a single sentence from a judgment without reference to the

[1] *Menzies* v. *Caledonian Canal Commissioners*, 1900, 2 F. 953, per Lord Kinnear.

[2] *Drummond* v. *Farquhar*, 1st July 1809, F.C.; see also *Lloyds* v. *Harper*, 1880, 16 Ch. D. 290; *Affreteurs Reunis* v. *Walford* [1919], A.C. 801.

[3] *Craig & Co.* v. *Blackater*, 1923, S.C. 472.

[4] *Maguire* v. *Burges*, 1909, S.C. 1283; per Lord Watson in *Hislop* v. *Macritchie's Trs.*, 1881, 8 R. (H.L.) 95, at p. 102. In *Beattie* v. *Ures* (1876, 3 R. 634) the Court seems to have overlooked the distinction between an action by a superior and an action by a co-feuar.

[5] *Proprietors of Royal Exchange Buildings, Glasgow* v. *Cotton*, 1912, S.C. 1151, at p. 1159.

circumstances or the context in which it was said, and founding upon it as if it had been propounded as a solitary dogma, to be followed in all cases without qualification."

In the case of a servitude *non altius tollendi* it may very well be, as is suggested by Lord Kinnear in an earlier part of the opinion from which this quotation is taken, that the mere ownership of the dominant tenement necessarily involves an interest in the owner to enforce its observance. But this is not necessarily the case in all building restrictions, and it is submitted that the prior authorities recognise the necessity of an interest of a more specific character. The opinion of Lord President Inglis in *Gould* v. *M'Corquodale*[1] is considered by Lord Kinnear, and also by Lord Johnston,[2] and explained on the ground that his Lordship is there speaking of enforcement *in æmulationem vicini*, but the opinion of Lord Deas in the same case seems plainly to contemplate that the interest must be of the nature of actual advantage. In *Hislop* v. *Macritchie's Trs.*[3] Lord Watson says: "The title of the superior rests upon contract, a contract running with the estate of superiority and burdening the subaltern estate of the vassal. The right of the feuar, though arising *ex contractu*, is of the nature of a proper servitude, his feu being the dominant tenement: consequently he cannot enforce it against other feuars except in so far as he can qualify an interest to do so." It is hard, indeed impossible, to read that passage without seeing that Lord Watson was speaking of an interest distinct from ownership of the feu which is the dominant tenement. And it is submitted that the question was actually decided, in a sense adverse to the opinion of Lord Kinnear (quoted above), in *Maguire* v. *Burges*.[4] There the restriction was against the erection of other than residential houses. The building it was proposed to erect was a church. The objector was a co-feuar, who was subject to the same restriction, and with whom the superior had contracted that the restriction would be inserted in all feu-rights to be granted in future. The objection failed, on the ground, as stated in the interlocutor, "that the respondent had failed to set forth any interest to enforce the conditions founded on by him." The case seems to establish that in building restrictions where the interest is not necessarily involved in the ownership of the dominant tenement (as it may be in the case of a servitude *non altius tollendi*), it lies upon a co-feuar who proposes to enforce the restrictions, and who is not an assignee of the contract by which the restrictions were imposed, to shew what specific interest of his would be endangered if the restrictions were disregarded.

Disproportion of Interest to Loss Inflicted. Where a party has a right to insist upon a particular demand, it is no answer to him to say that the loss he would inflict by so insisting would be out of all proportion to the benefit he would gain. So, if the owner of the surface has the right to prevent the working of minerals by any method likely to bring down the surface, he has a right to obtain an interdict, although it may be shewn that the consequent loss to the owner of the minerals would greatly exceed any possible diminution in the value of the surface.[5] Yet the Court of Session has an equitable power, in cases where a choice of remedy is possible, to refuse one remedy, otherwise competent, on the ground of the hardship it would entail. Most of the cases have related to buildings erected on another man's land, in

[1] 1869, 8 M. 165.
[2] In *Proprietors of Royal Exchange Buildings, Glasgow* v. *Cotton*, 1912, S.C. 1151, at pp. 1159, 1161.
[3] 1881, 8 R. (H.L.) 95, at p. 102.
[4] 1909, S.C. 1283.
[5] *Bank of Scotland* v. *Stewart*, 1891, 18 R. 957.

circumstances where undue loss would result if an order for the demolition of the building were pronounced.[1] But the same principle applies to obligations resting on contract. In *Moore* v. *Paterson*, *A.* had undertaken to construct a road in a definite line. Part of the ground over which it had to pass belonged to a third party, who refused to sell except at an exorbitant price. An action to enforce *A.'s* obligation failed on the ground that the particular pursuer was held to have no title to sue, but opinions were expressed that had the title been adequate the Court would have refused an order *ad factum præstandum*, and given relief in damages.[2]

Change of Circumstances.—Where a material change of circumstances has intervened between the formation of a contract and an action to enforce it, there is more room for the contention that a legitimate interest is necessary to the pursuer's title to sue. Two classes of cases have occurred: (1) where the validity of building restrictions is in question, and there has been a change in the nature of the locality since they were imposed: (2) where the contract relates to a particular subject, and the party suing has ceased to have an interest in that subject.

Disregard of Building Restrictions.—(1) It is established by a series of cases that where a number of feus from a common superior have been granted under the same restrictions as to the character of the buildings to be erected or the use to be made of them, and these restrictions have been generally disregarded without objection, with the result that the character of the street or locality has been altered, neither the superior nor the other feuars can enforce these restrictions against a feuar proposing to contravene them.[3] In the earliest of these cases [4] this result was rested both on the ground that the pursuer (the superior) had no interest, and that he was barred *personali exceptione*. These pleas raise questions which might in certain circumstances involve diverse considerations. The ground for personal bar has in all the subsequent cases been referred to as acquiescence, though it is difficult to see, if the question be with the superior, why his acquiescence in the proceedings of one feuar should bar him in a question with another. In any case acquiescence, founded on in support of a plea of personal bar, must involve that the party against whom it is pleaded had the power to prevent the acts in which he is said to have acquiesced, and therefore the plea can be available only in a case where contraventions of building restrictions have occurred within a particular feuing estate, and where the superior, or the neighbouring feuar, had the power to intervene. But the nature of a locality may be so altered by changes outside a feuing estate as to render the building restrictions useless to the superior and merely burdensome to the feuar. In

[1] *Grahame* v. *Magistrates of Kirkcaldy*, 1881, 8 R. 395; 1882, 9 R. (H.L.) 91, where the prior cases are reviewed by Lord Watson; *Wilson* v. *Pottinger*, 1908, S.C. 580.

[2] *Moore* v. *Paterson*, 1881, 9 R. 337.

[3] Rankine, *Land-Ownership*, 4th ed. 479. The leading authorities are: In actions by the superior—*Brown* v. *Burns*, 1823, 2 S. 298; *Campbell* v. *Clydesdale Bank*, 1868, 6 M. 943; *Earl of Zetland* v. *Hislop*, 1881, 8 R. 675; revd. 1882, 9 R. (H.L.) 40; *Liddell* v. *Duncan*, 1898, 25 R. 1119. In actions by co-feuars—*Gould* v. *M'Corquodale*, 1869, 8 M. 165; *Fraser* v. *Downie*, 1877, 4 R. 942; *Robertson's Trs.* v. *Bruce*, 1905, 7 F. 580; *Mactaggart* v. *Roemmele*, 1907, S.C. 1318; *Braid Hills Hotel Co.* v. *Manuel*, 1909, S.C. 120 (Lord President Dunedin, at p. 126). For English law, see *Duke of Bedford* v. *Trs. of British Museum*, 1822, 2 M. & K. 552; *Osborne* v. *Bradley* [1903], 2 Ch. 446. By the Housing, Town Planning (Scotland) Act 1919 (9 & 10 Geo. V. c. 60, sec. 26) the Sheriff has power to authorise the conversion of a house into two or more dwellings, in spite of a restriction in a feu-contract or lease, if it appears that, owing to changes in the locality, it cannot readily be let as a single dwelling, but could readily be let if converted.

[4] *Brown* v. *Burns*, *supra*.

such circumstances it could not reasonably be said that the superior was barred by acquiescence in events which he had no power to prevent, but it is possible that the plea of want of interest might be sucessfully advanced. It would seem clear that in the case of a small estate any interest originally possessed by the superior might be as much affected by developments outside as by developments within, but it is doubtful whether the plea of want of interest, in a case where the element of acquiescence was completely absent, would be recognised.[1]

When acquiescence has been in question it is necessary to shew that the party proposing to enforce the restriction either knew, or had full means of knowledge, of the fact that the restriction was being generally disregarded.[2] One tolerated contravention is not enough :[3] the contraventions must be sufficient to infer, in the words of Lord Gifford, "a virtual departure from the whole servitude."[4] Acquiescence in the disregard of one restriction does not imply any disability to enforce others ; so where storm windows had been permitted, it was held that a new storey might nevertheless be interdicted, though both were contraventions of the provisions of the feu-contract.[5] And though acquiescence may be successfully pleaded against a superior, the restriction may be enforced by a co-feuar, who may have had no title, or no sufficient interest, to object to the proceedings of a co-feuar at a distance, but may nevertheless have a title and an interest to object to similar proceedings next door.[6] A co-feuar has been successfully met with the plea of acquiescence or want of interest in a case where the feuars in a street which had completely lost its residential character had, by formal agreement, abrogated certain of the building restrictions, and in fact disregarded the rest ;[7] or where nearly all the back greens in a particular street had been built upon, and the co-feuar, who proposed to interdict a later builder, had expressly assented to a similar building on the feu next to his own.[8] Acquiescence by a co-feuar's author will bind him.[9]

Lack of Interest by Parting with *res*.—(2) If the original interest of a party to a contract lay in his ownership of a particular subject or thing, the alienation thereof involves a material change of circumstances, and may determine his right to sue on the contract. An action by a creditor after he has assigned the debt is barred, not so much by his want of interest as by his inability to grant an effectual discharge.[10] But there are other cases where the element of want of interest comes in more strongly. Thus any agreement which in

[1] It is recognised by Lord M'Laren (*Menzies* v. *Caledonian Canal Commissioners*, 1900, 2 F. 953, at p. 963) and in England by Sargant J., in *Sobey* v. *Sainsbury* [1913], 2 Ch. 513, at p. 529, but in neither case was the point necessary for the decision. An adverse view has been expressed by Lord Stormonth-Darling, founding on earlier English *dicta*, in *Cheyne* v. *Taylor*, 1899, 7 S.L.T. 276, and *Wingate's Trs.* v. *Oswald*, 1903, 10 S.L.T. 517.

[2] *Campbell* v. *Clydesdale Bank*, 1868, 6 M. 943.

[3] *Ewing* v. *Campbell*, 1877, 5 R. 230.

[4] *Stewart* v. *Bunten*, 1878, 5 R. 1108, 1116 ; *Johnston* v. *Walker's Trs.*, 1897, 24 R. 1061, opinion of Lord Adams.

[5] *Stewart* v. *Bunten*, 1878, 5 R. 1108. See opinion of Lord Young in *Johnston* v. *Macritchie*, 1893, 20 R. 539 ; *North British Rly. Co.* v. *Clark*, 1913, 1 S.L.T. 207.

[6] *Mactaggart & Co.* v. *Roemmele*, 1907, S.C. 1318.

[7] *Fraser* v. *Downie*, 1877, 4 R. 942.

[8] *Robertson's Trs.* v. *Bruce*, 1905, 7 F. 580.

[9] *Mactaggart & Co.* v. *Roemmele*, 1907, S.C. 1318, per Lord President Dunedin.

[10] *Fraser* v. *Duguid*, 1838, 16 S. 1130. If the assignation is only in security, as a general rule the cedent retains sufficient interest to support his title to sue (*Manson* v. *Baillie*, 1850, 12 D. 775), but where there was the specialty that the cedent was a pauper who had unsuccessfully applied for the benefit of the poor's roll, and the assignee (his law agent) was furnishing the funds for the action, it was held that the defender was entitled to demand that the assignee should sist himself as a pursuer (*Fraser* v. *Dunbar*, 1839, 1 D. 882).

substance amounts to an undertaking not to compete in trade cannot be enforced by the creditor after he has ceased to carry on the trade which it was designed to protect.[1] Where *A.*, disponing part of his lands, and without creating the permanent relationship of superior and vassal, imposes building restrictions on the disponee, it is probably the law that he loses the right to enforce the restrictions if he parts with the lands which he retained.[2] Both at common law,[3] and under the Bills of Lading Act, 1855,[4] the consigner of goods, who has contracted for their carriage, loses the right to sue the carrier when the property in the goods is transferred to the consignee. And if *A.* and *B.* enter into a particular contract with reference to a thing of which *A.*, at the date of the contract, is the owner, and the thing is afterwards transferred by *A.* to *C.* on terms which leave *A.* without interest in it or liability for its state, the plea of want of interest will debar *A.* from enforcing the contract against *B.*; nor can he obtain damages for *B.'s* breach of the contract, because, in the circumstances figured, he has suffered no loss.[5] In *Blumer & Co.* v. *Scott & Son*,[6] Blumer & Co. employed the defenders, a firm of ship-engineers, to fit up engines in a ship. This ship they had already sold to Ellis & Son, and, in the contract of sale, had protected themselves from any liability for late delivery owing to the delay of the engineers. The defenders failed to complete the engines within the contract time, and an action of damages was raised by Blumer & Co. and Ellis & Son, as joint pursuers. It was held that Ellis & Son, who had in fact suffered loss, had no title to sue, because they were not parties to the contract. The instance of Blumer & Co. also failed, in respect that they had no interest. As they were not liable for the delays of the engineers, and they had no interest in the ship, they had suffered no loss, and were therefore suing for damages which they had not sustained. In *Edinburgh United Breweries* v. *Molleson*,[7] *A.* sold a brewery to *B.* for £20,500. This amount was fixed on representations made by *A.* as to the annual returns. *B.* re-sold to *C.*, at an enhanced price, without any relation to the annual returns, and the brewery was, by arrangement, conveyed by *A.* to *C.* It was afterwards discovered that the amount of the annual returns had been over-estimated, owing to fraudulent entries made by a clerk for whom *A.* was responsible. *B.* and *C.* brought an action concluding for the reduction of the original sale by *A.*, on the ground of the misrepresentations involved in these false entries. It was not shewn that the second sale—that by *B.* to *C.*—was open to challenge, and the Court proceeded on the footing that it was not. It was held that neither *B.* nor *C.* had a title to sue—*B.*, because, having re-sold the brewery, he had no further interest in the matter; *C.*, because he had no title to found on misrepresentations which were not made to him. In a case presenting somewhat similar features, except that the misrepresenta-

[1] *Berlitz School of Languages* v. *Duchêne*, 1903, 6 F. 181.

[2] *Mactaggart & Co.* v. *Harrower*, 1906, 8 F. 1101.

[3] *Campbell* v. *Tyson*, 1840, 2 D. 1215.

[4] 18 & 19 Vict. c. 111. See opinion of Lord Ch. Selborne in *Sewell* v. *Burdick*, 1884, 10 App. Cas. 74, 84.

[5] *Blumer & Co.* v. *Scott & Son*, 1874, 1 R. 379; *Edinburgh United Breweries* v. *Molleson*, 1893, 20 R. 581; affd. 1894, 21 R. (H.L.) 10; *Magistrates of Arbroath* v. *Strachan's Trs.*, 1842, 4 D. 538.

[6] *Supra.* It must be noted that the pursuers (Blumer & Co.) in entering into the contract with Scott & Son, were not acting as agents for Ellis & Son, to whom they had sold the ship. The agent, though he may have no personal interest, is entitled to sue for damages on behalf of his principal. *Craig & Co.* v. *Blackater*, 1923, S.C. 472, where Blumer & Co. is explained by Lord Hunter.

[7] 1893, 20 R. 581; affd. 1894, 21 R. (H.L.) 10.

tions made by *A.* to *B.* were repeated by *B* to *C.*, it was held that if *C.* reduced the sub-sale *B.'s* title to sue *A.* revived.[1]

Nature of Interest.—In cases where an interest in the decree sought is necessary to the pursuer's title, it must be an interest which the Court will recognise as legitimate, such as a direct pecuniary interest, or the avoidance of a possible liability. An agreement with a third party who is interested in the contract, but has no title to sue upon it, may in certain cases be sufficient, but, it is conceived, is in general not a legitimate interest. In *Scottish Australian Emigration Society* v. *Borland*,[2] a society engaged in promoting emigration had employed a secretary, on the condition that his salary (£50) should be payable only in the event of the venture proving remunerative. From failure on the part of Borland, from whom they had chartered a ship, the venture proved unremunerative. It was held that the society was entitled to recover from Borland, as damages for his breach of contract, the £50 conditionally promised to the secretary, but the judgment seems open to the observation, made by the Lord Justice-Clerk, that there was "some looseness" in awarding damages to the society though they had suffered no hurt. And in the cases narrated in the preceding paragraph the fact that the original party to the contract was suing on behalf of his transferees was held not to obviate the objection that he had no direct interest.[3] In the analogous case of the reduction of a will at the instance of the testator's next of kin, it was held that his title to sue was excluded by lack of interest, in respect that there was in existence a prior will, admittedly valid, and therefore barring his right to take as on intestacy, and that the interest which in fact induced him to act—an arrangement with the beneficiaries under the prior will—was not one which the Court would recognise.[4] But it is no objection to title that the pursuer, being insured against the injury which the breach of contract has occasioned, is suing in the interest of the insurance company.[5]

Interest in Cases of Building Restrictions.—Where the question has been, what is a sufficient interest to support an action to enforce building restrictions, it is established that it is sufficient to shew that other property belonging to the objector will be injured if they are disregarded:[6] or that, in the case of a superior, who is also owner of the minerals, his contingent liability for surface damages will be increased if houses are built beyond the limits of the feu-contract.[7] In the case of a superior, it is probably sufficient to shew that a reputation for enforcing building restrictions, in the interests of the other feuars, will assist him in feuing the part of his ground which is still unfeued.[8] A superior has a sufficient interest to enforce a restriction against public houses if he is the owner of adjacent property,[9] or is an employer of labour in the vicinity,[10] or has his residence there.[11] Whether, if none of those elements of interest apply, an objection on moral or social grounds

[1] *Westville Shipping Co.* v. *Abram Shipping Co.*, 1922, S.C. 571; affd. 1923, S.C. (H.L.) 68.
[2] 1855, 18 D. 239.
[3] *Blumer & Co.* v. *Scott & Son*, 1874, 1 R. 379; *Edinburgh United Breweries* v. *Molleson*, 1893, 20 R. 581; affd. 1894, 21 R. (H.L.) 10.
[4] *Swanson* v. *Manson*, 1907, S.C. 426.
[5] *Delaurier* v. *Wyllie*, 1889, 17 R. 167, per Lord Wellwood, at p. 189; *Port-Glasgow and Newark Sailcloth Co.* v. *Caledonian Rly. Co.*, 1892, 19 R. 608.
[6] *Earl of Zetland* v. *Hislop*, 1881, 8 R. 675; revd. 1882, 9 R. (H.L.) 40.
[7] *Naismith* v. *Cairnduff*, 1876, 3 R. 863.
[8] *Forrest* v. *George Watson's Hospital*, 1905, 8 F. 341, per Lord Dundas (Ordinary), at p. 349.
[9] *Earl of Zetland* v. *Hislop*, 1881, 8 R. 675; revd. 1882, 9 R. (H.L.) 40.
[10] *Menzies* v. *Caledonian Canal Commissioners*, 1900, 2 F. 953.
[11] *Lord Belhaven and Stenton* v. *Chassels*, 1904, 12 S.L.T. 290.

would be sufficient has not been determined. Nor has it been decided whether the superior may sue simply as the champion of the other feuars. It seems doubtful whether the fact that the feuar would be prepared to pay for enfranchisement would be recognised as a sufficient interest.[1] A feuar has a sufficient interest in preserving the unbroken line of the street, though on æsthetic rather than commercial grounds:[2] and his interest in objecting to any alteration, such as the opening of a shop or the building of tenement houses, which will tend to interfere with the amenity of his residence, has never been seriously questioned.[3] But where the only interest which could be alleged to enforce a restriction against building a church instead of houses was that the co-feuar objecting– a medical man—would be deprived of the chance of patients, it was held to be illusory and insufficient.[4] In *Alexander* v. *Stobo*, Lord Deas remarked that if a superior, in feuing his lands on one side of the Forth, were to impose a servitude *non altius tollendi* in favour of his lands on the other, it would, at least in a question with singular successors, be a mere dead letter.[5]

[1] See opinion in the negative by Lord Kincairney (Ordinary), in *Menzies* v. *Caledonian Canal Commissioners*, 1900, 2 F. 953; in the affirmative by Lord Salvesen in *Anderson* v. *Dickie*, 1914, S.C. 706, 716; (1915, S.C. (H.L.) 79).

[2] *Stewart* v. *Bunten*, 1878, 5 R. 1108.

[3] See *Mactaggart & Co.* v. *Roemmele*, 1907, S.C. 1318.

[4] *Maguire* v. *Burges*, 1909, S.C. 1283.

[5] *Alexander* v. *Stobo*, 1871, 9 M. 599, at p. 612.

CHAPTER XV

LIABILITY ON CONTRACT

General Rule.—While, as explained in a previous chapter, the law of Scotland allows the parties to a contract to confer on a third party a title to sue upon it, and treats it as a question of intention whether they have done so, it is not within the province of contract to impose any liability upon a third party. *A.* and *B.*, by contracting, cannot impose any liability on *C.*, unless *C.* has given them an antecedent authority to bind him, or has, by a subsequent act, involved himself in the liabilities created by the contract.[1] The parties to a contract cannot fetter the free will of a third party, unless previously authorised by him to do so, but they may create a situation under which a third party, by an act not directly connected with the contract, may subject himself to its liabilities. Thus, while it may be said loosely that a man, in contracting, binds himself and his representatives after his death, what is meant is that his representatives, if and so far as they choose to take up his succession, must take it with the liabilities imposed by the contract. So a contractual obligation may be binding on the singular successors of the party in the ownership of a particular subject, but this implies only that a third party who chooses to acquire the subject must take it with the burden imposed upon it.

Liability to Assignee.—A third party, however, may be involved in the liabilities created by a contract to which he was not a consenter if he has given one or other of the contracting parties authority to bind him, and that authority need not be express. If *A.* enters into a contract with *B.*, and the contract is assignable, *A.* may be liable to an assignee with whom he has not contracted, but his liability rests on the ground that by entering into an assignable contract he has undertaken to be bound to an assignee in the event of the contract being assigned. His liability is not created by the contract between *B.* and the assignee; that contract only purifies the condition under which he undertook to be liable to any possible assignee. So a superior, by contract with a feuar, may impose a new liability on prior feuars, in so far as he may confer on the new feuar a title to enforce building restrictions, but he does so in respect of the prior consent of the earlier feuars to subject themselves to that liability.[2]

Questions as to Liability.—The law relating to liability on contract, then, may be treated as involving two main questions. The first is to determine within what limits a party, by assuming the position of debtor under a

[1] It must be observed that *A.* and *B.*, by entering into a contract, may impose upon *C.* a duty to which he was not previously subject, *i.e.*, the duty to abstain from inducing either *A.* or *B.* to break his contract. But this duty though it results from the contract between *A.* and *B.*, is not contractual, but rests upon principles of delict. It is imposed on *C.* by the contract between *A.* and *B.*, only in the sense that the duty not to assault *B.* is imposed on *A.* by the fact of *B.*'s existence.

[2] *Supra*, p. 244.

contract, remains liable until the obligation he has incurred is implemented or in some way extinguished; the second, to decide what acts of a third party may impose upon him the liabilities under a contract on which he was not originally bound.

Obligations, when Transmissible.—It is involved in the general conception of contract that the parties by contracting incur a liability to implement the obligations to which they have respectively agreed. But it does not follow that each remains liable until the claims of the other, as creditor, are satisfied. This is no doubt the general rule. "Generally, all obligations are intransmissible upon either party directly without the consent of the other party, which is clear upon the part of the debtor, who cannot, without consent of the creditor, liberate himself and transmit his obligation upon another, though with the creditor's consent he may, by delegation." [1]

Delegation.—Delegation is the extinction of the liability of one party by the substitution of the liability of another. It is a form of novation—the extinction of one debt by the substitution of another.[2] It requires no authority to prove that it is not, as a general rule, in the option of a debtor to effect delegation of the debt; to substitute, that is to say, the obligation of another party, who may be a person of no means, for his own. So the provision of sec. 47 of the Conveyancing (Scotland) Act, 1874,[3] under which the personal obligation in a bond and disposition in security transmits against the purchaser of the subjects when an agreement to that effect appears *in gremio* of the conveyance, was construed as merely imposing liability on the purchaser, not as discharging the liability of the original debtor in the bond.[4] And while there are certain cases, to be considered immediately, where an obligation is so intimately connected with the ownership of lands that it binds the owner of the lands for the time being rather than the original obligant, still, even in these cases, the original obligant is freed only in respect of obligations arising after he has parted with the lands; he remains liable for those obligations which became due and prestable while he was still the owner.[5]

Consent of Creditor Necessary.—In order to effect delegation—and the same rule applies to cases of novation—the consent of the creditor must in some way be obtained. It may be given at the time when the obligation was constituted. Thus it may be provided that the liability of the original obligant shall cease on a new obligation, or method of enforcing the debt, being obtained, as in the case of a cesser clause in a charter-party.[6] And where a building owner or architect employs a quantity surveyor, the custom of trade is that the successful tenderer for the building undertakes liability for the quantity surveyor's fees, and that the liability of the building owner or architect then ceases, whereas if no tender is received or accepted they remain liable. The custom of trade amounts to an implied condition, in the contract by which the quantity surveyor is employed, that the liability of his employer should cease on the acceptance of a builder's tender.[7]

Presumption against Delegation.—Where the original contract contains no provision for the novation or delegation of the obligations arising under it, the debtor must prove that the creditor has assented to his discharge. There

[1] Stair iii. 1, 2.
[2] Ersk. iii. 4. 22; Bell, *Prin.*, sec. 576.
[3] 37 & 38 Vict. c. 94.
[4] *University of Glasgow* v. *Yuill's Trs.*, 1882, 9 R. 643.
[5] *Infra*, p. 260.
[6] See as to the construction of the cesser clause, Scrutton, *Charter-Parties*, 12th ed., 174.
[7] *North* v. *Basset* [1892], 1 Q.B. 333.

would seem to be no general principle of law except that the consent of a creditor to release his debtor is not to be inferred from the mere fact that he accepts a new document of debt, or a new obligant. *Primâ facie* these are accepted as a further security. "It is laid down by all the authorities that delegation is not to be presumed, and I think the doctrine even goes further, and that there is a strong presumption against it." [1] So where a creditor, who had asked for payment, and been informed that payment would be made by the debtor's factor, took a promissory note from the factor, it was held that he did not thereby liberate the debtor.[2] And the mere fact that interest has been accepted on a debt from other than the original obligant does not infer that that obligant is released.[3] Where a landlord became liable on a bill for cattle purchased by his tenant, and the arrangement was that as the bill fell due it should be renewed by a bill for a lesser sum, the difference being paid by the tenant, it was held that the creditor, by taking a renewal of the bill without payment of the balance, had not lost his right to recover that balance from the landlord. The circumstances did not amount either to novation or delegation.[4]

The cases in which the plea of delegation has been sustained are all very special, involving either a decision, on the particular facts, that the creditor had agreed to release the original debtor,[5] or conduct on the creditor's part by which he induced the debtor to suppose that he had released him, with resulting loss to the debtor.[6] But where a creditor who is in possession of a document of debt gives it up, at the same time obtaining the obligation of a new debtor, there is a presumption that the real agreement between the parties was that the liability under the original document of debt is discharged.[7] But the acceptance of new promissory notes from the same debtor does not infer the abandonment of a claim for interest arising under the old one.[8]

Delegation in Partnership.—The narrowest cases with regard to novation or delegation occur when there is a change in a business, either complete by the transference of the business to another, or partial, by the retirement of a partner with or without the introduction of a new one. The mere facts that a party to whom a business has been transferred has undertaken to pay the debts of the transferor, that this arrangement has been intimated to creditors, and that a creditor has accepted the obligation of the transferee, are not enough to involve the extinction of the transferor's liability by delegation. These facts were present in *Pollock & Co.* v. *Murray & Spence*,[9] and it was held that the case for delegation still lacked any proof of the creditor's assent to it. But in such circumstances it is probable that a change in the form of the debt would supply the missing evidence of an agreement to take the new obligant in place of the old.[10]

When a partner in a firm retires, and the business is carried on by the remaining partners without the introduction of a new one, it is only in exceptional cases that the liability of the retiring partner for debt due by

[1] *Hay & Kyd* v. *Powrie*, 1886, 13 R. 777. [2] *Pearston* v. *Wilson*, 1856, 17 D. 197.
[3] *Hunter* v. *Falconer*, 1835, 13 S. 252; *Threipland* v. *Campbell*, 1855, 17 D. 487.
[4] Per Lord President Inglis, *M'Intosh & Son* v. *Ainslie*, 1872, 10 M. 304, at p. 309.
[5] *M'Intosh & Son* v. *Ainslie*, *supra*.
[6] *Morton's Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72; *Smith* v. *Patrick*, 1901, 3 F. (H.L.) 14.
[7] *Stevenson* v. *Lord Duncan*, 1805, Hume, 245.
[8] *Hope Johnstone* v. *Cornwall*, 1895, 22 R. 314.
[9] 1863, 2 M. 14. [10] *Buchanan* v. *Somerville*, 1779, M. 3402.

the firm at the time he retired can be extinguished on the plea that the creditor has accepted the liability of the firm as newly constituted in substitution for his original claim. As all the partners of the original firm are liable to him, it is not to be presumed that he voluntarily gives up the liability of one without any return. So the mere acceptance of interest, or of a dividend in the bankruptcy of the firm, does not liberate the retiring partner.[1] But where a party who had a credit account with a firm of bankers, in the knowledge that one of the partners had died, signed an entry in the bank books that his account was settled and the balance paid to him, and at the same time took a credit receipt for the balance, it was held that the only reasonable explanation of this proceeding was that he discharged his claim against the representatives of the deceased partner.[2] But the decision was not unanimous, and the case was observed to be a narrow one. In somewhat similar circumstances the English Courts have drawn a distinction between the act of taking a new deposit-receipt in the knowledge of the death of one of the partners of the bank, and the act of transferring an account current to a deposit-receipt at the instance and request of the surviving partner. The former act did not, the latter did, infer a renunciation of the claim against the representatives of the deceased partner.[3]

Where one partner retires from a firm and a new partner is introduced the inference will be more easy that a creditor who accepts the obligation of the firm as newly constituted gives up his claim against the old firm, if he has gained in exchange the obligation of the new partner. In *Bilborough* v. *Homes*,[4] *A.* retired from a firm of bankers and two new partners were introduced. On the bankruptcy of the firm claims were made against *A.* by two classes of depositors. One class consisted of parties who had held deposit-receipts while *A.* was a partner but had renewed them after his retirement, the other of parties who had not renewed their receipts but had accepted interest from the firm as newly constituted. It was held that in both cases *A.'s* original obligation was extinguished. But it has been pointed out that where a new firm succeeds the old the continuance of relations with the new firm is important only as evidence of an agreement to take the obligation of the new firm in place of that of the old, and that the significance of the creditor's actings would vary according as he was or was not familiar with business.[5]

Implied Delegation: Feu-Contracts.—There is no general rule that because a contract relates to particular property there is any implied provision that the liability under it ceases when the obligant parts with the property in question. But certain contracts relating to heritage are read as running with the lands and imposing an obligation on the obligant only so long as his relation to the lands in question subsists.

In a previous chapter an explanation has been attempted of the rules which determine what contracts between a superior and vassal run with the

[1] *Campbell* v. *Cruickshank*, 1845, 7 D. 548; *Muir* v. *Dickson*, 1860, 22 D. 1070; *Morton's Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72; *Smith* v. *Patrick*, 1901, 3 F. (H.L.) 14. The Partnership Act, 1890 (53 & 54 Vict. c. 39), enacts, sec. 17 (3): "A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted."

[2] *Ker* v. *M'Kechnie*, 1845, 7 D. 494.

[3] *In re Head* [1893], 3 Ch. 426; [1894], 2 Ch. 236.

[4] 1876, 5 Ch. D. 255.

[5] *Conquest's* case, 1875, 1 Ch. D. 334.

lands and are transmitted to those who successively occupy the position of the original parties to the feu-charter or feu-contract.[1] In such cases the obligations on either side are commonly undertaken by the party, his heirs, executors, and successors, and it is trite law that in this form the obligation binds the vassal only so long as he retains that character, and ceases to bind him when that character has been assumed by a disponee. "When a feuar dispones the lands the disponee on the completion of his title becomes, in place of the disponer, the debtor in the obligation imposed by the feu-contract on the vassal: and further, the disponer is, *ipso facto*, freed from such of those obligations as had not become prestable at the time of the transmission."[2] So, under the law prior to 1874 the liability of a feuar for future instalments of the feu-duty was extinguished when a new vassal entered with the superior.[3] By sec. 4 of the Conveyancing (Scotland) Act, 1874, under which any proprietor who is infeft in lands is deemed to be entered with the superior at the date of the registration of the conveyance in his favour in the appropriate Register of Sasines, it is provided that "notwithstanding such implied entry, the proprietor last entered in the lands, and his heirs and representatives, shall continue personally liable to the superior for payment of the whole feu-duties affecting the said lands, and for performance of the whole obligations of the feu, until notice of the change of ownership of the feu shall have been given to the superior." Though not expressly stated in the Act, it is clearly implied that the giving of the statutory notice frees the former vassal from all liability for the obligations of the feu, in so far as these have not yet become prestable, and are of such a character as to run with the lands.[4]

Obligations Binding on Superior.—The balance of authority seems to be that similar rules apply to the case where an obligation transmissible against singular successors is undertaken by a superior. A clause obliging the superior to relieve the vassal of public burdens or of augmentations of minister's stipend is a contract binding on the original obligant, as superior, and ceases to be binding on him, so far as regards liability for the future, when he transfers the superiority to a third party.[5]

It has been explained that the principle upon which the original superior or vassal is relieved of his obligations by a transfer to a singular successor is delegation: that the imposition of liability upon a new obligant frees the old.[6] The superior's consent to this is implied, presumably, on the ground that under the system of feudal tenure, as developed in Scotland and until altered by legislation, he had the power to enter or refuse a new vassal as he pleased.[7] It is therefore quite in harmony with principle to hold that

[1] *Supra*, p. 228.

[2] Per Lord Kinnear, *Marshall* v. *Callander, etc., Hydropathic Co.*, 1895, 22 R. 954, at p. 963.

[3] *Police Commissioners of Dundee* v. *Straton*, 1884, 11 R. 586; *Aiton* v. *Russell's Exrs.*, 1884, 16 R. 625.

[4] Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), sec. 4.

[5] This seems to follow from the opinions of the judges of the Court of Session and the House of Lords in *M'Callum* v. *Stewart*, 1868, 6 M. 382; affd. 1870, 8 M. (H.L.) 1; and is assumed to be the law in *Latto* v. *Magistrates of Aberdeen*, 1903, 5 F. 740. But it is inconsistent with the decision of the Court of Session in *Marquis of Breadalbane* v. *Sinclair*, 1844, 6 D. 378 (see opinion of Lord Medwyn, at p. 388), a decision not affected by the reversal in the House of Lords on another point (5 Bell's App. 353). Probably the conveyance of the superiority must be *bona fide*, *i.e.*, not to a man of straw for the sake of getting rid of the obligation (see *Gardyne* v. *Royal Bank*, 1851, 13 D. 912, at pp. 934, 935).

[6] *M'Callum* v. *Stewart*, *supra*, per consulted judges, 6 M., at p. 391; *Marshall* v. *Callander, etc., Hydropathic Co.*, 1895, 22 R. 954, per Lord Kinnear, at p. 963.

[7] See opinion of Lord President Dunedin in *Maguire* v. *Burges*, 1909, S.C. 1283, 1289.

under the law prior to the Conveyancing (Scotland) Act, 1874, a disponee from the vassal, on taking infeftment, became liable for feu-duty though he had not entered with the superior, and yet that the obligation of the vassal was not discharged.[1]

Obligations Undertaken Jointly and Severally.—The extinction of the liability of the original vassal on notice being given to the superior of a change of ownership is the rule only where the obligation is undertaken in the ordinary form, *i.e.*, by the vassal, his heirs, executors, and successors. Thus where a separate personal bond was given by the vassal for the feu-duty,[2] or when the obligation in the feu-contract was undertaken by the vassal, his heirs, executors, and successors, conjunctly and severally, it was held that the original vassal and his representatives remained liable for the feu-duty even after the entry of a new vassal.[3]

Obligations already Incurred.—Even if the obligation in a feu-contract is one which runs with the lands, and which binds the parties only so long as they continue to hold the relationship of superior and vassal, yet the original parties, and each successive superior and vassal, continue liable for those obligations which become prestable while they held that character, and cannot escape from that liability by conveying their estate to a third party. The cases illustrating this rule have related to the liabilities of the vassal, but there seems no reason to doubt that it applies to the liabilities of the superior as well. Thus a vassal is liable for arrears of feu-duties falling due during his vassalage, and the liability passes to his representatives after his death.[4] And when an obligation, immediately prestable, was laid upon the vassal to erect buildings, it was held that each successive vassal was liable to implement it; that he continued so liable after the entry of a new vassal; and that the representatives of an earlier vassal who had predeceased were liable in damages for their ancestor's failure.[5] In *Marshall* v. *Callander, etc., Hydropathic Co.*,[6] the vassal in a feu-contract had undertaken to erect buildings of a certain value, to keep them insured, and, in the event of their destruction by fire, to rebuild them. After the buildings had been destroyed by fire the vassal conveyed the subjects to a third party, and notice of the change of ownership was duly given to the superior, in terms of sec. 4 of the Conveyancing (Scotland) Act, 1874. The vassal then maintained that in respect of the implied entry of the party to whom he had conveyed the subjects, he was no longer liable to implement the obligation to rebuild. It was held that as that obligation became prestable while he was still vassal, he remained liable after he had ceased to hold that character.

Disponer and Disponee.—In cases where lands are disponed to be held

[1] *Hyslop* v. *Shaw*, 1863, 1 M. 535.

[2] *King's College of Aberdeen* v. *Hay*, 1852, 14 D. 675; revd. 1854, 1 Macq. 526.

[3] *Police Commissioners of Dundee* v. *Straton*, 1884, 11 R. 586; *Burns* v. *Martin*, 1887, 14 R. (H.L.) 20.

[4] *Marshall* v. *Callander, etc., Hydropathic Co.*, 1895, 22 R. 954; see opinion of Lord Ordinary (Kyllachy), at p. 962; *Aiton* v. *Russell's Exrs.*, 1889, 16 R. 625.

[5] *Rankine* v. *Logie Den Land Co.*, 1902, 4 F. 1074. In *Patterson* v. *Robertson* (1912, 2 S.L.T. 494), the Lord Ordinary (Hunter) held that this liability did not attach to a party who had taken an *ex facie* absolute disposition of the lands, on which he was infeft, but which was really in security. He was not liable in damages, after he had parted with the subjects, for failure to erect buildings while he held them.

[6] 1895, 22 R. 954; affd. of consent, 23 R. (H.L.) 55, explaining that, in the prior case of *Macrae* v. *Mackenzie's Trs.* (1891, 19 R. 138), the question of the liability of the personal representatives of a vassal in damages for his failure to implement obligations which had become prestable during his lifetime was excluded by the form of the action.

of the disponer's superior, and where therefore there is no continuous relation —such as that of superior and vassal—between the disponer and subsequent disponees, the immediate parties to the contract remain liable in all obligations which are of such a character that they can be performed by someone who is not the owner of the lands disponed. Thus where lands are disponed subject to an annual payment, such as a ground-annual, the obligation to pay it remains binding on the disponee and his representatives although he may have parted with the lands, with the corollary, already explained, that the party taking from the disponee incurs no personal liability to the original disponer.[1] And even where the obligation in question is one which can be performed only by the owner of particular lands, or by the consent of that owner, yet the party who undertakes it, if it is not an obligation running with the lands and binding on singular successors, has been held to remain liable although he has parted with the lands. Thus *A.*, in the conveyance of a mill, undertook to uphold and maintain the mill dam. The action was against *A.'s* executors. They averred that *A.* had subsequently parted with the *solum* of the dam, and maintained that the obligation was one binding on *A.* only so long as she remained owner of the *solum* on which it must be performed. It was held that the obligation was not one running with the lands, and consequently that *A.* and her executors remained liable to fulfil it.[2] The rule would apply to cases where an obligation to erect buildings is imposed on a disponee, in terms which do not make the obligation binding on subsequent disponees from him.[3] Even where the obligation is one which, under the rules explained in a prior chapter,[4] does transmit against singular successors of the disponer, the latter is not relieved from liability, at least if the obligation is one which admits of being fulfilled by a single act. So where *A.*, in disponing lands, undertook to form an access through other lands which he retained, it was held that both he and a singular successor to whom these lands so burdened were disponed were personally liable to fulfil this obligation.[5] But in this case the obligation was one immediately prestable, and it does not follow that if a disponer of lands undertook a continuous obligation which could not be fulfilled except by the owner of the lands disponed—such as an obligation to observe building restrictions—his liability would continue after he had ceased to be the owner. Such a contract would probably be construed as binding on him only so long as he remained owner.

Delegation in Leases.—The incidence of the obligations undertaken in a contract of lease may be altered either by an assignation of the lease by the tenant, or by a sale of the subjects let by the landlord.

Obligations of Tenant.—In the former case it is established law that if the obligations undertaken by the tenant are declared to be binding on himself, his heirs, executors, and successors, the liability he incurs ceases when he has assigned the lease, if assignable, or when the assignee has been received by the landlord, in the case of a lease not assignable without the landlord's consent. The assignation imposes the liabilities incident to the lease on the assignee, and, on the principle of delegation, frees the original tenant.[6] On

[1] *Supra*, p. 230.

[2] *Wilson's Trs.* v. *Brown's Exrs.*, 1907, 15 S.L.T. 747.

[3] *Marshall's Tr.* v. *M'Neill & Co.*, 1888, 15 R. 762. A lessee's obligation to rebuild in the event of fire remains binding although the lease may have expired before it was possible to fulfil it. *Matthey* v. *Curling* [1922], 2 A.C. 180.

[4] *Supra*, p. 229.

[5] *Cooper & M'Leod* v. *Edinburgh Improvement Trs.*, 1876, 3 R. 1106.

[6] *Skene* v. *Greenhill*, 1825, 4 S. 25; approved in *Burns* v. *Martin*, *infra*; *Lord Elphinstone* v. *Monkland Iron, etc., Co.*, 1886, 13 R. (H.L.) 98, per Lord Watson, at p. 102.

principles similar to those explained in relation to the obligations undertaken by a vassal to his superior, the tenant remains liable, notwithstanding an assignation, if the obligations in the lease are undertaken jointly and severally ;[1] and is also liable for all obligations which become prestable before he assigned his rights.[2]

Obligations of Landlord.—The question whether a landlord, by transferring the subjects let to a purchaser, is relieved from liability on obligations undertaken in current leases, is one on which the authorities are strangely inconclusive. It is conceived that it is clear on principle, and a fair inference from the cases which decide that the personal representatives of an heir of entail in possession are liable in those obligations to tenants which do not bind succeeding heirs of entail,[3] that a landlord must remain liable on any obligations in the lease which do not transmit against the purchaser.[4] Does he remain liable in obligations which do so transmit ? It is decided that he does in all those terms of the lease, such as the obligation to place the subjects in tenantable repair on entry, which become prestable before he sells the lands.[5] From the terms of the definition of the word "landlord" in the Agricultural Holdings Acts, it seems clear that any liabilities incumbent on a landlord under these Acts are necessarily discharged on his parting with the lands.[6] From a case so ill-reported as to be almost unintelligible[7] it would appear that there are certain obligations from which the original lessor is free on his parting with the lands, and it may be surmised that these obligations include those which cannot be effectively implemented except by the owner of the lands ; for example, the obligation to maintain the tenant in possession, and to keep the subjects in repair, in so far as that may rest upon the landlord.[8] The doubtful case would seem to be where it is a condition that the tenant shall be entitled, at the expiry of the lease, to be repaid sums expended by him on the improvement of the subjects. Such a condition is binding on the landlord's singular successor.[9] Is the original obligant free from liability ? In *M'Gillivray's Exrs.* v. *Masson*[10] an incoming tenant had undertaken to pay the outgoing tenant all sums which might be due to him for meliorations on the buildings, and obtained the obligation of the landlord to take from him the buildings in question at valuation on the expiry of the lease. During the currency of the lease the landlord died. The action was at the instance of his executors, and concluded for declarator that this obligation was not binding on them, but solely upon the landlord's heir. In a question with the tenant it was held that they were

[1] *Burns* v. *Martin*, 1885, 12 R. 1343 ; revd. 1887, 14 R. (H.L.) 20.

[2] *Skene* v. *Greenhill*, *supra*.

[3] *Gardiner* v. *Stewart's Trs.*, 1908, S.C. 985 ; *Riddell's Exrs.* v. *Milligan's Exrs.*, 1909, S.C. 1137.

[4] See *supra*, p. 233.

[5] *Barr* v. *Cochrane*, 1878, 5 R. 877.

[6] Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10), sec. 49 : "'Landlord' means any person for the time being entitled to receive the rents and profits of, and to take possession of, any holding." See *Bradshaw* v. *Bird* [1920], 3 K.B. 144 ; *Dale* v. *Hatfield Chase Corporation* [1922], 2 K.B. 282. In *Waddell* v. *Howat*, 1925, S.C. 484, the term of the purchaser's entry coincided with that of the tenant's outgoing, and it was decided that the purchaser was not liable as landlord.

[7] *Swan* v. *Fairholme*, 1894, 2 S.L.T. 74.

[8] See *Morison* v. *Patullo*, 1787, M. 10425 ; *Cumine* v. *Bayley*, 1856, 19 D. 97 ; *M'Gillivray's Exrs.* v. *Masson*, 1857, 19 D. 1099 (opinion of Lord Deas, at pp. 1105, 1106). In English law a lessor, on parting with the subjects let, is freed from obligations to the lessee which are merely incumbent on him by legal implication, but not from an obligation which he has expressly undertaken, although it may be an obligation running with the lands. Leake, *Contracts*, 7th ed., 932 ; *Stuart* v. *Joy* [1904], 1 K.B. 362.

[9] *Supra*, p. 234.

[10] 1857, 19 D. 1099.

not entitled to the declarator they sought, on the ground that an obligation of this character continued binding on the original obligant and his estate, though the ultimate liability might rest on the party (heir or singular successor) to whom the position of landlord had transmitted. The case was in one respect special, because the obligation in the lease practically amounted to an undertaking to repay to the tenant money which he had advanced on the landlord's behalf: but it does not appear that a different conclusion would have been arrived at had the obligation been one to pay for meliorations to be effected by the tenant himself.[1] Obligations are conceivable in a lease—*e.g.*, an agreement to take over sheep stock at valuation—which may result in a liability exceeding the value of the land, and it can hardly be the law that a landlord who has undertaken such an obligation could free himself from liability by conveying the subjects to a man of straw.

Transmission against Representatives.—In considering whether an obligation binds the estate of an obligant after his death, and therefore is binding on his representatives, there is an obvious distinction between contracts to do some particular thing and obligations to pay money. In the former case the element of *delectus personæ* may enter, and the death of the individual obligant may be regarded as a resolutive condition, with the result that the contractual relations are dissolved on the ground that fulfilment has become impossible.[2] If there is no element of *delectus personæ*, the general rule is that an undertaking by *A.* means an undertaking by *A.*, his heirs and successors. So when the question related to the terms of a disposition to give effect to missives of sale under which the purchaser submitted to a building restriction, it was pointed out that the restriction should be expressed as binding on the purchaser, his heirs and successors.[3]

If the obligation is to pay money, the general rule is that it may be recovered from the obligant's estate, although it was not exigible until after his death. "If a man binds himself he must make it very clear that he does not bind his representatives, for if he fails to make that clear the usual result will follow—that a man's representatives are bound by his obligations."[4] The general rule that a man's whole estate is liable for his debts after his death is too clear to be illustrated by any express decision. The only possible defence in the case of obligations not exigible at the date of the death is that they were intended to bind only the obligant himself, or only his successor in a particular capacity. This is not to be lightly inferred. Thus, where an heir of entail in possession, in granting a lease, undertook that "he or their incoming tenant" would take over the sheep stock at valuation at the end of the lease, and the succeeding heir of entail successfully maintained that the obligation was not binding upon him, it was held that the whole estate of the original lessor was liable in fulfilment.[5] But a limitation of liability may result from the construction of the particular

[1] *M'Gillivray's Exrs.* v. *Masson*, 1857, 19 D. 1099. Lord Currichill dissented, and held that it was established law that such obligations were binding only on a lessor while he continued owner of the lands. But the authorities he cites seem to decide no more than that the singular successor is liable, and, in a question with the original lessor, is liable to relieve him. They do not decide that the original lessor is not liable in a question with the tenant.

[2] *Supra*, p. 222.

[3] *Corbett* v. *Robertson*, 1872, 10 M. 329.

[4] Per Lord President Dunedin in *Gardiner* v. *Stewart's Trs.*, 1908, S.C. 985, at p. 989. See *In re Worthington* [1914], 2 K.B. 299 (executors liable on contract to underwrite shares).

[5] *Gardiner* v. *Stewart's Trs.*, 1908, S.C. 985; *Riddell's Exrs.* v. *Milligan's Exrs.*, 1909, S.C. 1137.

terms in which an obligation is undertaken; and so, when an obligation of warrandice in a lease was undertaken by the lessor (an heir of entail in possession) and his foresaids, and it was clear from the deed that the word "foresaids" meant his successors in the entailed estate, it was held that, although the tenant was evicted at the lessor's death, on the ground that the lease was not binding on succeeding heirs of entail, the lessor's representatives were not liable under the obligation of warrandice.[1] In *Beardmore & Co.* v. *Barry, A.*, in a letter addressed to the directors of a company, undertook "at any time upon request by you" to subscribe for or find subscribers for certain shares. It was decided that the obligation was transmissible and binding upon *A.'s* executrix.[2]

Obligations not Transmissible.—Again, it is the established construction of the obligatory clauses in certain contracts, if undertaken in the usual terms, that they bind the obligant only. Thus the obligations in a feu-charter, if undertaken by the vassal, his heirs, executors, and successors, bind him only during his lifetime. At his death his heir is not bound to take up the feu; and if he does not, the vassal's estate, though liable for all obligations prestable during his lifetime, is not liable for obligations which are only exigible after his death, such as feu-duties payable in the future.[3] The construction of similar words of obligation occurring in a lease is somewhat doubtful. In *Bethune* v. *Morgan*[4] it was held in the Outer House that when a lessee bound himself, his heirs, executors, and representatives whomsoever, his whole estate was liable for rents which fell due after his death. In the Inner House the point was not decided, and the decision of the Lord Ordinary seems inconsistent with the dicta of eminent judges in other cases.[5] It is decided that if the obligation is conjunct and several, all the representatives of the tenant are liable.[6]

Contracts Running with Moveables.—There remains for consideration the question how far third parties, by acquiring a right to a particular thing, may involve themselves in liability under contracts entered into by others in relation to that thing. The cases of contracts running with lands, and therefore binding on a singular successor of the original contracting party, have been already considered.[7] Another case where the acquisition of property involves liability is that of the indorsee of a bill of lading.[8] Apart

[1] *Duke of Bedford* v. *Earl of Galloway's Tr.*, 1904, 6 F. 971; *Lord Abinger's Trs.* v. *Cameron*, 1909, S.C. 1245.

[2] 1928, S.C. 101; affd. 1928, S.C. (H.L.) 47. Lord Shaw dissented, holding the obligation to be personal to the obligant, mainly in respect to the provision for a request.

[3] *Aiton* v. *Russell's Exrs.*, 1889, 16 R. 625; *Macrae* v. *MacKenzie's Tr.*, 1891, 19 R. 138. *Aliter* if the obligation is laid on heirs, executors, and successors conjunctly and severally (*Police Commissioners of Dundee* v. *Straton*, 1884, 11 R. 586).

[4] 1874, 2 R. 186.

[5] Lord President (M'Neill), *M'Gillivray's Exrs.* v. *Masson*, 1857, 19 D. 1099, at p. 1101: "The executors of a tenant are not liable in a question with the landlord"; *Burns* v. *Martin*, 1887, 14 R. (H.L.) 20, per Lord Watson, at p. 24: "I think it was rightly argued for the respondent that, according to the law of Scotland, it must be presumed that an obligation to pay rent is only meant to attach to those persons who are for the time being in right of the lease as tenants." This is the English law. *White* v. *Tyndall*, 1888, 13 App. Cas. 263.

[6] *Burns* v. *Martin*, 1885, 12 R. 1343; revd. 1887, 14 R. (H.L.) 20.

[7] *Supra*, p. 226.

[8] Bills of Lading Act, 1855 (18 & 19 Vict. c. 111, sec. 1): "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property of the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and shall be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." The liability of the indorsee ceases when he re-indorses the bill of lading to a third party (*Smurthwaite* v. *Wilkins*, 1862, 11 C.B. (N.S.) 842; see *Callendar* v. *Cavan*,

from these special cases, and whether the property be heritable or moveable, the general rule is that a purchaser undertakes no positive liability under contracts entered into by the seller in relation to the subject which is sold. No case suggests that a sub-purchaser may be liable to the original seller for the price of the article. It is clear law that he is not affected by a *pactum de retrovendendo*, or other resolutive condition of the seller's right.[1] Where holders of debentures charged on public funds employed an agent to secure their recognition by Parliament, and agreed to pay him a commission, his claim for payment was against his employers, he had no claim against transferees of the debentures.[2] The purchaser of shares in a ship, merely as such, incurs no direct liability for expenses previously incurred in fitting her for a voyage; although, if freight be earned, such expenses form a deduction in accounting with the various owners of shares.[3]

Partnership.—A question somewhat analogous is raised in the law of partnership where a new partner is introduced into an existing firm. Has he, by acquiring a right to the assets of the firm, involved himself in liability for its debts, or for contracts with regard to the subjects which constitute the assets? The mere fact of admission to a new firm does not make the party admitted liable to the creditors of the firm for anything done before he became a partner,[4] and if the firm, as constituted with the new partner, takes over the assets of the old firm, that does not necessarily make it, and with it the new partner, liable for the debts of the old business.[5] Yet taking over the assets of the old firm is a fact from which the Court may draw the inference that the new firm has agreed to be liable to the creditors of the old, and this inference will be almost irresistible if the new partner was admitted without contributing any capital, on the ground, as put by Lord Shand, that "if a person grants a universal disposition in favour of another party, in so far as this is gratuitous and not for value, it can only be under the burden of the obligations for which that party is liable."[6]

Price-Maintenance Agreements.—It is somewhat doubtful how far it is legally possible to impose restrictions on the use or disposal of moveables so as to bind subsequent owners who were not parties to the contract by which these restrictions were imposed. It may be taken as clear that a restriction, *e.g.*, not to retail under a certain price, cannot be made to run with the thing, so as to be binding on parties who have taken without any notice of it. The buyer is entitled, *primâ facie*, to deal with the thing he buys as he pleases. "To begin with, the general principle, that is to say, the principle applicable

1853, 16 D. 146). On an indorsement merely in security, it was held in England that the indorsee incurred no liability for freight unless he took possession of the goods (*Sewell* v. *Burdick*, 1884, 10 App. Cas. 74). As the principle was that the phrase "property in the goods" was used in the Act in the ordinary and not in any technical sense, the decision is probably applicable to Scotland, in spite of the fact that in Scotland the indorsement and delivery of a bill of lading, although the intention was to create a security, vests in the indorsee the property in the goods, subject to an obligation to reconvey them on payment of the debt. See *Hayman* v. *M'Lintock*, 1907, S.C. 936.

[1] Stair, i 14, 5; Ersk. iii. 3, 12; Bell, *Prin.*, sec. 110.

[2] *Campbell* v. *Creditors on the Equivalent*, 1725, M. 9276.

[3] *Carswell* v. *Finlay*, 1887, 14 R. 903.

[4] Partnership Act, 1890 (50 & 54 Vict. c. 39), sec. 17.

[5] *Stephen's Tr.* v. *Macdougall & Co.'s Tr.*, 1889, 16 R. 779; *Heddle's Exrx.* v. *Marwick & Hourston's Tr.*, 1888, 15 R. 698, per Lord Adam, at p. 706.

[6] *Heddle's Exrx.*, *supra*, at p. 710. See also *Hoskins* v. *Christie*, 1845, 8 D. 167; *Miller* v. *Thorburn*, 1861, 23 D. 359; *M'Keand* v. *Laird*, 1861, 23 D. 846. All the cases are very special, and in *Nelmes* v. *Montgomery* (1883, 10 R. 974) the Lord Justice-Clerk and Lord Young held that merely taking over the assets was no ground for inferring any agreement to pay the debts.

to ordinary goods bought and sold, is not here in question. The owner may use and dispose of these as he thinks fit. He may have made a certain contract with the person from whom he bought, and to such contract he must answer. Simply, however, in his capacity as owner, he is not bound by any restrictions in regard to the use or sale of the goods, and it is out of the question to suggest that restrictive conditions run with the goods." [1]

Effect of Notice.—But though restrictive conditions do not run with goods, as contracts may run with lands, still it does not follow that a person who takes with notice of the restriction may not be bound to observe it. But in England it would seem to be decided that where the restrictions relate to the price on re-sale, and the goods are not protected by a patent, notice has no effect. Thus where goods were sold on the condition that they were not to be retailed under a certain price, it was held that this condition was binding only on the parties who had agreed to it, not upon subsequent takers from them, and that it was immaterial that they had notice of the attempted restriction.[2]

These cases were approved, as statements of the general law, by the Judicial Committee in *National Phonograph Co.* v. *Menck*, but held not to apply to the case where the articles to which the restrictions relate were protected by a patent. Then, as no one is entitled to use or sell the article without the consent of the patentee, a transferee must take it subject to the conditions the patentee imposes, provided he be aware, at the time of taking the article, that the restrictions existed.[3]

A rule which is difficult to reconcile with the price-maintenance cases has been adopted where *A.*, after entering into a contract (hire or lease) which gives *B.* the use of a thing, sells it to *C.* Then *C.*, if he had notice of the facts, may be compelled to refrain from any acts which would interfere with *B.'s* rights under his contract with *A.* Thus where a ship which was under charter for several years was sold, it was held that the purchaser, who had notice of the charter, might be restrained, by injunction, from any use of the ship which would interfere with the charterer's rights.[4] And if *A.* has an option to buy a particular thing, it would seem that he can exercise it in a question with a party to whom the thing is sold during the currency of the option, if that party bought with notice.[5]

Scots Authorities.—The authorities in Scotland, though by no means conclusive, lend some countenance to the view that if *A.* owns moveable property under an obligation to *B.* not to use it in a particular way, purchasers from *A.*, if at the time of purchase they have notice of this restriction, are bound to observe it, and may be interdicted by *B.* if they disregard it. In *M'Cosh* v. *Crow & Co.*,[6] Adamson Brothers, who had taken

[1] Per Lord Shaw, *National Phonograph Co.* v. *Menck* [1911], A.C. 336, at p. 347.

[2] *M'Gruther* v. *Pitcher* [1904], 2 Ch. 306; *Taddy* v. *Sterious & Co.* [1904], 1 Ch. 354. In these cases the sub-purchaser, though he had notice of the restrictions, had not undertaken to observe them. In *Dunlop Pneumatic Tyre Co.* v. *Selfridge* [1915], A.C. 847, *A.*, the manufacturer, sold tyres to *B.*, a dealer, under a price-maintenance agreement, taking *B.* bound to obtain a similar agreement from any one to whom he might sell. This obligation *B.*, in selling to *C.*, duly implemented. *C.* therefore became bound to observe the agreement. It was held that *A.* could not enforce it against *C.*, whether *B.* was to be regarded as *A.'s* agent or as an independent party, because no consideration had been given by *A.* for *C.'s* undertaking to observe the agreement. This ground of judgment would not apply in Scotland, where, it is conceived, *A.* would have a title to sue.

[3] *National Phonograph Co.* v. *Menck* [1911], A.C. 336.

[4] *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* [1926], A.C. 108 (J.C.). See *supra*, p. 139.

[5] *Macdonald* v. *Eyles* [1921], 1 Ch. 631.

[6] 1903, 5 F. 670.

a photograph of daughters of M'Cosh, sold their photographic business, and, after certain transmissions, it was acquired by Crow & Co. The negative of the photograph passed with the business, and Crow & Co. exhibited copies in their showroom. Against this M'Cosh brought an interdict. It was held that it was an implied condition of the contract between a photographer and his sitter that he should not exhibit copies without the sitter's consent, and (Lord Young dissenting) that Crow & Co. must be held to have known of this condition, and were bound to observe it. In *Morton & Co.* v. *Muir Brothers* [1] it was proved that by the custom of trade in lace manufacturing, where one manufacturer gave an order to another for the production of curtains of a particular pattern, the latter prepared the necessary pattern cards at his own expense, but held them under an implied obligation not to use them for curtains of his own manufacture. A manufacturer failed with pattern cards in his possession prepared under these circumstances to fulfil an order given by Morton & Co. His stock of pattern cards was sold by auction by the trustee in his bankruptcy, and bought by Muir Brothers. It was a condition of the sale that the purchaser took the cards subject to any agreement in connection with them. Muir Brothers used the cards to produce curtains in their own business, and Morton & Co. brought an action to restrain them. It was proved that the defenders when they purchased the cards were aware of the condition under which the bankrupt held them. It was held that the pursuers were entitled to interdict. Two of the judges proceeded on the ground that, in the special circumstances of the case, Muir Brothers had adopted the contract between Morton & Co. and the bankrupt, and were therefore bound by its conditions. The remaining judge (Lord M'Laren) proceeded on the more general ground that a party taking the pattern cards with notice of the restriction as to their use under which his author held them, was bound by that restriction. On the other hand, in *Melrose* v. *Aitken, Melrose & Co.*, it was decided that where a company owned a trademark, subject to an obligation limiting the use of a particular word, the restriction could not be enforced against a new company to whom the business and the trademark were transferred, and that notice was immaterial.[2]

Royalties on Patent or Copyright.—The English Courts have decided that where a patent or copyright is sold, with a provision for payment of royalties to the patentee or author, the contract does not amount to a right in security over the patent or copyright, and, as a personal contract, is not binding on a sub-purchaser, although he may have had notice of it.[3] A trustee in bankruptcy cannot sell a copyright which has passed to him as part of the property of the bankrupt except on terms which will secure to the author the royalties which would have been payable by the bankrupt.[4]

[1] 1907, S.C. 1211. Apparently *M'Gruther* v. *Pitcher* [1904], 2 Ch. 306 was not cited.

[2] 1918, 1 S.L.T. 109 (O.H., Lord Cullen).

[3] *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* [1902], 1 Ch. 146 (patent); *Barber* v. *Stickney* [1919], 1 K.B. 121 (copyright).

[4] Bankruptcy (Scotland) Act, 1913, sec. 102.

CHAPTER XVI

CONSTRUCTION OF EXPRESS CONDITIONS

Meaning of Condition.—The word condition is used in two distinct senses. It may mean (1) a qualification of a particular obligation, as where a debt instantly payable is contrasted with one which will become payable on the occurrence of a certain event. It may mean (2) an independent obligation, term, or stipulation in a contract. Thus Erskine points out that an obligation on a tenant to enclose part of the subjects let may be called a condition of the contract of lease, but is so called most improperly, in respect that instead of suspending any obligation of the tenant it is in itself an obligation which may be enforced against him.[1] Both Stair and Erskine protest against the use of the word condition to denote, in Stair's language, "the mutual obligations of the creditor, which he is positively obliged to perform."[2] The word should not, these authors hold, be used for an independent stipulation or term of the contract; it should be used only in reference to some qualification or limit of an obligation. It cannot be said that their protest has been entirely successful, and a certain ambiguity is still apt to lurk in the word condition. In the ensuing pages, relating to the construction of express conditions, an attempt will be made to limit the use of the word to the narrower sense favoured by Stair and Erskine.

Pure Obligation.—A contractual obligation is termed pure when it can be enforced at once, and is not subject to any condition; future, or to a day, when it will become pure at a fixed date, or on the occurrence of an event which is certain to happen; conditional or contingent, when its enforceability is dependent on an event which may or may not happen.[3] In the absence of any provision to the contrary an obligation is deemed to be pure, and enforceable at once.[4]

The ordinary example of a pure obligation is a debt instantly and unconditionally payable. As a general rule of construction a debt is not held to be conditional merely because it is expressed as payable out of a particular fund. Such a provision indicates the fund out of which payment is expected; it does not make the emergence of the fund a condition of liability;[5] nor does it amount to an assignation of the fund so as to give the creditor any preferential right.[6]

Obligation Pure though Disputed.—A debt may be pure though liability

[1] Ersk. iii. 1, 7.

[2] Stair, i. 3, 8; Erskine *ut supra*. In another passage Stair suggests the word "adjection" (i. 14, 4). See also opinion of Lord Johnston in *Sellar* v. *Highland Rly.*, 1918, S.C. 838, 853.

[3] Stair, i. 3, 7; Ersk. iii. 1, 6; Bell, *Prin.*, sec. 55; Bell, *Com.*, i. 332.

[4] *Dig.*, l. 17, 14. *In omnibus obligationibus, in quibus dies non ponitur, præsenti die debetur.*

[5] *Pilbrow* v. *Pilbrow's Atmospheric Rly.*, 1848, 5 C.B. 440 (to pay "out of the money raised by the first calls on the shares"); *Scott* v. *Ebury*, 1867, L.R. 2 C.P. 255 (a loan "to be repaid out of the calls on shares").

[6] *Graham & Co.* v. *Raeburn & Verel*, 1895, 23 R. 84.

is disputed. If it is ultimately decided that the defence is ill-founded, the debt has all the characteristics and incidents of a pure obligation. Thus while diligence on a future or contingent debt is not generally competent, diligence on the dependence of an action for the recovery of a debt alleged to be presently due is one of the ordinary rights of a creditor,[1] and may confer a preference over the subjects attached although the debtor may have become bankrupt before decree in the action is obtained.[2] In bankruptcy, a debt which is the subject of an action in which the pursuer ultimately obtains decree is entitled to a ranking as of the date when it was incurred by the bankrupt, not as of the date of the decree. And any expenses found due to the pursuer follow the same rule. Thus where the defender in an action became bankrupt, and was allowed to continue his defence, it was held that the pursuer, ultimately successful, was entitled to be ranked both for the sum found due and for expenses, as debts owed by the bankrupt before his bankruptcy, though not then admitted or proved to be due.[3]

Future Obligations.—A debt is termed future, as opposed to contingent, when, though not presently exigible, it is dependent on no other condition than the arrival of the day of payment. Under this head are included debts which will become exigible on the occurrence of an event which is certain to happen (*e.g.*, the death of a particular person) though the date of the occurrence cannot be predicted.[4]

The creditor in a future debt is not generally entitled to take any active steps against the debtor until the date of payment has arrived. Until then an action concluding for instant payment will be dismissed as incompetent, though it is probably competent if the operative conclusions are qualified by such words as "the date of payment being first come and bygone."[5] On the theory that if a party to a contract desires a security he ought to stipulate for it arrestments or inhibition in security of a future debt arising from contract will not be granted unless it is averred that the debtor is *in meditatione fugæ* or *vergens ad inopiam*.[6] A seller who has allowed a period of credit may withhold delivery if the buyer be insolvent;[7] it would appear that he has no right to demand security, and is not justified in a resale, with or without judicial authority, if his demand for security is refused.[8]

It is laid down in the *Digest* that the creditor in a future debt is bound to accept payment if tendered in advance, on the ground that the postponement of payment is in the interests of the debtor only.[9] This rule is not supported by any modern authority, and cannot be applicable to obligations in general. A man who contracts for some service to be performed in future

[1] Bell, *Prin.*, sec. 2275; Graham Stewart, *Diligence*, 9, 187.

[2] *Mitchell* v. *Scott*, 1881, 8 R. 875, correcting Ersk. iii. 6, 18.

[3] *Miller* v. *M'Intosh*, 1884, 11 R. 729. The same rule holds in England (*In re British Goldfields of West Africa* [1899], 2 Ch. 7.

[4] Stair, i. 3, 7.

[5] *Crear* v. *Morrison*, 1882, 9 R. 890; explaining *Macbride* v. *Williams*, 1881, 18 S.L.R. 609.

[6] Bell, *Com.*, ii. 60, 136; Graham Stewart, *Diligence*, 15, 529; *Dove* v. *Henderson*, 1865, 3 M. 339; *Symington* v. *Symington*, 1875, 3 R. 205; *Crear* v. *Morrison*, 1882, 9 R. 890. Diligence in respect of a claim for damages for a wrong may be used, without averments that the debtor is *vergens ad inopiam*, if the claim is merely future, and not contingent; in the case, —*e.g.*, where the damages are payable by instalments (*Smith* v. *Cameron*, 1879, 6 R. 1107). As to the meaning of *vergens ad inopiam*, see *Harper* v. *Faulds*, 1791, Bell's *Octavo Cases*, 440, at p. 473; *Bennett* v. *Fraser*, 1834, 12 S. 760; *Campbell* v. *Cullen*, 1848, 10 D. 1496.

[7] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, sec. 41).

[8] *Linton* v. *Sutherland*, 1889, 17 R. 213.

[9] *Dig.*, xlvi. 3, 70, questioned in Bell's *Prin.*, sec. 46. As to the effect of an express provision that the debtor, though bound to pay on demand, shall not be entitled to insist on paying until a certain period has expired, see *Ashburton* v. *Escombe*, 1892, 20 R. 187.

presumably does so because he wants that service at the appointed date, and not earlier.

Contingent Obligations. -An obligation is contingent or conditional if its enforceability is dependent on an event which may or may not happen, or if, though exigible at once, it will cease to be exigible on the occurrence of some uncertain event. The question whether a debt is contingent has been considered in reference to a provision in the Bankruptcy Acts, whereby the debts of a petitioning or concurring creditor "may be liquid or illiquid, provided they are not contingent." [1] In the construction of this provision, the right of a creditor against a cautioner, or against a party secondarily liable on a bill, is contingent.[2] Arrears of rent, which were the subject of an application to the Crofters' Commission, were held to be a contingent debt, in respect that it depended on the findings of the Commission whether and how far they were due.[3] And a decree for expenses in an action which was the subject of appeal to the House of Lords, though the creditor had obtained an order for interim execution, was held not to warrant an application for the sequestration of the debtor, because, if the judgment were reversed, repayment could be demanded, and the debt was therefore contingent.[4] On the other hand, in *Fleming* v. *Yeaman, A.*, who was engaged in a joint adventure with *B.*, gave him an I.O.U., and *B.*, by a relative letter, undertook to regard it merely as a voucher on which he was not to sue or do diligence until accounts were settled between them. On *A.* becoming notour bankrupt *B.* petitioned for his sequestration, founding on the I.O.U., and giving credit for payments he had received. Sequestration was awarded, and a petition for its recall was presented on the ground that *B.'s* debt was contingent, in respect that the subsequent course of the joint adventure might wipe out the debt. It was held that this objection was ill-founded. *B.*, at the date of the petition, was a creditor, though for a future debt, and the mere possibility that a future debt might never become exigible did not render it contingent.[5] And the rent due under a lease for a term which has not yet arrived is a future debt, and not contingent, and may form the ground for a petition for sequestration.[6]

Suspensive and Resolutive Conditions.—When an obligation is contingent, and the contingency is such that nothing is due unless some uncertain event occurs, the obligation is said to be subject to a suspensive condition: where it is such that a continuing contract will cease to be obligatory on the occurrence of some uncertain event, the condition is said to be resolutive. In either case, looking at the matter from the point of view of the debtor, the obligation exists from the time when it was undertaken: from the point of view of the creditor, if the condition is suspensive, no debt comes into existence unless the condition is purified; if the condition is resolutive, the debt exists from the time when it was undertaken, but is extinguished on the occurrence of the event on which the contingency depends. Of resolutive conditions examples may be found in the excepted risks in a charter party, or in the condition, sometimes expressed but more often implied, that

[1] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), sec. 12, re-enacting sec. 14 of the Bankruptcy Act, 1856.

[2] *Morrison* v. *Turnbull*, 1832, 10 S. 259; *Gordon* v. *M'Cubbin*, 1851, 13 D. 1154.

[3] *Stuart & Stuart* v. *Macleod*, 1891, 19 R. 223.

[4] *Forbes* v. *Whyte*, 1890, 18 R. 182.

[5] *Fleming* v. *Yeaman*, 1884, 21 S.L.R. 722 (H.L.), 9 App. Cas. 966.

[6] *Strathdee* v. *Paterson*, 1913, 1 S.L.T. 498; *Palace Billiard Rooms* v. *City Trust Corporation*, 1912, S.C. 5; a decision on the meaning of "contingent or not ascertained" in sec. 49 (3) of the Companies (Consolidation) Act, 1908.

performance will cease to be due if a change of circumstances renders it impossible. Where on a floating policy on goods it was provided that a declaration of the ship selected should be made as soon as possible after the ship sailed, and the declaration was not made, it was held that the insurer had incurred liability subject to a resolutive condition: he was liable for any loss occurring before the time when the declaration should have been made: his liability was determined by the failure to declare.[1] When a cheque is sent to a creditor the debt is extinguished subject to a resolutive condition; it has ceased to exist as a debt, but will revive if the cheque is dishonoured.[2] In a very narrow case a company, in letters of allotment of shares, appended a note that if the Board decided not to purchase a particular mine the money paid on application would be returned. It was decided not to purchase the mine and the application money was returned. In the subsequent liquidation of the company the allottees were placed on the list of contributories. They maintained, successfully, that the note to the allotment letters constituted a suspensive condition of the agreement to take shares, and not a condition merely resolutive, and, consequently, that they had never become shareholders.[3]

Condition Precedent.—The phrase "condition precedent" is not used by the earlier writers on Scots law, and has been borrowed from English legal phraseology. If used with reference to time, and with regard to a particular obligation, it is synonymous with suspensive condition. To say that the occurrence of a particular event is a condition precedent to the enforceability of an obligation is to say that the obligation in question is subject to a suspensive condition. But in many cases where the term "condition precedent" is used, the word condition is to be understood in its wider sense as denoting one of the various obligations to which each party may be subject under the contract. The reference is then not to time but to materiality. A condition—or, more correctly, a term in a contract—is a condition precedent if it is of such materiality that its non-fulfilment amounts to a discharge of the contract, and liberates the other party from his obligations. It is not necessarily so merely because, in reference to time, it may be the initial step in the performance of the contract. In *Wade* v. *Waldon*[4] the engagement of Wade, a comedian, to perform in a theatre in the ensuing year, contained a clause whereby he undertook to give fourteen days' notice before the date at which he was engaged to appear. This notice he failed to give, and in consequence the manager of the theatre cancelled his engagement, and refused to allow him to perform. It was held that the manager was liable in damages. The term or condition of his contract which Wade had failed to implement was one which was precedent in time to the obligations of the manager, but, in respect that it was of minor importance, it was not precedent in materiality and did not form a condition precedent.

Condition Subsequent.—The phrase "condition subsequent" has not yet been naturalised in Scotland. It may mean a resolutive condition. Thus, referring to a sale conditional on the purchaser obtaining a permit, Viscount Haldane speaks of an "actual contract, subject to a resolutive condition, or condition subsequent."[5] The phrase, however, would seem to be used

[1] *Union Insurance Co. of Canton* v. *Wills* [1916], 1 A.C. 281.
[2] *Leggat Brothers* v. *Gray*, 1908, S.C. 67.
[3] *Consolidated Copper Co. of Canada* v. *Peddie*, 1877, 5 R. 393 (Lord Ormidale dissenting). See also *Nelson* v. *Fraser*, 1906, 14 S.L.T. 513 (O.H., Lord Dundas).
[4] 1909, S.C. 571.
[5] *Eisen* v. *M'Cabe Ltd.*, 1920, S.C. (H.L.) 146. And see Pollock, *Contract*, 9th ed., p. 299.

in England in reference to materiality. Thus it has been defined as "a provision that the fulfilment of a condition or the occurrence of an event shall discharge 'both parties' from further liabilities under the contract." [1]

Materiality in Express Conditions. It may often be a narrow question of construction whether a particular provision in a contract is to be read as a condition or qualification of one of the obligations undertaken, or as a separate and independent term. This must depend on the intention of the parties, as interpreted by the Court, and cannot be stated under any definite rules.[2] Assuming that the answer is that the obligation is to be read as expressly conditional, it is generally irrelevant to consider whether the condition is material. "It is competent to the contracting parties, if both agree to it, and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and, if they do so, the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material: the parties would not have made it a part of their contract if they had not thought it material,[3] and they have the right to determine for themselves what they shall deem material." [4] So where a policy of insurance has been preceded by a proposal form, and it is definitely provided that the validity of the policy is to depend on the truthfulness of the answers to the queries therein, the argument that the query alleged to be untruthfully answered related to a matter in no way material to the risk is clearly excluded by the decisions.[5] In *Dawsons Ltd.* v. *Bonnin* a fire policy was preceded by a proposal form. It was not stated that the validity of the policy was to depend on the truthfulness of the answers to the queries, though there was a provision that material misstatements or any concealment of any circumstance material to the premium should avoid the policy. It was also provided that the proposal form "shall be the basis of this contract and be held as incorporated herein." To a claim under the policy the defence was a misstatement in the proposal on a point (in the opinion of the House of Lords) not material to the risk or to the premium charged. It was held by a majority, though with much doubt, that the provision that the proposal form should be the basis of the policy was equivalent to making the truthfulness of the answers to the queries a condition of the validity of the policy, and, on that footing, that it did not matter whether the particular point was material to the risk or not.[6] In *Yorkshire Insurance Co.* v. *Campbell* [7] a horse was insured during sea transit. A proposal form, declared to be the basis of the policy and incorporated therein, stated, incorrectly, its pedigree. It was held that the mistake vitiated the

[1] Anson, *Contract*, 16th ed., 339.

[2] See, as illustrative cases, *Moir* v. *Duff*, 1900, 2 F. 1265; *Ingram-Johnston* v. *Century Insurance Co.*, 1909, S.C. 1032 (narrated *supra*, p. 41); *London Guarantee Co.* v. *Fearnley*, 1880, 5 App. Cas. 911.

[3] This must be read subject to the qualification that it may rest with one party to bring to the notice of the other the fact that his obligation is conditional. See cases as to conditions on tickets, *supra*, p. 30, and opinions of Viscount Finlay and Lord Wrenbury in *Dawsons Ltd.* v. *Bonnin*, 1922, S.C. (H.L.) 156.

[4] Per Lord Blackburn in *Standard Life Assurance Co.* v. *Weems*, 1884, 11 R. (H.L.) 48, at p. 51.

[5] *Newcastle Fire Assurance Co.* v. *M'Morran*, 1815, 3 Dow 255; *Standard Life Assurance Co.* v. *Weems*, 1884, 11 R. 658; revd. 1884, 11 R. (H.L.) 48; (9 App. Cas. 671, as *Thomson* v. *Weems*).

[6] *Dawsons Ltd.* v. *Bonnin*, 1921, S.C. 511; affd. 1922, S.C. (H.L.) 156. The minority held that the language of the policy was ambiguous, and that it rested with the company to make their meaning plain.

[7] *Yorkshire Insurance Co.* v. *Campbell* [1917], A.C. 218 (J.C.).

insurance. There was no proof that the pedigree of the horse in any way affected the risk or the premium charged, but the Court declined to assume that it could not be material. From the opinion of Lord Sumner it would appear that a misstatement on a point patently immaterial, *e.g.*, that the horse had been ridden by a lady, would have left the policy in force.

All Conditions Conditions Precedent. When a list of conditions under which some liability is undertaken is given, with a statement prefixed or appended that all the conditions are to be read as conditions precedent, this will not confer on a term of the contract, though included in the list, the character and incidents of a condition precedent, if from its nature it cannot come into active operation until after the liability has accrued. So where in an insurance policy for the fidelity of an official, one of the terms, all declared to be conditions precedent, was that the insured, in the event of default, should give all the information required by the company in order to obtain reimbursement from the defaulter, it was pointed out that such a provision could not be a condition precedent to the liability of the company, because they could have no claim to reimbursement until they had paid. Failure to give the information required would doubtless render the insured liable in damages, but it would not annul his right to payment under the policy.[1] And from one case it would appear that the general provision that all conditions are to be conditions precedent leaves it open to the Court to consider, with regard to each of the conditions specified, whether in the circumstances it is really material. A policy covering liability under the Workmen's Compensation Act contained eight conditions. All were declared to be conditions precedent. Some of them were clearly not of that character. The particular condition, on the non-observance of which the company disputed liability, was that the insured should keep a wages book. It was held that in spite of the general statement that all the conditions were to be conditions precedent, it was open to the Court to consider whether each condition was sufficiently material to be suspensive of liability, and to decide that, considering the nature of the insured's business, the condition regarding the wages book could not have been so intended.[2]

Conditions Known to be Impossible.—If an obligation is undertaken under a condition which, to the knowledge of both parties, can never be purified, this, in certain English forms of bonds which have never been in use in Scotland, may be an artificial and cumbrous way of stating that an obligation is not incurred.[3] Apart from these cases it will generally be assumed, in cases where a statement known by both parties to be untrue is apparently warranted, that the condition has been inserted *per incuriam*, or as a mere matter of form, and that the obligation is really unconditional.[4] And when the ordinary meaning of the words used would import a condition which could

[1] *London Guarantee Co.* v. *Fearnley*, 1880, 5 App. Cas. 911.

[2] *Bradley* v. *Essex, etc., Indemnity Society* [1912], 1 K.B. 415. The decision, from which Fletcher-Moulton, L.J., dissented, laid great stress on the principle that it lay on the company to make the meaning of their policy clear.

[3] Pollock, *Contracts*, 9th ed., p. 334. As to contracts to perform a physical impossibility, see *infra*, Chap. XIX.

[4] In *Dimech* v. *Corbett*, 1858, 12 Moore P.C. 199, a charter party stated that the ship was "now at anchor at this port." This was not a condition precedent, on the ground, as is explained in *Behn* v. *Burness*, 1863, 3 B. & S. 751, that both parties were aware that the statement was untrue. As to the effect of printed conditions in policies of marine insurance, inapplicable to the particular risk, but not deleted, see conflicting opinions in *Marten* v. *Vestey* [1920], A.C. 307.

never be purified, the knowledge of both parties that this was the case may lead to the construction of the words in an exceptional sense.[1] A number of cases have raised the question whether statements by the insured in a proposal form, and warranted by him, can be founded on by the insurance company if it is proved that the insurance agent was aware that the statements were untrue. It is conceived that it is now established that the knowledge of the insurance agent is not to be imputed to the company. Even if the insured allowed the agent to fill in the required answers, and he, in doing so, relied on his own imagination, or misapprehended the information supplied, he is, for the time being, acting as the agent of the insured and not of the company, and the responsibility of the insured for the truth of the statements which he has allowed to be made is not affected.[2] But knowledge by the officials of the company of a fact which should have been stated in the proposal form will bar any objection founded on its omission.[3]

Grounds for Excusing Fulfilment of Condition.—The further consideration of the construction of express conditions may be attempted by asking what answers may be open to a party who proposes to enforce an obligation, and is met by the defence that the liability undertaken was conditional, and that the condition has never been purified. Reserving for another chapter the effect of supervening impossibility or illegality, one of the following pleas may be open: (1) That the fulfilment or accomplishment of the condition has been impeded by the party founding on its non-fulfilment. (2) That the words or conduct of that party amount to a waiver of the condition. (3) That, in the particular circumstances, the performance of equivalent acts amounts to fulfilment. The first two cases, on an ultimate analysis, raise questions of personal bar or estoppel; the third, a question of the proper construction of the terms of the particular obligation.

(1) *Fulfilment Impeded by One of the Parties*

Potestative, Casual, Mixed Conditions.—It may be premised that a condition is termed potestative if its accomplishment depends upon the voluntary act of one of the parties; casual, when it depends on chance, or the act of a third party; mixed, when it is partly potestative and partly casual.

Obligation not to Impede Fulfilment.—A condition may be so purely casual that neither of the parties can affect the result, and it is then obvious that no question as to impeding its accomplishment can arise. Even if, on a

[1] *Milne* v. *Kidd*, 1869, 8 M. 250. Construction of the term "allotment" of shares.

[2] *Reid* v. *Employers Accident Insurance Co.*, 1899, 1 F. 1031; *Life and Health Association* v. *Yule*, 1904, 6 F. 437; *M'Millan* v. *Accident Insurance Co.*, 1907, S.C. 484; *Dawsons Ltd.* v. *Bonnin*, 1921, S.C. 511; affd. 1922, S.C. (H.L.) 156, where this point, if taken, is not reported; *Biggar* v. *Rock Life Assurance Co.* [1902], 1 K.B. 516; *Levy* v. *Scottish Employers Co.*, 1901, 17 T.L.R. 229. The difficult cases are *Cruikshank* v. *Northern Accident Co.*, 1895, 23 R. 147, and *Bawden* v. *London, Edinburgh, etc., Co.* [1892], 2 Q.B. 534. In *Cruikshank* the insured's answer to a question regarding physical disabilities was "slight lameness from birth." It was objected that this statement did not truly describe his lameness. Lord Low (Ordinary) sustained the argument that as the insurance agent had seen the insured, and knew the degree of his lameness, the company could not found on the untruth. The judgment was affirmed, but on the ground that it was not proved that the statement was untrue, and the opinion of Lord Low is questioned in *M'Millan* v. *Accident Insurance Co., supra.* In *Bawden* the insured, as the agent knew, had lost an eye, and failed to disclose the fact. It was held that the case must be treated on the assumption that the company knew that the answers were those of a one-eyed man. The decision has been criticised or distinguished in the English cases cited above, and in *Macmillan* v. *Accident Insurance Co.* (Lord Salvesen (Ordinary), 1907, S.C., at p. 489; L.J.C. (Macdonald), p. 491).

[3] *Ayrey* v. *British Legal Insurance Co.* [1918], 1 K.B. 136.

condition originally purely casual, one of the parties ultimately acquires the power to influence the result, he is under no obligation not to impede fulfilment, unless it can be proved that he acquired the power in question with a view to precluding the accomplishment of the condition.[1] If, however, from the original scope of the obligation one of the parties has the power to affect the result, it is a very general implication that if one party has undertaken a liability or conferred a right, subject to a suspensive condition, he must be deemed to have agreed to leave the fulfilment or non-fulfilment of the condition to the arbitrament of chance, or to the efforts of the other party, and not voluntarily to impose any obstacle. A party cannot plead that a condition has not been fulfilled or purified if that has been due to his own act. Similarly, if *A.* has a right enforceable only if *B.* fails to perform some particular act, and *B.'s* failure is due to the fact that *A.* has rendered performance impossible, *A.* cannot take advantage of that failure.[2]

Condition held to be Purified.—The implication in such cases may be merely that if the party does prevent or impede the fulfilment of the condition, his liabilities will be interpreted on the assumption that the condition has been fulfilled—that the conditional promise has become absolute. The law of Scotland, it has been laid down,[3] is in accordance with the maxim of the civil law: *In jure civili receptum est, quotiens per eum, cujus interest condicionem non impleri, fiat quo minus impleatur, perinde haberi, ac si impleta condicio fuisset.*[4] It is then not material whether the act by which fulfilment of the condition is impeded amounts to a breach of the contract or not. Thus where advance notes were issued to seamen payable one day after the ship sailed, the shipowner, who had abandoned the voyage, could not plead, in a question with tradesmen who had supplied goods on the advance notes, that they were conditional on the ship sailing.[5] When the sale of a music hall was conditional on a "theatrical licence" being obtained, and the licensing authorities were prepared to grant a licence which, in the opinion of the Court, satisfied that term, it was decided that the condition had been purified, although the purchaser, desiring a licence for the sale of exciseable liquors, refused to accept that which was offered.[6] In building and engineering contracts the provision that the production of a certificate by the architect or engineer shall be a condition precedent to any claim for payment cannot be relied upon when the employer has induced the wrongful refusal of the certificate,[7] or when he has supported the architect in a refusal to exercise his judgment.[8] In contracts where work is undertaken under a time-limit it is an implied condition that the employer shall do nothing to impede performance within the time specified; he cannot therefore enforce a penalty if he has failed to give access to the work at the proper time;[9] or if, where

[1] *Paterson* v. *M'Ewan's Trs.*, 1881, 8 R. 646.

[2] *Dowling* v. *Methven*, 1921, S.C. 948, narrated *infra*.

[3] *Pirie* v. *Pirie*, 1873, 11 M. 941, per L.J.C. (Moncreiff), at p. 949.

[4] *Ulpian* in *Dig.*, l. 17, 161. See also *Dig.*, xlv. 1, 85 (*quicumque sub condicione obligatus caraverit, ne condicio existeret, nihilominus obligatur*); Pothier, *Obligations*, sec. 212; Ersk. iii. 3, 85; Bell, *Prin.*, sec. 50; Comyn's *Dig.*, Condition L. (6.); Savigny, *System*, sec. cxix. Cases in following notes, and *Gillespie* v. *Miller, Son & Co.*, 1874, 1 R. 423, opinion of Lord Neaves; *North British Rly.* v. *Benhar Coal Co.*, 1886, 14 R. 141.

[5] *Wilkie* v. *Lord Advocate*, 1920, 1 S.L.T. 69 (O.H., Lord Sands).

[6] *Temperance Halls, etc., Building Society* v. *Glasgow Pavilion Co.*, 1908, 16 S.L.T. 112.

[7] *Clarke* v. *Watson*, 1865, 18 C.B. N.S. 278; *Ludbrook* v. *Barrett*, 1877, 46 L.J. C.P. 798; *Smith* v. *Howden Sanitary Authority*, 1890, Hudson, *Building Contracts*, vol. ii.

[8] *Hickman* v. *Roberts* [1913], A.C. 229.

[9] *MacElroy* v. *Tharsis Sulphur Co.*, 1877, 5 R. 161 (not appealed on this point); *Holme* v. *Guppy*, 1838, 3 M. & W. 387.

several tradesmen are engaged on the same building, he has failed to impose the time-limit on each of them, and the one left free has delayed the work of the others.[1] On similar grounds, liability to demurrage for failure to unload a ship does not attach if the shipowner has imposed obstacles to unloading.[2] Where in a sale of bonds which were to be issued by a company it was provided that they were to be completed and delivered by a certain date, and the purchaser, getting possession of the bonds in order to consider their terms, kept them until the prescribed date had passed, he was precluded from maintaining that the seller had failed to complete and deliver them.[3] Where under testamentary provisions, *A.* was the creditor of his brother in a bond, subject to the condition that the principal should not be exigible for eight years provided that *A.* remained a director of a particular company, it was held that *A.* was not entitled, by resigning his directorship, to demand immediate payment.[4] In *Dowling* v. *Methven*,[5] a merchant had appointed a selling agent for five years, had undertaken to supply him with goods to fulfil orders, and had reserved the right to dismiss him if the turnover in his district was not increased by a specified amount. Dismissal followed. In an action of damages by the agent it was proved that, although the specified increase in turnover had not been reached, orders had been obtained which would have accomplished it had the merchant supplied goods to fulfil them. This he had not done, his failure being accounted for by the dislocation in his trade due to the war, which had rendered it impossible for him to obtain the goods. It was decided, on the assumption that the merchant's failure was excused on the ground of impossibility of performance, and therefore did not amount to a breach of contract on his part, that it did amount to a bar to his insistence on the conditional power of dismissal, on the ground that it was his action which had caused the agent to fail in the condition which would have rendered the provision for dismissal inapplicable.

Impeding Performance as Breach of Contract.—In these cases the conclusion that the conditional obligation must be read as absolute was sufficient to do justice between the parties. But it may also be held that a party has impliedly contracted that he will not, by any voluntary act, defeat the rights which the other party would enjoy if he abstained from that act. An interference is then a breach of contract, with a consequent liability in damages. Thus where, in a charter-party, it was provided that the ship should proceed with all convenient speed to the port of loading, with an option to the charterer to cancel the charter if she were not ready by 10th March, and the charterer availed himself of this option, and also claimed damages, it was held to be an implied term of the contract that the shipowner should not voluntarily impede the timeous arrival of the ship, and—on proof that he had entered into other charters which rendered her arrival impossible—that he was in breach of contract and liable in damages.[6] Where *A.* had

[1] *Duncanson* v. *Scottish County Investment Co.*, 1915, S.C. 1106; *U.S. Shipping Board* v. *Durrell* [1923], 2 K.B. 739.

[2] *Hansa* v. *Alexander*, 1919, S.C. 89; affd. 1919, S.C. (H.L.) 122, explaining *Hansen* v. *Donaldson*, 1874, 1 R. 1066.

[3] *Sprague* v. *Booth* [1909], A.C. 576.

[4] *Pirie* v. *Pirie*, 1873, 11 M. 941. See also *Pollok & Son's Trs.* v. *Pollok*, 1880, 7 R. 975; *Stirling* v. *Maitland*, 1864, 5 B. & S. 840.

[5] 1921, S.C. 948.

[6] *Nelson* v. *Dundee East Coast Shipping Co.*, 1907, S.C. 927. The argument that where there was no express obligation to have the ship ready by a particular date, and where there was a cancelling clause, the charterer's sole remedy was to cancel the charter, was repelled, on the ground that it was applicable only to cases where the non-arrival of the ship was due to causes beyond the shipowner's control.

undertaken that if and when he feued certain lands he would impose an obligation of relief on the feuars, and he disposed of the lands without feuing them, he was held liable in damages. It was an implied term of the contract that he should not, voluntarily, impose any obstacle to the creation of the obligation of relief.[1]

It would appear that the principle that a condition, if impeded, is to be held as fulfilled is not applicable unless the act by which it was impeded was deliberately done with that intent. In *Kedie's Trs.* v. *Stewart & Macdonald*[2] the provision, under which a business was turned into a private company, gave *A.*, one of the partners, a claim for payment of £10,000 when the reserve fund exceeded £50,000. By the articles half the profits, after certain charges, were to be placed to the credit of the reserve fund. Subsequently the company became a public company, and the articles were altered, to the effect of leaving it in the discretion of the directors whether anything should be placed to reserve. Before the reserve fund had reached £50,000 the company went into voluntary liquidation. *A.* claimed to be ranked for £10,000, on the ground that the fulfilment of the condition on which that sum was due to him, *i.e.*, the attainment of £50,000 in the reserve fund—had been voluntarily impeded by the alteration in the articles. The Lord Justice-Clerk was prepared to sustain this claim: the other members of the Court held that it was unmaintainable, proceeding partly on the specialties of the case, mainly on the ground that as there was no proof that the articles had been altered in order to defeat *A.'s* claim, the rules as to the consequence of impeding potestative or mixed conditions did not apply.

Potestative Conditions.—A passage in Erskine's *Institutes* requires passing notice. It is there stated: "All potestative conditions, the performance of which is in some degree in the creditor's own power, are held as fulfilled if he has done all he could to fulfil them. If, for instance, an obligation be granted under the condition that the grantee shall intermarry with a particular lady, law considers the condition as purified if he has made addresses to her, though she may have rejected them."[3] The principle expressed in this passage is repeated in Bell's *Principles*,[4] and has the apparent sanction, given without any serious consideration, of Lord Watson.[5] But it cannot be law. Suppose a brewer to agree to advance money to a publican if he obtains a licence, could any Court hold that the money was due because the publican had applied for a licence, and had been refused? Erskine's dictum is derived from a passage in the *Digest*,[6] relating to the construction of wills, and states a result deduced from consideration of the probable intention of the testator. As is noticed by Pothier,[7] it has no application to the law of contract, where it may be assumed that if a party undertakes a conditional obligation he does not intend to bind himself unless the condition is actually fulfilled.

Implied Obligation to Purify. Where the condition under which an obligation is undertaken is potestative, so that its accomplishment is within the power of the party conditionally liable, it may be held that his implied obligation is not merely to impose no obstacle to accomplishment, but to take active steps to promote it. This is by no means a general rule.

[1] *Leith School Board* v. *Rattray's Trs.*, 1918, S.C. 94.

[2] 1926, S.C. 1019. In addition to the authorities cited in the argument, see *North British Rly.* v. *Caledonian Rly.*, 1890, 17 R. 861.

[3] Ersk. iii. 3, 85; see also *Bankton*, i. 4, 22.

[4] Sec. 50.

[5] *Mackay* v. *Dick & Stevenson*, 1881, 8 R. (H.L.) 37, at p. 45.

[6] *Dig.*, xxviii., vii. 11 and 23.

[7] *Obligations*, see, 212-214.

A man who undertakes to do work if he is in London at a particular date, does not involve himself in any obligation to be there. An option to buy is not an agreement to buy, and leaves the party free to complete the contract if he pleases.[1] And it remains an option to buy though expressed as an agreement to buy if the purchaser performs some act which he is free to perform or not, as he pleases. So where a railway company agreed to purchase certain lands when they began to construct their line, and had not begun operations within the time-limit provided by their statutory powers, it was held that they were under no obligation to buy: they had acquired an option which they might exercise or not at pleasure.[2] When *A.* arranged with a county council for a supply of water to lands which were outside the statutory water district it was held that he had bargained for a supply of water if and so long as he chose to take it, and had come under no implied obligation to pay the water rate after he had ceased to take the water.[3] Where an architect agreed to survey lands and lay them out for building purposes, without charge, on condition that he should be employed when the lands were disposed of for building, it was decided that the owner was under no obligation to dispose of the lands for building purposes, and might dispose of them otherwise.[4] The cases where an obligation to promote the accomplishment of a condition has been implied are those which fall within the rule formulated by Lord Blackburn—"As a general rule, where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both parties concur in doing it, the construction of the contract is that each agree to do all that is necessary to be done on his part, though there may be no express words to that effect."[5] So, in the case in question, the defender agreed to buy a steam navvy if it passed a test on a railway cutting which he was to open. It was decided that he was bound to give facilities for the test, and not entitled to reject the machine on the ground that it had failed in another test which he had in fact applied. If a man agrees to sell the fixtures in his house at valuation, he is bound to allow the valuer to enter, and his obligation may be enforced by a decree *ad factum prastandum*.[6] Similarly, where an heir of entail sold his estate "subject to the ratification of the Court" he could be compelled to take the appropriate legal steps to obtain ratification.[7] Where a reward was offered for information as to the perpetrator of a crime, to be paid "on conviction," it was held that the party who had offered the reward, and who had taken no steps to prosecute after receiving the information, was liable to pay though no conviction had been obtained.[8] A contract to pay money, or to supply goods, at such time or in such manner as may be mutually agreed upon, is not a contract which either may render nugatory by refusing to agree; the Court will decide what is a reasonable time or

[1] The *criteria* which distinguish an option from an agreement to buy, and the results in contracts of hire purchase, are explained in *Helby* v. *Mathews* [1895], A.C. 471.

[2] *Philip* v. *Edinburgh, Perth, and Dundee Rly. Co.*, 1854, 16 D. 1065; revd. 1857, 2 Macq. 514. See also *North British Rly.* v. *Caledonian Rly.*, 1890, 17 R. 861.

[3] *Maconochie-Wellwood* v. *Midlothian C. C.*, 1894, 22 R. 56.

[4] *Moffatt* v. *Laurie*, 1855, 15 C.B. 583.

[5] *Mackay* v. *Dick & Stevenson*, 1880, 7 R. 778; affd. 1881, 8 R. (H.L.) 37; as *Mackay* v. *Dick*, 6 App. Cas. 251. Lord Blackburn's opinion has been constantly cited in England as a general statement of principle. See, *e.g.*, *Sprague* v. *Booth* [1909], A.C. 576 (Lord Dunedin); *Harrison* v. *Walker* [1919], 2 K.B. 453 (M'Cardie, J.); *U.S. Shipping Board* v. *Durrell* [1923], 2 K.B. 739 (Bankes, L.J.).

[6] *Smith* v. *Peters*, 1875, L.R. 20 Eq. 511.

[7] *Stewart* v. *Kennedy*, 1889, 16 R. 421; affd. 1890, 17 R. (H.L.) 1.

[8] *Petrie* v. *Earl of Airlie*, 1834, 13 S. 68.

manner of supply.[1] When the legislature made the possession of a permit a condition of the export of certain goods, a contract for their sale, where both parties were aware of the regulation, while it did not impose on the seller an obligation to obtain a permit, did bind him to do his best to obtain one.[2]

(2) *Waiver of Condition*

Principles of Waiver. The plea that fulfilment of a condition has been waived, or, alternatively, that the party insisting on it is barred from maintaining that it has not been fulfilled, is vague enough to make it difficult to formulate any definite rules. Two principles, however, may probably be regarded as established. The first is that the party who alleges waiver must in some way have altered his position, or abstained from fulfilling the condition, in reliance on the words or conduct of the other.[3] "The essence" of the plea of personal bar "is that owing to the action of one party the other party is put in a worse position than he would otherwise have been in."[4] The other principle is that the words or acts on which the plea of waiver or personal bar is founded must amount to something more than a statement of intention. A statement that a party does not intend to enforce a condition does not bind him not to change his mind, or bar him from doing so. "It has been well established by a long train of authority that in order to support a plea of estoppel by representation, the representation must be a representation of existing facts; a promise or a representation of intention to do something in the future is entirely insufficient."[5] But statements or conduct which may primarily refer to the intention of one party not to insist on the fulfilment of a condition may in substance be inducements to the other to abstain from taking steps to purify it, and, if so, may amount to a case of waiver. This obviously may raise a narrow question of the construction of the statement or conduct in question, and the cases which follow can be regarded only as illustrations.[6]

Waiver in Leases, etc.—In leases, where notice to quit is necessary and must be given in established forms, failure on the part of the landlord is not excused by a mere statement by the tenant that he is prepared to remove, but a case of waiver is reached if the tenant after receiving some notice of an informal character takes no objection when proceedings for the re-letting of the subjects are brought to his notice.[7] The liability of the drawer of a bill to the holder is conditional on presentment for payment and notice of dishonour, but failure has been held to be excused, on the plea of waiver, when the holder was asked to delay presentment;[8] or even, in two cases

[1] *Hall* v. *Conder*, 1857, 2 C.B. N.S. 22; *Pearl Mill Co.* v. *Ivy Tannery Co.* [1919], 1 K.B. 78; *Henry* v. *Seggie*, 1922, S.L.T. 5; *Terry* v. *Moss Empires*, 1915, 32 T.L.R. 92. See, however, the construction of an ill-framed clause in trade union rules—*Drennan* v. *Associated Ironmoulders*, 1921, S.C. 151.

[2] *In re Anglo-Russian Merchant Traders and Batt* [1917], 2 K.B. 679; *Mains Spinning Co.* v. *Sutcliffe*, 1917, 23 Com. Cases, 216.

[3] *Magistrates of Alloa* v. *Wilson*, 1913, S.C. 6; *Simm* v. *Anglo-American Telegraph Co.*, 1879, 5 Q.B.D. 188; *Cooke* v. *Eshelby*, 1887, 12 A.C. 271.

[4] Per Lord President Dunedin in *Magistrates of Alloa* v. *Wilson*, *supra*, at p. 12.

[5] Lord Atkinson, *Yorkshire Insurance Co.* v. *Craine* [1922], 2 A.C. 541, at p. 553. See *Mitchell* v. *Heys*, 1894, 21 R. 600, opinion of Lord Kinnear, p. 810.

[6] For the general law of waiver or acquiescence see Rankine, *Personal Bar*, p. 68.

[7] *Blain* v. *Ferguson*, 1840, 2 D. 546 (see opinion of Lord Fullerton); *Dunlop* v. *Meiklem*, 1876, 4 R. 11. An earlier case, *Gordon* v. *Bryden*, 1803, M. 13854, seems inconsistent. See *Fenner* v. *Blake* [1900], 1 Q.B. 426. The English cases on "waiver of a forfeiture," in questions between landlord and tenant, are collected in Bower, *Estoppel by Representation*, p. 229.

[8] *Cairns's Trs.* v. *Brown*, 1836, 14 S. 999. Bills of Exchange Act, 1882, sec. 46 (2) (c); sec. 50 (2) (*e*).

amounting to a separate obligation to pay, but treated as cases of waiver, from admissions of liability and requests for time.[1] Where a party, conditionally bound, intimates that he does not regard the obligation as binding whether the condition is purified or not, he has clearly induced the other not to take steps to purify, and cannot found on any failure. Thus where a tenant's right to a renewal of his lease was conditional on giving notice, and the landlord had raised legal proceedings involving the contention that he was under no obligation to renew, it was found that the tenant's failure to give notice was immaterial.[2] Where the conditions of an insurance policy required the insured to furnish a medical report, and the company, in answer to a question as to the form in which the report should be sent, intimated that they repudiated liability on a separate and untenable ground, the decision was that as their conduct had induced the insured to assume that a report would be useless they could not invalidate the policy on the plea that it had not been furnished.[3] In other cases it has been held that if an insurance company, after failure to give a prescribed notice, exercised rights under other clauses of the policy, they must be deemed to have waived any objection on the ground of want of notice.[4]

Waiver from Prior Failure to Insist.—Where liability will emerge if a debtor fails to perform some act at successive terms the mere fact that the creditor has accepted less than exact performance without demur does not bind him to allow a similar latitude in the future, but may lay upon him the obligation to give notice that he intends to enforce his rights more strictly. In *Paterson* v. *Tod*[5] a creditor had agreed not to call up a bond if the interest was regularly paid. After three terms' interest had been accepted in spite of the fact that the term day had passed, the creditor, two days after the next term day, intimated that as the interest had not been regularly paid he proposed to call up the bond. This, it was decided, he was not entitled to do, and it was pointed out by Lord Glenlee that while his acceptance of tardy payments did not bar him from insisting on regularity in the future it prevented him "from going back and taking advantage of failure without warning." This decision, and the opinion of Lord Glenlee, were approved in the House of Lords in a case presenting somewhat similar features, but where, as there had been only one acceptance of payment after the term, and that accompanied with a warning for the future, there was no effective answer to the creditor's insistence on the letter of his bond.[6] So acquiescence in a breach of contract does not bar a claim for damages for a subsequent breach, at least when notice has been given that the contract must be strictly performed.[7] In an English case, *A.* had agreed to make certain shipments on condition that *B.* obtained a "confirmed banker's credit." He made certain shipments, which were duly paid for, though the "credit" *B.* had obtained was not confirmed. He then, founding on *B.'s* failure to fulfil the condition, cancelled the contract. It was held that he was not within his rights; he might still insist on the condition, but was bound to give notice to *B.* of his intention to do so.[8]

[1] *Allhusen* v. *Mitchell*, 1870, 8 M. 600; *Shepherd* v. *Reddie*, 1870, 8 M. 619.
[2] *Hunter's Trs.* v. *Earl of Hopetoun*, 1863, 1 M. 1074; revd. 1865, 3 M. (H.L.) 50.
[3] *Shiells* v. *Scottish Assurance Corporation*, 1889, 16 R. 1014.
[4] *Donnison* v. *Employers Accident Co.*, 1897, 24 R. 681; *Yorkshire Insurance Co.* v. *Craine* [1922], 2 A.C. 541.
[5] 1828, 6 S. 1062.
[6] *Gatty* v. *Maclaine*, 1920, S.C. 441; affd. 1921, S.C. (H.L.) 1.
[7] *Steel Co. of Scotland* v. *Tancred, Arrol & Co.*, 1892, 19 R. 1062.
[8] *Panoutsos* v. *Raymond Hadley Corporation* [1917], 2 K.B. 473.

(3) *Performance of Equivalent Acts*

General Rule.—Where it is proved that a condition has not been fulfilled according to its terms it may be argued that the performance of some equivalent act has the effect of fulfilment. In the case of conditions purely casual this argument is not maintainable.[1] In the case of obligations wholly or partially potestative it is a question of some difficulty how far the law recognises what has been termed elasticity in the accomplishment of a condition.[2] From the most recent authority it would appear that such cases are rare. A lender agreed that a lower rate of interest than that specified in the bond would be accepted, provided that there was punctual payment at times specified therein, one of these being 1st August.[3] Payment was not tendered till 7th August. The lender demanded interest at the higher rate, and his claim was sustained. It was observed that punctual payment on 1st August meant payment on that day, and that no belated payment could satisfy the condition. The decision would appear to rule all cases where the condition is that action must be preceded by notice for a definite period.[4]

Equivalent where Exact Performance Impossible.—The strongest case for the acceptance of equivalents as amounting to the accomplishment of a condition is where, at the inception of the obligation, literal accomplishment was possible by an act which one of the parties was free to perform, and that act has in the meantime become impossible or illegal. Then, it is conceived, performance of some equivalent act is sufficient unless the other party can shew a substantial interest in literal observance of the condition. So where the exercise of a power of sale in a bond was expressed to be conditional on advertisement in a particular newspaper, and that newspaper was no longer published, advertisement in a newspaper of equivalent circulation was authorised.[5] Where the rights of a company and of a shareholder depended on the purchase by the company of the shareholder's shares, and it was subsequently decided that such a purchase was illegal, it was decided that the company was entitled to proffer a transferee to whom no reasonable objection could be taken.[6] In *Laird* v. *Securities Insurance Co.*[7] the defenders had guaranteed payment of a deposit receipt issued by a colonial bank. It was a condition of the contract that the party guaranteed should transfer "the deposit and all his rights in respect thereof in exchange for a sum equal to the amount of the deposit." The bank failed. Before the date at which the defenders became liable under their guarantee a colonial

[1] Ersk. iii. 1, 85; Pothier, *Obligations*, sec. 213; *Worsley* v. *Wood*, 1796, 6 T.R. 710; *Hollies Stores* v. *Timmis* [1921], 2 Ch. 202.

[2] In certain of the earlier cases (*e.g.*, *Whitson's Trs.* v. *Neilson*, 1828, 6 S. 579; *Gibson-Craig* v. *Aitken*, 1848, 10 D. 576; *Wight* v. *Earl of Hopetoun*, 1858, 20 D. 955; see opinion of Lord Curriehill, at p. 958), judicial reference is made to the civil law distinction between contracts which admit of actions *bonæ fidei* and contracts *stricti juris*, and it is laid down that contracts of the former class allow a wider and more equitable construction. There would seem to be little support for this doctrine in the civil law texts (*Inst.*, iv. 6, 28; Gaius, iv. 61-67), and Stair (iv. 8, 41), dealing with the civil law, does not indicate that the distinction holds in the law of Scotland. The principal contracts and quasi-contracts classed as *bonæ fidei* are sale, lease, hiring, *negotiorum gestio*, mandate, deposit, partnership, commodate, pledge.

[3] *Gatty* v. *Maclaine*, 1920, S.C. 441; affd. 1921, S.C. (H.L.) 1; correcting dicta of Lord M'Laren as to the elasticity of the word "punctual" in *Scott-Chisholme* v. *Brown*, 1893, 20 R. 575. See also *Leeds and Hanley Theatre* v. *Broadbent* [1898], 1 Ch. 343.

[4] *Wight* v. *Earl of Hopetoun*, 1863, 1 M. 1097; affd. 1864, 2 M. (H.L.) 35.

[5] *Wallace, Petr.*, 1868, 7 M. 24.

[6] *Moir* v. *Duff & Co.*, 1900, 2 F. 1265.

[7] 1895, 22 R. 452, following *Dane* v. *Mortgage Insurance Corporation* [1894], 1 Q.B. 54.

statute was passed, whereby the liability under the deposit receipt was extinguished and certain rights in a new bank were given in exchange. These the pursuer offered to transfer. It was held that the condition as to transferring the deposit must be construed consistently with the principal obligation to pay on default, and therefore that it was sufficiently complied with by the offer to transfer the rights in the new bank.

Cases where Equivalents Admitted.—In certain cases, though exact fulfilment was possible, the want of it has been overcome when it was clear that the debtor had no interest to insist on it except to escape liability on a technicality. So it has been held that where a party has undertaken to execute a bond, or to indorse a bill, for a particular sum, and has not done so, he cannot defend a claim for immediate payment on the plea that his contract was to execute or indorse, and not directly to pay.[1] When a railway company had the power to make a branch line, provided they did so within six months, and agreed to make a certain payment if they declared their intention not to make the line, the Court brushed aside the argument, advanced after the six months had expired, that the payment was not due because their intention not to make the line had not been expressly declared.[2] Fidelity guarantees may provide for a system of checks on the conduct of the party guaranteed so strict as to be practically unworkable; and the opinion of Lord Wood, that such provision does not require "specific performance to the letter, but only that it shall be substantially implemented or fulfilled," has been quoted with approval by Lord Stormonth-Darling.[3] In certain special cases equivalent checks have been accepted as sufficient:[4] but when a guarantee policy for a commercial traveller provided for a monthly settlement with the traveller, and accounts to customers every three months, and neither provision was observed, it was held that the guarantee could not be enforced.[5] When there has been a substantial failure in the conditions of the policy it is no argument that these are so expressed as to make it possible to suggest circumstances where their literal enforcement could not conceivably have been intended.[6] In *Shiells* v. *Scottish Assurance Corporation*[7] an accident insurance policy provided that notice of any accident should be given within twelve hours of its occurrence. It was expressly stated that notice to the insurance agent should not be deemed sufficient. Notwithstanding this provision it was found that notice given to the agent and at once transmitted by him to the company was a sufficient compliance with the condition. In *Bain* v. *Assets Co.*[8] a contributory in the liquidation of a bank obtained a discharge, declared to be on the basis and on the condition of the truth, accuracy, and completeness of a statement of his whole assets, to be made according to the best of his knowledge and belief. It was proved that the statement omitted assets of which he must

[1] *Halyburton* v. *Rutherford*, 1838, 16 S. 1235; *Watt* v. *National Bank*, 1839, 1 D. 827.

[2] *Glasgow, Paisley, and Ardrossan Canal Co.* v. *Glasgow, etc., Rly. Co.*, 1850, 13 D. 182.

[3] *British Guarantee Association* v. *Western Bank*, 1853, 15 D. 834, 839. Approved in *Haworth* v. *Sickness, etc., Insurance Association*, 1891, 18 R. 563.

[4] *British Guarantee Association, supra*; *Lochruan Distillery Co.* v. *Anderson*, 1870, 8 S.L.R. 111; *Annan* v. *Marshall*, 1887, 25 S.L.R. 94. American and colonial cases on the construction of fidelity guarantees are collected in Macgillivray, *Insurance*, 974, 982.

[5] *Haworth* v. *Sickness, etc., Insurance Association*, 1891, 18 R. 563.

[6] *Clydebank Water Trs.* v. *Fidelity Co. of Maryland*, 1915, S.C. 362, opinion of Lord Johnston (affd. 1916, S.C. (H.L.) 69), a case turning on the construction of the particular guarantee.

[7] 1889, 16 R. 1014. A very doubtful decision, Lord Rutherfurd Clark doubting, and reversing the decision of Lord Trayner.

[8] 1904, 6 F. 676, 692; revd. 1905, 7 F. (H.L.) 104.

have been aware. In a reduction of the discharge more than twenty years afterwards, the Court were of opinion that all points left doubtful by the proof must be assumed in the contributory's favour, and, on this basis, that he might have informed the liquidators verbally of the existence of the assets in question. This assumption was sufficient to sustain the discharge, as, in the opinion of the Court, the conditions on which it was granted might be satisfied by verbal disclosure, and did not necessarily demand disclosure in the written statement of assets.

Cases of Exact Fulfilment. While these authorities, in particular the two cases last cited, seem to favour elasticity of construction, the balance of authority is certainly in favour of holding that if a debtor can shew an interest—reasonable, though possibly not very substantial—in the qualification he has placed on his liability, he may successfully maintain that he is under no liability unless the condition has been exactly fulfilled. So when in a building contract a certificate by the architect is made a condition precedent of any claim for payment it is irrelevant to aver, in the absence of any collusion between the architect and the employer,[1] that the work has been done, and the certificate wrongfully withheld.[2] Similarly, when in engineering contracts the certificate of the engineer is required as a prerequisite to payment for extra work, the condition must be exactly fulfilled.[3] Railway companies have attempted in vain to argue that clauses limiting their liability in transit by a particular method, or by a defined route, could be applicable when a different method, or different route, was adopted.[4] A party who has contracted for an "approved insurance policy" is not bound to accept a certificate of insurance, though there may be evidence that it offers equal security."[5] Where a cautioner for rent had stipulated that the landlord should "exercise his right of hypothec" before calling on him, the House of Lords decided that he had an interest in the exact observance of the condition, and was not liable when the landlord had sequestrated but had not proceeded to a sale, disregarding the argument, which had prevailed in the Court of Session, that the object of taking a cautioner for the rent was to avoid the ruinous consequences of a sale under hypothec.[6] Where certain rights of a shareholder were conditional on a prior offer of the shares to the company, the Court declined to regard a letter asking what price the company was prepared to give as equivalent to the fulfilment of the condition.[7]

[1] *Supra*, p. 277.

[2] *Brown* v. *Rollo*, 1832, 10 S. 667; *Clarke* v. *Watson*, 1865, 18 C.B. N.S. 278; *Eaglesham* v. *M'Master* [1920], 2 K.B. 169. Proof that the work had been done was allowed when, after some delay, the architect stated that he had no longer sufficient information to enable him to give a certificate. *M'Cartney* v. *Magistrates of Edinburgh*, 1832, 10 S. 705.

[3] *M'Elroy* v. *Tharsis Sulphur, etc., Co.*, 1877, 5 R. 161 (affirmed on a separate point, 5 R. (H.L.) 171). As to the effect of an arbitration clause, see *Howden* v. *Powell-Duffryn Steam Coal Co.*, 1912, S.C. 920; *Brodie* v. *Cardiff Corporation* [1919], A.C. 337.

[4] *Lord Polwarth* v. *North British Railway*, 1908, S.C. 1275; *Gunyon* v. *S.E., etc., Committee* [1915], 2 K.B. 370.

[5] *Scott* v. *Barclay's Bank* [1923], 2 K.B. 1.

[6] *M'Tavish* v. *Scott*, 1827, 5 S. 597; revd. 1830, 4 W. & S. 410.

[7] *Gibson-Craig* v. *Aitken*, 1848, 10 D. 576.

CHAPTER XVII

IMPLIED TERMS AND CONDITIONS

It is not necessary that the offer and acceptance by which a contract is formed should specify all the contractual terms. As has already been indicated,[1] while an expression of willingness to be bound in a necessary element in contractual obligation, the exact measure of the obligation undertaken involves a question on which legal implication may have more to say than any proof of the actual intention of the parties. A written or verbal agreement may be the framework on which the law may build.

Forms of Implication. The phrases "implied contract," "implied warranty," "implied condition," cover various forms of implication.[2] The Courts may hold that a particular obligation has been incurred because they find evidence of tacit agreement; because they deem that one or other of the parties have so spoken or acted as to bar him from asserting that he did not agree; or because the law infers the obligation as an incident of contracts of the particular class.[3] In the same way it may be held that an expressed obligation, apparently unqualified, is subject to an implied condition. In so far as any of these assumptions is rested on the implication of actual agreement, or from the application of the principle of personal bar, reference may be made to what has already been said on the nature and meaning of agreement and on the distinction between expressions of intention and expressions of willingness to incur an obligation.[4] It has now to be considered how far terms or conditions may be implied in a contract where there is no ground for inferring that they have been actually agreed upon, and on what principles such terms may be formulated.[5] The present chapter

[1] *Supra*, p. 16.

[2] The term "contract implied in law" is one with which the jurisprudence of Scotland may well dispense. It is used in English law in reference to obligations which the law may infer where there is no contract, and means that in such cases a fictitious contract is supposed to exist, and to form the basis of the obligations in question (see explanation by Lord Haldane in *Sinclair* v. *Brougham* [1914], A.C. 398, 413; and by Lindley, L.J., in *Rhodes* v. *Rhodes*, 1890, 44 Ch. D. 94, 107). In Scots law such obligations are not referred to any fictitious contract. They are recognised as arising independently of contract, and are spoken of obediential, as quasi-contractual, or as arising *ex lege*. See *infra*, Chap. XVIII.

[3] See opinion of Lord Sumner, *in re Southern Rhodesia* [1919], A.C. 211, at p. 244: "English law, in such a connection, speaks of an implied contract: not that it supposes that the parties actually made a parol agreement, but forgot to record it, or had identical intentions in mind but omitted to express them, but this is the accepted terminology under which legal effect is given to such relations. . . . Alike by the common law and by the civil law certain legal incidents attach *de jure* to the relationship which is constituted by the grant of an authority on the one hand, to be exercised for the benefit of the granter, and by the exercise of that authority by the recipient of it according to his mandate. It is not that this arises out of some unexpressed stipulation, it is annexed to the relationship."

[4] *Supra*, sec p. 17.

[5] In certain cases a distinction appears to be drawn between implied terms of a contract and duties imposed by law on the parties to a contract. Thus where a party to an agreement to refer to arbitration appointed an arbiter who, as it was ultimately found, was disqualified, and the proceedings proved abortive, all the judges concurred in holding that he was liable to the other party for the expense which the latter had incurred in the arbitration proceedings,

is concerned with obligations or conditions implied between parties who are in contractual relations, leaving to another obligations imposed by law between parties who are in no such relationship (quasi-contracts).

In considering how far it is legitimate to read into a contract terms which are not expressed, cases when the contract is entered into merely by actings may be disregarded. Some form of implication is then obviously necessary. More difficulty arises when the contract is entered into by words or writing. It may then be asked—Here is the record of what was said, or the written agreement, where do you find the obligation you allege, or the condition by which you maintain your obligation to be qualified? To determine whether this form of reasoning has any force it must be borne in mind that the argument for an implied term or condition may be advanced either as part of the construction of the contract at its inception, or as the method of determining the rights of the parties when a change of circumstances has given rise to questions for which the contract does not provide. In the former case it is a question whether implication is legitimate; in the latter it is imperative. Where for instance the thing to which the contract relates is accidentally destroyed, and the parties have not provided for that event, the question who is to bear the loss must necessarily be solved by the implication of a term or condition. The law must imply, in the case where an article pledged has been accidentally destroyed, either that the pledgee is liable for its value or that he is not. A contract into which no implied term could ever be read would be a contract, were such a thing conceivable, so detailed as to provide for every possible occurrence in the future. And in reading judicial *dicta* on the limited province of implication it must be remembered that the speaker is probably referring only to the case where an unexpressed term is proposed though no change of circumstances has occurred. It is only then that the Court has the option of refusing to read into the contract terms which are not expressed.[1]

Implication in Innominate Contracts.—In *Landless* v. *Wilson*[2] an architect had been verbally employed to supply plans for some proposed buildings. The project of building was abandoned. To an action claiming payment the defence was that the plans had been supplied competitively, and under the implied term that there was to be no charge unless they were actually used. In rejecting this contention, mainly on the ground that no proof of any professional usage was offered, Lord President Inglis said: "Conditions may be easily implied in well-known and nominate contracts, but in unusual and innominate contracts I have always clearly understood that nothing can be left to implication." This dictum has been adopted by

on the ground that one who appoints an arbiter is bound to appoint a man qualified to act. The Lord Ordinary, the Lord President, and Lord Johnston held that this was an implied term of the contract; Lords Mackenzie and Skerrington, that it was not an implied term but a duty arising out of the contract, and fixed by law. *Sellar* v. *Highland Rly.*, 1918, S.C. 838; revd. 1919, S.C. (H.L.) 19. In *London Joint Stock Bank* v. *Macmillan* [1918], A.C. 777, where it was decided that a customer was bound, in a question with his banker, to take reasonable care to draw his cheques so that the amount could not be fraudulently altered, Lord Haldane refers to an implied term of the contract, the other judges to "duty arising directly out of the contractual relations" (Lord Shaw, p. 823). When a corresponding obligation of a banker was considered, in a subsequent case, it was held that his obligation not to disclose the state of his customer's account arose from an implied term of his contract. *Tournier* v. *National Provincial Bank* [1924], 1 K.B. 461. It is submitted that the distinction between implied terms of a contract, and duties arising directly out of the contract, is a distinction without a difference. Doubtless such "duties" are fixed by law, but they are fixed by law as implied terms of the contract.

[1] See opinion of Lord Frazer in *Craig* v. *Millar*, 1888, 15 R. 1005, 1022.

[2] 1880, 8 R. 289.

the editor of Bell's *Principles* as a general statement of the law.[1] So far as it is intelligible it requires a good deal of qualification. It is difficult to see how the contract (*locatio operis*) can be characterised as innominate. And if in a contract where no provision as to payment can be found an obligation to pay may be inferred, it is hard to see why the implication of an undertaking to work for nothing should be impossible. Vague as the term "innominate and unusual" undoubtedly is, instances may be found of implied terms and implied conditions in contracts which merit that epithet at least as much as *Landless* v. *Wilson*.[2] It is submitted that the real distinction in the question of implication of terms, between nominate and innominate contracts, is, as is noticed by Lord Stair,[3] that in nominate contracts the law may supply an immediate answer to the question what terms are implied, whereas in innominate contracts the answer must depend on other considerations.

Principles of Implication. It is always a question of the construction of each contract whether a particular term can be implied, but the general principles upon which the Courts proceed may be given in the words of Lord M'Laren: "The conception of an implied condition is one with which we are familiar in relation to contracts of every description, and if we seek to trace any such implied conditions to their source it will be found in almost every instance they are founded either on universal custom or in the nature of the contract itself. If the condition is such that every reasonable man on the one part would desire for his own protection to stipulate for the condition, and that no reasonable man on the other would refuse to accede to it, then it is not unnatural that the condition should be taken for granted in all contracts of this class without the necessity of giving it formal expression."[4] A well-known English dictum is cited below.[5]

Opinions that the implication of a term depends on the presumption that

[1] Bell, *Prin.*, sec. 524 (6).

[2] In *Teacher* v. *Calder* (1898, 25 R. 661; affd. 1899, 1 F. (H.L.) 39), an agreement to abide by an auditor's report as to the profits of a business was held to be qualified by an unexpressed condition that the auditor must be informed of the exact relation in which the parties stood. In *Cunninghame* v. *Edmiston* (1871, 9 M. 869), it was held that certain terms were implied, while others were not, in the purchase of lairs in a private cemetery. In *Morton & Co.* v. *Muir Brothers* (1907, S.C. 1211), it was found that where cards were prepared for a design for making lace the maker and owner of the cards held them under an implied obligation not to use them in his own business.

[3] Stair, i. 10, 12.

[4] *Morton* v. *Muir Brothers*, 1907, S.C. 1211, at p. 1224. It is submitted that the proper word is "term," not "condition." See *supra*, p. 270.

[5] Bowen, L.J., in *The Moorcock*, 1889, 14 P.D. 64. "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe that if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances." See also opinion of Lord Watson, *Dahl* v. *Nelson*, 1881, 6 App. Cas. 38, and comments on it by Lord Sumner, *Bank Line* v. *Capel* [1919], A.C. 435; opinion of Lord Esher, M.R., *Hamlyn* v. *Wood* [1891], 2 Q.B. 488; opinion of Scrutton, L.J., in *Reigate* v. *Union Manufacturing Co.* [1918], 1 K.B. 592.

the parties would have agreed to it [1] raise the obvious difficulty that it is usually clear, either directly from his evidence or indirectly from his attitude to the case, that one of the parties would not have agreed to it, had it been originally suggested. The hypothetical agreement which justifies the implication of a term is not, it is submitted, that of the parties to the contract, but that of two reasonable men in the same circumstances.[2]

It is a rule which does not admit of being stated other than generally that an obligation will be more easily implied in a verbal than in a written and formal contract.[3] It has even been said that "a deed of entail is not to be read in such a way as to extract from it any obligations by implication." [4]

Implication Excluded by Express Provision.—The brocard *expressum facit cessare tacitum* means that no implied term is admissible directly contradictory of the terms that are expressed. If a party undertakes to give *X.*, it would be impossible to imply a term in the contract that he should give *Y.* instead, or that he should give nothing at all, though the time of enforcement and the term of endurance of his obligation to give *X.* might be impliedly qualified or limited. So where the contract was to supply "the whole of the steel required for the Forth Bridge, the estimated quantity to be 30,000 tons, more or less," it was held that not even on averments of custom of trade—the strongest case for implication—could the contract be read as implying an obligation to supply 30,000 tons and no more.[5]

Grounds of Implication.—In cases where the implication of a term in a contract has been found to be legitimate, or, owing to a change of circumstances, necessary, the considerations to which the Court has given weight in determining the content of that term have, if we may judge from the origin of those implications which have reached the dignity of rules of law, varied at different periods of legal history. In certain cases the ruling consideration has not been any presumable intention, but public policy. Thus the right of a law agent to secure his hypothec for expenses in cases where the action was settled was upheld on the ground that its recognition would be to the general advantage.[6] And the exceptional liability for goods lost or stolen laid upon carriers and innkeepers, which in Scotland is derived from the prætorian edict, has been accepted in the law of England on grounds of public policy.[7] In the earlier history of the law of Scotland the Court seems generally to have proceeded on equitable grounds rather than on any evidence of general practice in similar or analogous cases. Thus where a lease contained no provision as to the term of entry, the implication that an immediate term of entry was to be inferred, now regarded as an integral part of the law of landlord and tenant,[8] seems originally to have

[1] *E.g.*, opinion of Lord Kinnear in *Patrick* v. *Harris' Trs.*, 1904, 6 F. 985, 988; Bowen, L.J., in *The Moorcock*, quoted in the preceding note. Lord Kinnear, in holding that a contract of lease did not imply a particular obligation on the landlord, gives as his reason that the Court could not be certain that if the tenant had required the obligation his demand would have been conceded. But is such certainty ever attainable?

[2] See opinion of Lord Sumner, *Becker, Gray & Co.* v. *London Assurance Corporation*, 1918, A.C. 101, 111, quoted *supra*, p. 16.

[3] See opinion of Kay, J., *in re Railway and Electric Appliance Co.*, 1888, 38 Ch. D. 597.

[4] *Earl of Breadalbane* v. *Jamieson*, 1877, 4 R. 667, per Lord President Inglis, at p. 671. Obligations may be implied on a feu-charter. *Leith School Board* v. *Rattray's Trs.*, 1918, S.C. 94

[5] *Tancred, Arrol & Co.* v. *Steel Co. of Scotland*, 16 R. 440; affd. 1890, 17 R. (H.L.) 31.

[6] *Ormerod* v. *Tate*, 1801, 1 East 464; *Hamilton* v. *Bryson*, 17th June 1813, F.C., opinion of Lord Meadowbank.

[7] See *Farwell* v. *Boston and Worcester Railroad Corporation*, 3 Macq. 316, an American decision, approved in the House of Lords (3 Macq. 297).

[8] *Christie* v. *Fife Coal Co.*, 1899, 2 F. 192.

been arrived at simply on the ground that to the judicial mind it appeared fair and reasonable, without any evidence as to the practice in other cases.[1] More recently the tendency has been to endeavour to discover the practice in analogous cases, either by evidence or by a remit to a man of skill. Thus where a store had fallen, and the question was whether the tenant was responsible on the ground that he had overloaded it, or the landlord, on the ground that he had failed to supply a building sufficiently strong, it was held that the obligations of a tenant in using a store, if not expressed in the contract, fell to be determined by the evidence of parties engaged in store-keeping as to the ordinary and usual practice.

Another ground on which the question of an implied term may be decided has been suggested by Lord M'Laren: "I think it is a just and convenient rule, and it is certainly in accordance with the best traditions of our jurisprudence, that in the case of innominate contracts the obligations of the parties and the responsibility for negligence should be the same as in the case of the nearest known contract."[2] So it is laid down by Pothier that if *A.* and *B.* exchange houses the obligations impliedly undertaken by each are those of the contract of lease.[3]

Implication from Prior Contracts.—When parties have previously been engaged in similar contracts, it is not necessary to resort to general principles of implication; the inference will be that they intended that their new contract should be on the same terms as the old. So where the price of goods sold is not fixed it may be determined by the course of dealing between the parties.[4] It has been observed that when a new lease is granted without specifying the rent it will be inferred that the rent is that which was previously paid.[5] Where services have continually been rendered, or goods supplied, at a specified rate, it rests with the party proposing an alteration of terms to indicate his intention; if he fail to do so, a continuance of the old rate will be presumed.[6] Where, however, a quarry supplied two kinds of stone ("clean" and "black") at the same price, and a builder in his first order specified "clean" stone, and in his subsequent orders—mostly verbal, and known to be for the same house—omitted to specify which kind of stone he required, it was held that the quarry was not bound to assume that "clean" stone was ordered.[7] Where there has been a course of dealing with a firm, on exceptional terms, it will be presumed that these terms hold if the dealing is continued after a change in the firm, even if the change involves a complete alteration in the partnership, and the new partners were unaware that any exceptional terms had been arranged.[8]

It is not proposed to attempt to deal with all the cases in which the implication of a term or condition has been in question. Such an attempt would involve the examination in detail of the special rules applicable to particular contracts, and is beyond the scope of the present work. All that is proposed is to illustrate the principles on which terms may be implied in cases where the proposed term, though not universally applicable, is not

[1] *Seton* v. *White*, 1679, M. 15173. A modern instance is *Seton* v. *Paterson*, 1880, 8 R. 236.
[2] *Barr* v. *Caledonian Rly.*, 1890, 18 R. 139, per Lord M'Laren, at p. 148.
[3] Pothier, *Louage*, App. Art. 1, sec. 4.
[4] Sale of Goods Act, 1893, sec. 8.
[5] *Wilson* v. *Mann*, 1876, 3 R. 527, per L.J.C. (Moncreiff), at p. 532.
[6] *Malloch* v. *Hodghton*, 1849, 12 D. 215.
[7] *Straiton Oil Co.* v. *Sanderson*, 1882, 9 R. 929. So far as the writer is aware, this decision has never been followed. It seems in conflict, not only with the rule in analogous cases, but with ordinary usage.
[8] *Garden, Haig-Scott, & Wallace* v. *Prudential Society*, 1927, S.L.T. 393.

confined to any one specific contract. With this end in view the extent and limits of the following principles of construction may be considered: (1) The implication of a right to payment. (2) The implied obligation to furnish work. (3) The rule that a man must not derogate from his own grant. (4) Implication as to the duration of a contract. (5) Implied limitations of discretionary powers. (6) Implied terms as to quality of performance.

(1) *Implication of a Right to Payment*

General Rule.—There can be no doubt of the general rule that the receipt of goods or services under a contract implies an obligation to pay for them.[1] But the rule is not to be applied indiscriminately; there are the alternative views that they have been proffered gratuitously, or in reliance on payment by a third party. And if there is a definite provision that payment for services is left to the discretion of the party who receives them, the party who renders them cannot complain if he gets nothing.[2]

Relationship of Parties.—The right to payment may depend on the nature of the services rendered. Thus the Court, without proof, and proceeding simply on the nature of the services, arrived at the conclusion that a Sheriff Substitute was entitled to be paid without any previous bargain,[3] a political agent was not.[4] It may also depend on the relationship of the parties. Where the work done is that by which the doer of it earns his livelihood there is at least a very strong presumption that he intended to claim payment and that his work was accepted on that basis.[5] So it is now settled that a professional man, undertaking the duties of an arbiter, cannot be supposed to have consented to act gratuitously, and is entitled to remuneration without any express agreement.[6] "Gift-making tradesmen," Lord Dunedin has remarked, "are not to be found in everyday life."[7] Where the service rendered is of the nature of supplying an introduction a particular act may infer a contract for payment if done by a professional broker, not if done by a private individual.[8] Where goods were supplied by a merchant the Court had no doubt that the recipient was bound to pay for them, and that it lay upon him to prove donation, or that he received the goods in satisfaction of a debt.[9] A different conclusion was arrived at when it was a question of goods sent by one brother to another, neither of them being in trade: the implication was then that donation was intended.[10] Where an employer had made use of a process invented by one of his employees, and, to the employer's knowledge, patented by him, the Lord Ordinary decided that the employer had come under an implied contract to pay for the use of the process. The judges of the Second Division, arriving at the same result, preferred to rest their decision on the principle of recompense.[11]

Where the services are such as would normally support a claim for

[1] *Supra*, p. 26. As to obligations to pay where there is no contract, see Chap. XVIII.
[2] *Taylor* v. *Brewer*, 1813, 1 M. & S. 290.
[3] *Macevers* v. *Rose*, 1761, M. 13435.
[4] *Bulman* v. *Earl of Galloway*, 1766, M. 13435.
[5] *Bell* v. *Ogilvie*, 1863, 2 M. 336; *Landless* v. *Wilson*, 1880, 8 R. 289.
[6] *Macintyre Brothers* v. *Smith*, 1913, S.C. 129.
[7] *Ramsden & Carr* v. *Chessum*, 1913, 30 T.L.R. 68.
[8] *White* v. *Munro*, 1876, 3 R. 1011, per L.J.C. (Moncreiff).
[9] *Hume* v. *Jamieson*, 1677, M. 11508.
[10] *Anderson* v. *Anderson*, 1679, M. 11509.
[11] *Mellor* v. *Beardmore & Co.*, 1927, S.C. 597. It is submitted that the Lord Ordinary's ground of judgment was the correct one. The view taken in the Inner House ignores the rule that a party claiming recompense must shew that he has sustained a loss. See *infra*, p. 322.

payment, or at least lay the onus of proof that no payment was expected on the party who has profited by them, special circumstances may alter that presumption and lay the onus of proof on the party making the claim. Thus where one relative claims wages from another, with whom he or she has been living in family and doing work for which an outsider would certainly be entitled to claim wages, it is a question of the circumstances of each case whether there is a presumption for wages or not.[1] Where the custom of a profession is proved to be not to make a charge in particular circumstances, any charge requires express agreement.[2] Where a law agent had acted for eleven years as secretary of the managing board of a church, and had never made any claim for remuneration, it was held that the inference was that he had agreed to work for nothing, and a claim by his executors was repelled.[3]

Payment for Extra Work. -Where two parties are in contractual relations, as employer and employed, under a contract by which the remuneration of the party employed is expressly fixed, a claim by him for additional payment, on the ground that he has done work falling outside his ordinary duties, and that the employer has come under an implied obligation to pay for it, is extremely difficult to maintain. The authorities establish that an engagement in work of an institorial character, such as that of the factor of an estate, or the manager of a business, does not necessarily exclude a claim for extra work, even if the terms of the engagement are that the employee shall devote his whole time to his duties, but that any such claim requires, in a question of relevancy, very clear averments defining the claimant's general duties in such a way as to exclude the extra services for which he claims to be paid.[4] The most recent opinions would seem to justify the statement that the gradual increase of the duties attached to a post is only a ground for a claim for increased salary, not the basis of an implied obligation for extra payment. And delay in making such a claim will almost necessarily be fatal.[5]

Brokers, Commission Agents. –Where a broker or commission agent has introduced one party to another with a view to business being done between them in a particular line, it has in some cases been proved or admitted to be a custom of trade,[6] in others assumed to be a rule of law,[7] that although no express agreement for payment to the broker may have been made, he is entitled to claim a commission if business is done between the parties whom he has introduced. He is entitled to his commission if his introduction results in a contract, even if that contract may not be implemented.[8] And even where the broker made the introduction with a view

[1] *Anderson* v. *Halley*, 1847, 9 D. 1222; *Thomson* v. *Thomson's Tr.*, 1889, 16 R. 333; *Miller* v. *Miller*, 1898, 25 R. 995; *Urquhart* v. *Urquhart's Tr.*, 1905, 8 F. 42; *Russel* v. *M'Clymont*, 1906, 8 F. 821. The more recent cases negative any such claim where the claimant has been treated as one of the family.

[2] *Corbin* v. *Stewart*, 1911, 28 T.L.R. 99 (doctor attending widow of deceased practitioner).

[3] *Mackersy's Exrs.* v. *St Giles Managing Board*, 1904, 12 S.L.T. 391. See also *Boyes* v. *Waring*, 1822, 1 Sh. App. 121; *Carmichael* v. *Millar*, 1830, 8 S. 783.

[4] *Latham* v. *Edinburgh and Glasgow Rly.*, 1866, 4 M. 1084; *Mackenzie* v. *Baird's Trs.*, 1907, S.C. 838; *Campbell, Rivers & Co.* v. *Beath*, 1824, 3 S. 353; revd. 1826, 2 W. & S. 25 (claim by partners for services to firm).

[5] *Mackison* v. *Burgh of Dundee*, 1909, S.C. 971; affd. 1910, S.C. (H.L.) 27. See also *Rose* v. *Earl of Fife*, 1806, 5 Paton 115.

[6] *Walker, Donald & Co.* v. *Birrell, Stenhouse & Co.*, 1883, 11 R. 369; *Jacobs* v. *Macmillan*, 1894, 21 R. 623; *Dawson Brothers* v. *Fisher*, 1900, 2 F. 941.

[7] *Kennedy* v. *Glass*, 1890, 17 R. 1085; *Walker, Fraser & Steele* v. *Fraser's Trs.*, 1910, S.C. 222.

[8] *Menzies, Bruce, Low & Thomson* v. *M'Lennan*, 1895, 22 R. 299.

to a particular transaction, under a definite arrangement as to the commission he was to receive, and that particular transaction was not carried out, he has been found entitled to a commission if the parties entered into a subsequent transaction substantially the same as that which he had suggested, provided that the subsequent transaction was in a reasonable sense due to his introduction.[1] In *Walker, Fraser & Steele* v. *Fraser's Trs.*, an estate agent was employed by *A.* to find a purchaser for his estate. Particulars of the estate were sent to *B.*, who was also a client of the estate agent, but no offer was received from him. Subsequently *B.*, in response to an advertisement, received particulars from *A.* of the estate in question, and, the price being now reduced, purchased it, without any further intervention on the part of the estate agent. It was held that the latter was entitled to a commission, on the ground, as put by Lord Dundas, that he had contributed to a sufficient degree to the ultimate purchase of the estate.[2] In *Walker, Donald & Co.* v. *Birrell, Stenhouse & Co.*[3] a shipbroker introduced *A.* as a possible buyer to a shipbuilder, the transaction then in view being that twin ships were to be ordered, one for the broker himself, the other for *A.* It was part of this proposal that the shipbuilder should not be liable for any commission to the broker. The negotiations for this transaction were abandoned. Subsequently *A.* ordered from the shipbuilder a ship substantially the same as that which had previously been considered. The broker, though he had not intervened in this sale, was held to be entitled to a commission. The principle laid down was that a mere introduction *primâ facie* implied an obligation to pay a commission, and that the original agreement that there was to be none was applicable only to the original and abortive proposal.

In *Van Laun* v. *Neilson, Reid & Co.* the pursuer, a commission agent, averred that he had approached three firms (all of which were well known to each other) with a view to arranging for their amalgamation, that they had agreed to enter into a formal contract with him, placing the amalgamation in his hands, that they had refused to execute this contract, but had subsequently, and without his assistance, carried through an amalgamation. He claimed a commission ultimately upon the ground that his services had in effect resulted in the amalgamation. His case was held to be irrelevant. The prior case was distinguished, partly on the ground that he did not aver that he had effected any introduction, partly on the ground that a claim for payment *quantum meruit* must rest on an implied contract, and that the pursuer's averment merely amounted to an agreement for a contract to be

[1] *Moss* v. *Cunliffe & Dunlop*, 1875, 2 R. 657 (doubted by Lord Shaw in *Brett & Co.* v. *Bow's Emporium*, 1928, S.C. (H.L.) 19); *White* v. *Munro*, 1876, 3 R. 1011; *Robertson* v. *Burrell*, 1899, 6 S.L.T. 368; *Gibb* v. *Bennett*, 1906, 14 S.L.T. 64; cases in two following notes. For English cases on commissions to shipbrokers, see M'Lachlan, *Shipping*, 6th ed., p. 138.

[2] *Walker, Fraser & Steele* v. *Fraser's Trs.*, 1910, S.C. 222. In England it has been laid down that an estate agent is not entitled to commission unless he has been the *causa causans*, not merely the *causa sine qua non*, of the ultimate sale, a rule which would seem to lay a heavier onus on the agent: *Millar* v. *Radford*, 1903, 19 T.L.R. 575; *Nightingale* v. *Parsons* [1914], 2 K.B. 621.

[3] 1883, 11 R. 369. In *Howard, Houlder & Co.* v. *Manx Isles Co.* [1923], 1 K.B. 110, a contract provided for a commission to a shipbroker, in the event of the sale of the ship to the charterer for £125,000. The owner, without the broker's intervention, subsequently sold her to the charterer for £65,000. M'Cardie, J., held that the broker had no claim to the commission provided for, because the sale for £125,000 had not been effected. He held further, and on the principle *expressum facit cessare tacitum*, that the broker had no claim *quantum meruit*. The writer would not venture to say whether this is in accordance with the prior English authorities; it is clearly inconsistent with the Scotch.

executed in future, an agreement from which the defenders were entitled to resile.[1]

Amount of Implied Payment. When services are rendered under circumstances which satisfy the Court that there was no intention on either side that they should be rendered gratuitously, the amount to be paid may be fixed by custom of trade, if any custom can be shown to exist; if not, it is for the Court, acting as a jury, to fix a reasonable remuneration. Thus while the charges of a law agent for ordinary work fall to be regulated by the Table of Fees, exceptional work, such as that involved in the formation of a company, leaves it to the Court to fix the fee on consideration of what would be a reasonable charge for work of that particular kind.[2] Where a mineral searcher was employed to make secret researches as to the minerals on properties which did not belong to his employer, it was held that his remuneration was to be fixed on an estimate of the value of the services rendered; that evidence of the value of the pursuer's time was not properly relevant; and that an obligation for an annual sum for expenses could not be inferred in an employment so exceptional.[3]

(2) *Implied Obligation to Furnish Work*

Employment on Commission.—In contracts whereby an agent is employed there may or may not be an implied obligation on the employer to continue his business and thus afford employment to the agent. The same question is raised in contracts for the disposal of the bye-products of a manufactory.[4] If the contract is not for any fixed period, there is clearly no such implied obligation.[5] On the other hand, if the period of engagement is fixed, and the agent is to be paid by salary, no implication is necessary; there is a definite obligation for a fixed period, and it is not to be implied that the employer may terminate it by giving up his business.[6] There is more difficulty when the contract is for a definite period but payment is to be by commission and not by salary. Then, if there is nothing in the contract which can be read as amounting to an obligation to supply work or goods on which the agent may earn his commission—in other words, if the agent takes his chance of getting any work at all—it may probably be regarded as settled that the Court will not imply any obligation on the employer to continue his business, and therefore that he commits no breach of contract should he discontinue or sell it. In *Rhodes* v. *Forwood*,[7] probably the leading case, a contract provided that *R.* should be the sole agent at Liverpool for the sale

[1] *Van Laun* v. *Neilson, Reid & Co.*, 1904, 6 F. 644. It has, however, been laid down by Lord Shaw that an introduction, in the sense of bringing parties together who were previously unaware of each other's existence, is not a necessary element in the broker's claim. "All that is meant is that the agent shall have been the means of bringing a willing seller and a willing buyer into relation with each other in regard to a business transaction, and that a business transaction results." *Brett & Co.* v. *Bow's Emporium*, 1928, S.C. (H.L.) 19. Lord Shaw does not refer to *Van Laun* v. *Neilson, Reid & Co.*, which presumably was cited.

[2] *Brownlie, Watson & Beckett* v. *Caledonian Rly.*, 1907, S.C. 617; *Welsh & Forbes* v. *Johnston*, 1906, 8 F. 453.

[3] *Pinkerton* v. *Addie*, 1864, 2 M. 1270. See also *Kennedy* v. *Glass*, 1890, 17 R. 1085.

[4] *Hamlyn* v. *Wood* [1891], 2 Q.B. 488.

[5] *London, Leith, etc., Shipping Co.* v. *Ferguson*, 1850, 13 D. 51; *Galbraith & Moorhead* v. *Arethusa Shipping Co.*, 1896, 23 R. 1011, opinion of Lord President Robertson.

[6] *Ross* v. *Macfarlane*, 1894, 21 R. 396; *Day* v. *Tait*, 1900, 8 S.L.T. 40; *ex parte Maclure*, 1870, L.R. 5 Ch. 737; *Rubel Bronze, etc., Co.* v. *Vos* [1918], 1 K.B. 315.

1876, 1 App. Cas. 256.

of coals from *F.'s* colliery for a period of seven years. *R.* undertook not to sell coals from any other colliery. It was admitted that *F.* had undertaken no obligation, express or implied, to send any coals to Liverpool. The colliery was sold within the seven years, and *R.* sued for damages, on the ground that it was an implied term of the contract that *F.* should not by any voluntary act preclude himself from furnishing coals on which *R.* might earn his commission. It was decided that there was no ground on which such an obligation could be inferred. So in Scotland it was held that there was no implied obligation of continuance where *A.* had agreed to work a ship which *B.* had ordered, for a period of ten years;[1] nor where *A.* was appointed agent for the sale of leather for five years, and his employer discontinued his leather business.[2] A series of English cases,[3] culminating in *French* v. *Leeston Shipping Co.*,[4] have illustrated the same rule. There a broker who had negotiated a charter-party for eighteen months was to be paid by a commission on the monthly hire. It was held that he had no remedy when the ship was sold to the charterers (thus ending the charter-party) while the contract had still fourteen months to run. The Court declined to imply an obligation not to sell the ship during the currency of the charter-party. The question whether the broker could have any remedy on proof that the ship had been sold merely to escape payment of his commission was expressly reserved, and has not been decided.

A different rule has been applied when the contract binds the employer to furnish the agent with the means of earning a commission, or to execute orders which the agent may procure. There is then an implied obligation on the employer not to end his business by any voluntary act. In *Turner* v. *Goldsmith*,[5] a manufacturer agreed to "employ" an agent for the sale of his goods on commission. The contract was for five years. After two years the factory was destroyed by fire, and the manufacturer gave up his business. It was decided that he was in breach of contract and liable in damages to the agent. The Court read the agreement to "employ" the agent as amounting to an agreement to furnish the agent with samples, in the words of Lindley, L.J., "to a reasonable extent,"[6] and on this ground distinguished *Rhodes* v. *Forwood*,[7] where the word "employ" had not been used. A clearer case is *Reigate* v. *Union Manufacturing Co.* A company appointed an agent for seven years. He was to receive a commission on any orders he might obtain. These orders were to be submitted to the directors, who were not to refuse to execute them unless there was a reasonable objection. The company became insolvent, went into voluntary liquidation, and ceased to carry on business. The agent successfully maintained a claim for damages, on the ground that there was an obligation to execute any orders he might obtain,

[1] *State of California Co.* v. *Moore*, 1895, 22 R. 562.

[2] *Patmore & Co.* v. *Cannon*, 1892, 19 R. 1004.

[3] *Hamlyn* v. *Wood* [1891], 2 Q.B. 488; *Lazarus* v. *Cairn Line*, 1912, 17 Com. Cases 107, see statement of the law by Scrutton, J.; *in re Newman, Raphael's Claim* [1916], 2 Ch. 309; *Rubel Bronze, etc., Co.* v. *Vos* [1918], 1 K.B. 315.

[4] [1922], 1 A.C. 451, followed, with admitted reluctance, by M'Cardie, J., in *Howard, Houlder & Co.* v. *Manx Isles Co.* [1923], 1 K.B. 110.

[5] [1891], 1 Q.B. 544. The contention that the destruction of the factory amounted to *rei interitus*, and discharged the contract, was unsuccessful, on the ground that the agent's engagement was not limited to goods manufactured by the employer. The latter could, it was decided, have fulfilled his contract by purchasing the goods.

[6] Lindley, L.J., did not find it necessary to give any exact numerical or financial meaning to the word "reasonable." Could an advocate not be said to "employ" his clerk, without undertaking that he will enjoy a "reasonable" practice?

[7] 1876, 1 App. Cas. 256.

and that this implied an obligation not voluntarily to give up the business during the currency of the agency.[1]

Devonald v. *Rosser*,[2] a somewhat exceptional case, may be noticed separately. The terms of a workman's engagement were that twenty-eight days' notice was to be given on either side before the contract was terminated. The employers discontinued their business, gave notice, and maintained that they were under no obligation to the workman during the twenty-eight days. It was held that this contention, involving, as it did, that the workman remained bound while the employers were free, could not be supported, and that the employers were liable for the amount that the workman would have earned during the period of notice.

Payment for Future Dealings.—If a man has been paid in advance for his future dealings he cannot deprive the other party of what he has paid for by ceasing to carry on business. Where the goodwill of a medical practice was sold on an arrangement whereby the seller was to receive a percentage on the purchaser's earnings for the next four years, a contract to continue the practice for that period was inferred.[3] In *Ogdens Ltd.* v. *Nelson*,[4] wholesale dealers undertook to distribute their whole net profits for the next four years among retail dealers, provided that the latter would abstain from dealing with their rivals. During the currency of the four years they went into voluntary liquidation, sold their business, and therefore had no profits to distribute. It was held that they were liable in damages to a retail dealer who had agreed to their terms and had abstained from dealing with rivals. They had practically been paid in advance for a share of their profits, and this implied an obligation to do no voluntary act to prevent those profits accruing. Where an agent, as a condition of his appointment, agrees to take shares in the employers' company, or to advance capital, the fact is a strong ground for the inference that the appointment, even though no term be fixed, cannot be terminated merely by giving notice.[5]

(3) *Rule that a Man must not Derogate from his Own Grant*

General Rule.—The cases on the implied obligation to furnish work may be regarded as illustrations of the general rule that when a man has conveyed property, or made a grant in any form, for onerous causes, he comes under an implied obligation not to do anything to diminish the advantage which the grantee may reasonably expect to acquire: an obligation which may affect the grantor's conduct in the future, or his dealings with his remaining property. The rule is expressed in the maxim that a man must not derogate from his own grant. Thus the transferror of shares who, in answer to the notice sent by the company, states untenable objections to the registration of the transferee, is liable in damages if loss to the transferee results: he is

[1] *Reigate* v. *Union Manufacturing Co.* [1918], 1 K.B. 592. The possibility that in the existing state of trade the agent might fail to obtain any orders which the directors could not reasonably refuse was, it was pointed out, merely an element in the question of the amount of damages.

[2] [1906], 2 K.B. 728.

[3] *Macintyre* v. *Belcher*, 1863, 14 C.B. (N.S.) 654, 135 R.R. 860; approved in *Rhodes* v. *Forwood*, 1876, 1 App. Cas. 256. See also *Telegraph Despatch, etc., Co.* v. *M'Lean*, 1873, L.R. 8 Ch. 658.

[4] [1905], A.C. 109. See [1904], 2 K.B. 410. The point in question was not disputed in the H.L.

[5] *Galbraith & Moorhead* v. *Arethusa Shipping Co.*, 1896, 23 R. 1011. See conflicting opinions as to the weight to be attached to the agent's investment in *Reigate* v. *Union Manufacturing Co.* [1918], 1 K.B. 592.

in breach of the implied term in his contract that he will not interfere with the rights which his transfer has conferred.[1] But the rule is one to be applied with great limitations, and the cases on its application to leases and to contracts for the sale of the goodwill of a business shew that the reasonable expectations of the lessee or purchaser are very narrowly construed.[2]

Leases.—In leases, the right of the tenant to immunity from any physical interference with the subjects may be rested on express or implied warrandice without resorting to the implication that the landlord must not derogate from his own grant.[3] And on the authorities in Scotland it is doubtful whether that principle gives the tenant any right in cases where there is no actual physical interference. From an almost unanimous decision of the whole Court [4] it may be taken as settled that a landlord who has let subjects for the purpose of carrying on a particular trade has come under no implied obligation not to use, or let, his remaining property for a business in competition with that of the tenant. It is true that certain *dicta* [5] to the effect that in questions of interference with the tenant's enjoyment of the subjects, the landlord is in the same position as any other neighbour, have been disapproved by Lord President Dunedin.[6] But it is difficult to specify any aggression from which the tenant, not already shielded by the law of neighbourhood, may be protected on the ground that the aggressor is his landlord. He cannot maintain that the landlord has impliedly undertaken not to use his remaining property in a manner destructive of the object for which the subjects were let,[7] or to refrain from building so as to shut out the tenant's light and air.[8] In *Huber* v. *Ross*, *R.* let the upper flat of his house to *H.* for the express purpose of carrying on business as a photographer. He subsequently made alterations on the lower flats, and these, though carried out with all reasonable care, involved injury to the flat let to *H.*, and to his business as a photographer. *R.* did not dispute his liability for the expense of repairing the structural injury, and the Court had no difficulty in holding that he was also liable for injury to the tenant's business while the repairs were being carried on. The critical point was the injury to business which had been caused during the alterations. The majority of the

[1] *Hooper* v. *Herts* [1906], 1 Ch. 549.

[2] As to the application of the principle in the law of the constitution of a servitude by implied grant, or of a right of support for buildings, where other considerations besides the implication from contract are involved, see Rankine, *Land-Ownership*, 4th ed., 430.

[3] *Shawsrigg Fireclay Co.* v. *Larkhall Collieries*, 1903, 5 F. 1131; a mineral field contained both coal and fireclay. An unqualified lease of the fireclay was granted. It was proved that coal could not be worked without serious interference with the working of the fireclay. The right of the tenant of the fireclay to prevent the landlord, or subsequent lessee from him, working the coal, was rested both on the warrandice clause in the lease and on the principle that the landlord could not derogate from his own grant.

[4] *Craig* v. *Millar*, 1888, 15 R. 1005, dissenting Lord Lee, distinguishing, and practically overruling, *Campbell* v. *Watt*, 1795, Hume, 788. See also *Dare* v. *Bognor Urban Council*, 1912, 28 T.L.R. 489.

[5] *Laurent* v. *Lord Advocate*, 1869, 7 M. 607, opinion of Lord Kinloch.

[6] *Huber* v. *Ross*, 1912, S.C. 898, at p. 908.

[7] *Ibid.*, per Lord President Dunedin, at p. 911. "I think the landlord would be entitled, according to the law of Scotland—although he knew from the beginning that the house which he had let was to be used for the purpose of a nursing home—to let the house which he retained, even if it were next door to it, as a manufactory . . . or anything else that he chose, which was so conducted as not to be a nuisance at common law."

[8] *Ibid.*, pp. 909, 910. It is conceived that Lord Dunedin's opinion, on a point on which as he says there is no prior authority, is not necessarily final. The analogy of the rule that a negative servitude cannot be constituted by implied grant is not exact. It is founded on the principle that latent burdens on land are undesirable; a principle which applies with much greater force to the permanent burden involved in a servitude than to the temporary right of a lessee.

Court held that *R.* was liable for that injury, on the ground that he was not entitled to derogate from his own grant, but only in so far as that injury was physical or tangible (caused, for instance, by vibration or dust), not for the loss of custom due to the fact that the entrance was partially blocked and that the noise and inconvenience had acted as a deterrent to customers. Lord Johnston, dissenting, was of opinion that injury of this latter kind was covered.[1]

In England, the principle that a landlord must not derogate from his own grant has been more widely applied. A landlord who has let premises for the purpose of carrying on a particular trade is bound not to use his other property, either personally or through the agency of a subsequent tenant, so as to interfere with the method in which that trade is ordinarily carried on,[2] though if the tenant desires protection for any exceptional use he must stipulate for it expressly.[3] Thus where the particular trade required a free current of air the tenant could object to buildings which interfered with it ;[4] where moorland was let for the purpose of making explosives—which is lawful only on condition that there are no buildings within a certain radius—an obligation not to erect any buildings within the statutory limit was implied.[5] But where subjects were subsequently let for a purpose not necessarily injurious to the first tenant it was held that there was no implied obligation on the landlord to supervise the second tenant's proceedings, and consequently no liability when these proceedings amounted to a nuisance.[6]

Sales of Goodwill.—Where the goodwill of a business is sold, and the limitations to be imposed on the subsequent action of the seller are not settled by express contract, it is decided that the doctrine that a man must not derogate from his own grant does not go the length of imposing on him any implied obligation not to set up in the same business and in the same locality.[7] And he cannot be prevented from using his own name, though that was the name of the business which he has sold,[8] except possibly on proof of a fraudulent intention to pass himself off as still carrying on his original business.[9] But the seller of goodwill is not entitled to use the firm

[1] *Huber* v. *Ross*, 1912, S.C. 898. Professor Rankine states (*Leases*, 3rd ed., p. 219, note 1) that the principle of *Huber* v. *Ross* was foreshadowed in *Alexander* v. *Couper*, 1840, 3 D. 249, and *Blanc* v. *Greig*, 1856, 18 D. 1315. On the contrary, both cases lend strong support to the view taken by Lord Johnston. In the former, premises were let as a lawyer's office, with access by a common stair. It was held that the tenant could prevent the landlord opening a new door in the stair, in order to make it available for the use of printing works. The decision was based on the loss of the privacy which the tenant had the right to expect, not on any physical injury either to his office or to the stair as an access. In *Blanc* v. *Greig* it was held that the tenant was entitled to object to an ornamental front protruding from the flat below (which belonged to the same landlord), simply on the ground that her chance of gaining custom would be diminished.

[2] *Aldin* v. *Latimer, Clark, Muirhead & Co.* [1894], 2 Ch. 437 ; *Browne* v. *Flower* [1911], 1 Ch. 219 ; *Harmer* v. *Jumbil Tin Areas* [1921], 1 Ch. 200 ; *O'Cedar Ltd.* v. *Slough Trading Co.* [1927], 2 K.B. 123.

[3] *Robinson* v. *Kilvert*, 1889, 41 Ch. D. 88.

[4] *Aldin* v. *Latimer, Clark, Muirhead & Co.* [1894], 2 Ch. 437.

[5] *Harmer* v. *Jumbil Tin Areas* [1921], 1 Ch. 200.

[6] *Malzy* v. *Eichholz* [1916], 2 K.B. 308. See also *Gardner* v. *Walker*, 1862, 24 D. 1430.

[7] *Dumbarton Steamboat Co.* v. *Macfarlane*, 1899, 1 F. 993. In *Trego* v. *Hunt*, 1896, A.C. 7, opinions were expressed that this rule was much to be regretted, but too well settled to be disturbed.

[8] *Melrose-Drover* v. *Heddle*, 1902, 4 F. 1120 ; *Smith* v. *Macbride & Smith*, 1888, 16 R. 36. Where a party assumed a name, using it both privately and as her business designation, and sold her business, she was restrained from setting up again in the assumed name. *Pomeroy Ltd.* v. *Scale*, 1906, 24 R.P.C. 177.

[9] *Hommel* v. *Hommel*, 1912, 29 R.P.C. 398.

name, if that differs in any way from his own,[1] nor to canvass or solicit orders from his former customers,[2] though he is under no obligation to refuse to deal with them if they offer him their business without solicitation on his part.[3] In *Trego* v. *Hunt*[4] a deed of partnership between *A.* and *B.* provided that on the expiry of the partnership the goodwill of the business should belong to *A.* Shortly before the expiry of the term *B.* employed a clerk to copy out the names of the customers, with the avowed intention of setting up in the same business and using the list of names for canvassing purposes. It was held that *A.* was entitled to an injunction. For all practical purposes the case was the same as if *B.* had sold the goodwill of the business to *A.*, in which case he undertakes impliedly not to canvass the customers.

Implied Grant of Servitude Rights.—The rule that a man must not derogate from his own grant has been applied in cases where a portion of a property has been conveyed, and it is maintained, either that the grantor is impliedly restricted in the use of the property which he retains, or that he may exercise rights, not expressly reserved, over the portion which he has conveyed. It may be regarded as settled that these two cases raise separate considerations.[5] Where a grantor maintains that he has some right over the property which he has conveyed he must shew that it is a right without which the property which he retains would be absolutely useless. Thus he may be held to have retained impliedly a right of access through the property which he has conveyed, but only if that right is absolutely necessary, not merely because it is convenient, and as a matter of fact was exercised before the properties were severed.[6] He derogates from his own grant if he asserts any restriction on the property which he has conveyed, which he has not expressly reserved, and which is not necessary for the property which he retains.[7]

Where a restriction on the property retained is claimed by the owner of the property disponed, where, in the language of servitude, that property is the dominant tenement, the general rule has been laid down that "anything which was used, and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant."[8] So when the owner of a tanyard and garden constructed a drain leading to a cesspool in the garden, and then sold the tanyard, he was not entitled to interfere with the drain, though it was observed that its

[1] *Melrose-Drover* v. *Heddle*, 1902, 4 F. 1120; *Churton* v. *Douglas*, 1859, Johnston 174, 123 R.R. 56. The principle that the law will protect the right of trade-name is also involved, so that the same restriction is imposed when the business is sold by a trustee in bankruptcy. *Melrose-Drover* v. *Heddle*, *supra*.

[2] *Trego* v. *Hunt* [1896], A.C. 7; *in re David & Matthews* [1899], 1 Ch. 378; *Boorn* v. *Wickes* [1927], 1 Ch. 667. See interlocutor in *Dumbarton Steamboat Co.* v. *Macfarlane*, 1899, 1 F. 993. This rule rests solely on implied obligation, and does not hold where the business is sold by a trustee in bankruptcy. *Walker* v. *Mottram*, 1881, 19 Ch. D. 355; *Farey* v. *Cooper* [1927], 2 K.B. 384.

[3] *Curl Brothers* v. *Webster* [1904], 1 Ch. 685.

[4] [1896], A.C. 7.

[5] *Wheeldon* v. *Burrows*, 1878, 12 Ch. D. 31, approved, as in principle applicable to Scots law, *Union Heritable Securities Co.* v. *Mathie*, 1886, 13 R. 670; *Shearer* v. *Peddie*, 1899, 1 F. 1201.

[6] *Wheeldon* v. *Burrows*, *supra*; *Shearer* v. *Peddie*, *supra*; *Union Lighterage Co.* v. *London Dock Graving Co.* [1902], 2 Ch. 557; *Ray* v. *Hazeldine* [1904], 2 Ch. 17.

[7] There may be an exception to the general rule where it is admitted or proved that restrictions on the disponee's property were contemplated by both parties at the date of the severance. So it has been laid down that "if *B.* takes a plot from *A.*, he may not act so as to frustrate the purpose for which, in the knowledge of both parties, the adjoining plot remaining in *A.'s* hands was destined." Lord Loreburn in *Lyttelton Times Co.* v. *Warner* [1907], A.C. 476. And see *Cory* v. *Davies* [1923], 2 Ch. 95.

[8] Per Lord Chancellor Campbell, *Ewart* v. *Cochrane*, 1861, 4 Macq. 117, 121.

existence was not absolutely necessary for the use of the tanyard.[1] Rights of access, convenient though not indispensable, and in use before the severance, are impliedly conveyed.[2] It has been stated to be a necessary condition for the application of this rule that the access, or other accommodation, should have been in use before the properties were severed.[3] The fact that certain rights, of the nature of servitudes, are expressly granted, does not negative the implication of others.[4] Probably the same rules apply where a proprietor sells two adjacent properties at the same time, and one of the purchasers claims to exercise over the property of the other some right not expressly conferred but which his property had in fact enjoyed before the severance.[5] But the case for implication of a right is much less strong when a party purchases land adjoining his own. The inference will then be that he buys in reliance on an access through his own property; to entitle him to an access through property retained by the seller he must set forth a case amounting to necessity.[6]

The general principle that the party who purchases a portion of a property is entitled to the uses over the remainder which existed at the date of severance is limited, in Scots law, by the rule that a negative servitude cannot be constituted except by express grant.[7] Therefore, at least if the question is with singular successors, he acquires no right to immunity from interference with the light and air which reached his property before severance.[8] So where the owner of several houses, with portions of land attached to each, sold one of them, the purchaser acquired no right to object to the owner of the remaining houses (a singular successor) building *in suo* so as to obstruct the light reaching his windows.[9] And the fact that a superior, in feuing, has approved the vassal's building plans, does not entitle the latter to prevent a subsequent feuar erecting a building which will exclude the light from his back windows.[10]

Subject to the rule, when and in so far as it is applicable, that a negative servitude cannot be constituted except by express grant, the general principle, in the conveyance of land, is expressed in the brocard *lex est cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit*.[11] The conveyance of land for a particular purpose involves a grant of everything essential to that purpose, and an obligation by the grantor to abstain from

[1] *Ewart* v. *Cochrane*, *supra*, p. 299, note 8.

[2] *Walton Brothers* v. *Magistrates of Glasgow*, 1876, 3 R. 1130; *Union Heritable Securities Co.* v. *Mathie*, 1886, 13 R. 670. Not if the access was, in the words of Lord Neaves, a "superfluous luxury." *Gow's Trs.* v. *Mealls*, 1875, 2 R. 729.

[3] *Shearer* v. *Peddie*, 1899, 1 F. 1201, per Lord Kinnear.

[4] *Cory* v. *Davies* [1923], 2 Ch. 95.

[5] *Allen* v. *Taylor*, 1880, 16 Ch. D. 355; *Hansford* v. *Jago* [1921], 1 Ch. 322.

[6] *M'Laren* v. *City of Glasgow Union Rly.*, 1878, 5 R. 1042, at p. 1048; *Cullens* v. *Cambusbarron Co-operative Society*, 1895, 23 R. 209; *Aldridge* v. *Wright* [1929], 1 K.B. 381.

[7] Stair, ii. 7, 9; Ersk. ii. 9, 35; *Dundas* v. *Blair*, 1886, 13 R. 759; cases in note 9. See opinion of Lord Pres. Dunedin in *Huber* v. *Ross*, 1912, S.C. 898, contrasting Scots and English law.

[8] All the cases have raised questions with singular successors; it may still be open for decision whether a party who has conveyed a house, or feued for the purpose of building one, is entitled to build so as to block its windows. The opinion of Lord Pres. Dunedin, in *Huber* v. *Ross* (1912), S.C. 898, at p. 911, certainly suggests an answer in the affirmative. But the argument that building restrictions would be unnecessary if the law implied a restraint on the disponer or superior is not convincing, because building restrictions bind singular successors.

[9] *Inglis* v. *Clark*, 1901, 4 F. 288; *Metcalfe* v. *Purdon*, 1902, 4 F. 507; *Heron* v. *Gray*, 1880, 8 R. 155, is either overruled or treated as a special case dependent on the law of the tenement.

[10] *King* v. *Barnekin*, 1896, 24 R. 81.

[11] Broom, *Legal Maxims*, 9th ed., 307. See opinion of Lord Parker in *Pwllbach Colliery Co.* v. *Woodman* [1915], A.C. 634.

any act on adjoining property by which that purpose would be defeated.[1] So a conveyance for the purpose of making a railway involves right of support from the disponer's subjacent and adjacent lands,[2] a right which is available in a question with his singular successors.[3] An express reservation of minerals is to be construed as a right to work them in so far as may be consistent with the implied right of support.[4] An express, or statutory, grant of a wayleave for a water pipe raises the same implications.[5] Where minerals are conveyed or reserved, a right to work them through the surface, if necessary, is implied.[6] But a sale or lease for the purpose of carrying a particular business does not legalise an act which amounts to a nuisance and affects other property belonging to the seller or lessor,[7] in the absence of proof that if the nuisance were not committed the business could not be carried on.[8]

(4) *Implications as to Duration of a Contract*

Rule of Reasonable Notice.—When contracts are entered into without any express provision as to their duration the normal construction is that they are terminable by either party either at pleasure or on giving reasonable notice.[9] So an ordinary contract of service, if not expressed to be for any particular period, may be terminated by either party on giving the notice usual in that particular class of employment ;[10] a partnership, if entered into for no definite time, is dissolved by any partner giving notice to the others of his intention to dissolve the partnership.[11] A lease, where the period of endurance is not provided for, is, in the absence of any term or circumstance from which a different agreement between the parties in the particular case may be inferred, construed as subject to the general implication that it is for a period not exceeding one year.[12] A guarantee for advances to be made, or for goods to be supplied, in the future, may be revoked as regards any dealings not yet entered into ;[13] it is not revocable when it is acted on once and for all, as in the case of a guarantee on the admission of a party as an underwriter,[14] or a guarantee to a landlord for the rent under a lease.[15] The guarantor for the fidelity of an agent, where the agency is not for any fixed period, may withdraw on giving reasonable notice.[16] The cautioner for a debt, while of course conclusively bound in a question with the creditor, has the right to insist that the debtor shall relieve him of his liability, either by

[1] As to the general obligation to fulfil potestative conditions, see *supra*, p. 276.

[2] *Caledonian Rly.* v. *Sprot*, 1856, 2 Macq. 449. For the limitation of this rule involved in the construction of sections 70 and 71 of the Railway Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), see Deas on *Railways*, 2nd ed., 190.

[3] *North British Rly.* v. *Turners Ltd.*, 1904, 6 F. 900.

[4] *Caledonian Rly.* v. *Sprot*, *supra*.

[5] *Clippens Oil Co.* v. *Edinburgh Water Trustees*, 1900, 3 F. 156 ; affd. 1903, 6 F. (H.L.) 7.

[6] *Ramsay* v. *Blair*, 1876, 3 R. (H.L.) 41, per Lord Chelmsford, at p. 42.

[7] *Pullbach Colliery Co.* v. *Woodman* [1915], A.C. 634.

[8] *Balds* v. *Alloa Colliery Co.*, 1854, 16 D. 870.

[9] On the question whether and what notice is necessary, see *infra*, Chap. XXXIX. ; and Index *voce* Notice. "Where there is no term stated the general rule is that either party may put an end to it, not on reasonable cause shewn, but on reasonable notice." Per Lord President Inglis, *Fifeshire Road Trustees* v. *Cowdenbeath Coal Co.*, 1883, 11 R. 18, at p. 21.

[10] Bell, *Prin.*, sec. 174.

[11] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 32.

[12] Stair ii. 9, 16 ; Bell, *Prin.*, sec. 1194.

[13] Bell, *Prin.*, sec. 266. The point was assumed rather than decided in *Cochrane* v. *Mathie*, 1820, Hume, 115, and *British Linen Co.* v. *Monteith*, 1858, 20 D. 557.

[14] *Lloyds* v. *Harper*, 1880, 16 Ch. D. 290.

[15] Bell, *Prin.*, sec. 266 ; Rankine, *Leases*, 3rd ed., 414.

[16] *Taylor* v. *Adie*, 1818, Hume, 114 ; *Kinloch* v. *M'Intosh*, 1822, 1 S. 491.

procuring his discharge or by paying the debt. He must, however, give the debtor a reasonable time to fulfil this obligation.[1] Where a party was appointed agent for the sale of a patented article it was held that there was no implication that the appointment would last as long as the patent: it was revocable on reasonable notice.[2] An agreement by employers to give a workman "regular employment as a foreman" did not bind them to employ him so long as he was willing to work, but was revocable at their pleasure.[3] Where the lessee of a mine let the water which he pumped (at that time running to waste) to a manufacturer at an annual rent, the arrangement to subsist as long as the lessee continued to pump, the decision was that this was a lease without an ish, which the manufacturers were free to terminate when they ceased to require the water.[4]

Inference of Permanency.—Cases of this kind, however, are not reducible to any general rule. It may be inferred from the terms of the contract that it was intended to be permanent. That will be the inference if there was anything of the nature of prepayment.[5] If not, it would seem irrelevant for the party maintaining that the agreement was permanent to aver that he had incurred expense in reliance on that view; he must show that from the nature of the contract he was entitled to regard it as permanent.[6] Such a construction has been put upon the lease of one railway to another;[7] upon an agreement whereby road trustees sanctioned the construction of a level crossing for a private line.[8] Where, however, a company, under its private Act, was bound to supply a local authority with gas, the Court inferred from the terms of the statute, and in particular from the fact that the authority was under no obligation to take any particular quantity, that the agreement might be determined on reasonable notice by either party. It was observed that the fact that both parties were permanent bodies was not, under modern conditions, a point of any importance in solving the question of implied duration.[9]

(5) *Implied Limitations of Discretionary Powers*

Where one party to a contract is vested with a discretionary power, in terms apparently unqualified, it would seem to be a question to which no general answer can be given whether the power will be construed according to the literal meaning of the words, or qualified by the implication that the party vested with it must regard himself as bound to decide in a quasi-judicial or fiduciary capacity.

Leases.—In leases, it is established that if the lease is declared not to be assignable without the landlord's consent, his power to accept or refuse an assignee is quite absolute, and averments that his refusal is arbitrary or fraudulent are irrelevant and meaningless.[10] Where a break in the lease is

[1] *Doig* v. *Lawrie*, 1903, 5 F. 295.
[2] *Stewart* v. *Rendall*, 1899, 1 F. 1002.
[3] *Lawrie* v. *Brown*, 1908, S.C. 705.
[4] *Dunlop* v. *Steel Co. of Scotland*, 1879, 7 R. 283.
[5] *Supra*, p. 296.
[6] *Stewart* v. *Rendall*, 1899, 1 F. 1002.
[7] *Llanelly Rly. and Dock Co.* v. *L. & N.W. Rly.*, 1875, L.R. 5 H.L. 550.
[8] *Lanarkshire Road Trs.* v. *Lord Belhaven's Trs.*, 1891, 18 R. 949. See *Fifeshire Road Trs.* v. *Cowdenbeath Coal Co.*, 1883, 11 R. 18, when there was an express provision as to the power to end the agreement.
[9] *Crediton Gas Co.* v. *Crediton Urban Council* [1928], 1 Ch. 447.
[10] Bell, *Com.*, i. 74; Rankine, *Leases*, 3rd ed., p. 177; *Muir* v. *Wilson*, 20th January 1820, F.C.; *Duke of Portland* v. *Baird & Co.*, 1865, 4 M. 10; *Marquis of Breadalbane* v. *Whitehead*, 1893, 21 R. 138. As to the construction of a provision, common in English leases, that the landlord's consent will not be unreasonably withheld, see *Treloar* v. *Bigge*, 1874, L.R. 9 Ex.

provided, it has never been suggested that the motive of either party in taking advantage of it could be questioned. But powers to terminate the lease raise a more doubtful question. In a case where such a power was reserved if the landlord was dissatisfied with the working of the minerals;[1] in another where it was provided if the tenant was, in the landlord's opinion, endangering the licence,[2] while it was held that the landlord was not bound to give reasons for his decision, opinions were expressed that averments of *mala fides*, to the effect that the landlord, for ulterior motives, was expressing opinions which he did not hold, would be relevant. In *Montgomerie* v. *Carrick*[3] a mineral lease contained the clause "if any other pits should be required than the two already in part sunk, then the tacksman shall have power to sink another pit . . . but only in such a situation as shall have been previously approved of in writing by" the landlord. Though it was not necessary to decide the point, opinions were expressed that this clause did not give the landlord an absolute veto on the sinking on new pits. The landlord, if he refused to assent to any situation proposed for a new pit, was bound to give his reasons, and the question whether his refusal was justified was one for an arbiter under an arbitration clause provided in the lease. The most recent authority is in favour of the view that if a landlord's consent is necessary to a particular act he is entitled to refuse to consent if he please. A tenant undertook to insure "in the Law Fire Office or in some other responsible insurance office to be approved by the lessor." It was held that the landlord could insist on the control he had thus acquired, whether his reason—that he desired all his tenants to be insured in the same office—was or was not adequate.[4]

Service.—In a contract of service it was provided that the master should be entitled to dismiss the servant without notice "should you be guilty of such misconduct as I consider justifies it." Following the cases on leases the Lord Ordinary held that the master was not bound to give reasons for dismissal, and that if he did give them the Court would not consider whether they were sufficient or not. The question whether averments of fraud would be sufficient was not decided.[5]

Partnership.—In cases of partnership the law—not illustrated by any Scotch decision—seems to be doubtful. In *Russell* v. *Russell*[6] one of two partners reserved power to dissolve the partnership if the business was not carried on to his satisfaction. This was construed as an absolute power, precluding any investigation as to the motives for exercising it. In a subsequent case,[7] however, where the power reserved was to expel a partner, Cozens Hardy, M.R., while apparently approving *Russell* v. *Russell*, laid down the law in the following terms: "a clause enabling one partner to expel the other cannot be relied upon unless there is good faith; it cannot be used if the motive is really to get an undue advantage over the other partner by purchasing him out on unfavourable terms."

Discretionary Powers of Directors.—A clause in the articles of a company giving the directors power to reject a proposed transferee has received a

151; *Bates* v. *Donaldson* [1896], 2 Q.B. 241; *Lewis & Allenby* v. *Pegge* [1914], 1 Ch. 782; *Mills* v. *Cannon Brewery Co.* [1920], 2 Ch. 38; *Houlder Brothers* v. *Gibbs* [1925], 1 Ch. 575; doubted in *Lord Tredegar* v. *Harwood*, *infra*.

[1] *Houldsworth* v. *Brand's Trs.*, 1875, 2 R. 683. See also *Stewart* v. *Rutherfurd*, 1863, 1 M. 511.

[2] *Guild* v. *M'Lean*, 1897, 25 R. 106.

[3] 1848, 10 D. 1387.

[4] *Tredegar, Lord,* v. *Harwood* [1929], A.C. 72.

[5] *Taylor* v. *Smith*, 1909, 1 S.L.T. 453 (O.H., Lord Johnston).

[6] 1880, 14 Ch. D. 471.

[7] *Green* v. *Howell* [1910], 1 Ch. 495.

narrower construction. Directors act in a fiduciary capacity, and must exercise such a power in the interests of the company. "Directors must exercise the powers conferred upon them fairly and reasonably; they must not act in the exercise of that power capriciously or corruptly." [1] So while the onus of proving unfair rejection lies on the transferee,[2] yet proof that the directors' refusal was merely capricious, *a fortiori*, one dictated by a desire to acquire the shares for one of themselves, would justify an order for the rectification of the register by the admission of the transferee.[3] It would appear that the objection must be to the transferee, not to the motives of the transferror.[4] The general rules have been formulated by Lord Atkinson in the following terms: "(1) That directors refusing to consent to a transfer are not bound to state their reasons for so refusing; (2) that if they do not state their reasons it must, in the absence of all evidence to the contrary, be assumed that they have acted *bona fide* and honestly for the furtherance, in their belief, of the interests they were bound to protect; and (3) that in order to vitiate the exercise of their powers it must be shewn by evidence that their action was arbitrary and capricious." [5]

Similar rules apply to the construction of a power to directors to issue new shares. They again act in a fiduciary capacity, and their resolution to issue new shares may be reduced on proof that it was induced by a desire to consolidate or improve their voting power, and not by an honest consideration of the financial needs of the company.[6]

Power to Expel from Club, etc.—Where the rules of a voluntary association, club, or trade union vest in the governing body a power to expel a member, or, where periodical re-election is required, to refuse it, their action is not necessarily unfettered though the power is conferred in unqualified terms. In the case of expulsion from a club it is an implied condition—deduced from the principles of "natural justice"—that the member incriminated should have an opportunity of being heard in his own defence.[7] And while the Court will not review the decision of the club on the facts, it will interfere if there is proof of *mala fides*, which would appear to mean that the decision is ostensibly based on one ground in order to conceal the true and less presentable one, and of this the entire absence of any reasonable warrant for the decision may be evidence.[8] In a trade union case Lord Cullen decided that the expulsion of a member, under a rule by which the Executive Council had power to expel if they considered that the member had been guilty of conduct calculated to injure or bring discredit upon the union, might be challenged on averments that the Council's action was not in the *bona fide* exercise of their powers, but was dictated by a desire to stifle inquiry into the illegal actings of the Executive.[9] In *Weinburger* v. *Inglis*, the Committee of the London Stock Exchange had, under the rules, power to elect such persons "as they think proper." Annual re-election on the same terms was

[1] *Stewart* v. *Keiller*, 1902, 4 F. 657, per Lord Trayner, p. 678.
[2] *In re Coalport China Co.* [1895], 2 Ch. 404; *In re Hannan's King, etc., Mining Co.*, 1898, 14 T.L.R. 314.
[3] *Stewart* v. *Keiller*, 1902, 4 F. 657.
[4] *In re Bede Shipping Co.* [1917], 1 Ch. 123.
[5] *Weinburger* v. *Inglis* [1919], A.C. 606, at p. 626.
[6] *Cook* v. *Barry, Henry & Cook*, 1923, S.L.T. 692 (O.H., Lord Morison); *Piercy* v. *Mills* [1920], 1 Ch. 77.
[7] *Fisher* v. *Keane*, 1878, 11 Ch. D. 353; *Dawkins* v. *Antrobus*, 1879, 17 Ch. D. 615.
[8] *Dawkins* v. *Antrobus, supra*. *M'Lean* v. *Workers' Union*, 1929, 45 T.L.R. 256.
[9] *M'Dowall* v. *M'Ghee*, 1913, 2 S.L.T. 238. See also opinion of Bankes, L.J., in *Kelly* v. *National Society of Operative Printers*, 1915, 113 L.T. 1055, and o Lord Atkinson in *Thompson* v. *British Medical Association* [1924], A.C. 764, 778.

necessary. In Weinburger's case re-election was refused, on the ground that he was of German origin. The action of the Committee was sustained, on proof that they had given him an opportunity of stating his case, and had duly considered it. It was not necessary to decide whether the Committee could have maintained that they had an unfettered discretion, but the opinions seem to place the case in the same category with those dealing with the power of directors to accept or refuse a transfer.[1] Conflicting opinions were given in the House of Lords on the question whether the member was entitled to be heard.[2]

Power to Award Prize.—Where the proprietor of a newspaper undertook that an insurance company would make a payment to the person whom the proprietor might decide to be the next of kin of anyone who was killed in a railway accident with a copy of the newspaper in his possession, it was decided that a person who was next of kin of a party so killed could not enforce any direct claim.[3] In *Law* v. *Newnes*[4] the proprietor had decided in favour of a relative who was not, according to the law of succession, one of the next of kin of the deceased. In an action by the next of kin a proof before answer was allowed of averments that the decision was in bad faith, in respect that the proprietor had notice that the party whom he favoured was not one of the next of kin. These averments, it was held, were not substantiated. Had they been so, Lord Rutherfurd Clark expressed the opinion that the pursuer would have a remedy, not on the ground that any obligation in his favour had been undertaken, but that a decision in bad faith amounted to a wrong to him. The competency of any remedy, even on proof of *mala fides*, was doubted by Lord Moncreiff in a subsequent case.[5] But it seems a tenable view that if *A.* undertakes an obligation in favour of the party whom he shall adjudge to fulfil certain conditions, he impliedly undertakes that his adjudication shall be honest, and therefore is liable in damages for breach of contract on proof of *mala fides*.[6]

Arbitration, Bias of Arbiter.—A clause in a contract submitting disputes between the parties to arbitration is not necessarily construed as involving an implied condition that the arbiter shall be in a position to approach the question with an unbiased mind. If, when originally chosen, he was in a neutral position, he will be disqualified from acting if he subsequently becomes identified in interest with one of the parties. This was held in a case where the party named as arbiter became a partner in a firm interested in the question in dispute:[7] and, where the engineer named as arbiter in a contract between a corporation and a contractor was elected Dean of Guild, and as such became *ex officio* a member of the corporation, it was held that the objection might be taken either by the corporation or the contractor, and held good even although at the date of dispute the engineer had demitted office.[8] If the fact that an arbiter had an interest in the case was

[1] *Weinburger* v. *Inglis* [1919], A.C. 606. See also *Cassel* v. *Inglis* [1916], 2 Ch. 211. The opinions in the C.A. (1918, 1 Ch. 517) draw a distinction between a power to expel and a power to refuse re-election, but appear to draw none between a power to refuse re-election and a power to refuse election originally. But surely a candidate for a club, who has failed to secure election, could not, on any averments, question the action of the Committee.

[2] Contrast opinions of Lord Parmoor, at p. 636, and Lord Wrenbury, at p. 640.

[3] *Law* v. *Newnes*, 1894, 21 R. 1027; *Hunter* v. *Hunter*, 1904, 7 F. 136. As to the obligatory character of offers of this kind, see *supra*, p. 22.

[4] *Supra.*

[5] *Hunter* v. *Hunter*, 1904, 7 F. 136.

[6] See cases as to fraudulent withholding of an architect's certificate, *infra*, p. 307.

[7] *Tennant* v. *Macdonald*, 1836, 14 S. 976.

[8] *Magistrates of Edinburgh* v. *Lownie*, 1903, 5 F. 711.

unknown to one of the parties, any proceedings in the arbitration are open to reduction.[1] But if both parties were aware at the time of entering into the contract that the arbiter they selected had a personal interest in the matter in dispute, or was interested in one side or the other, the arbitration clause will be binding. So where two proprietors agreed to refer a question of their respective obligations as to drainage to a third, the reference was binding, though it was shown that the decision of the question in one way would benefit the arbiter's own lands, both parties having been aware of this interest from the first.[2] And where in a contract with a railway company it was provided that all disputes should be referred to *A.*, who was the engineer of the company, it was held that the reference remained binding although *A.* was appointed manager.[3] A reference to an employer as sole arbiter has been sustained.[4]

Reference to Engineer or Architect.—In building or engineering contracts it is a common practice to provide that all disputes shall be referred to the architect or engineer of the employers. The general validity of such an agreement has long been settled in cases where the arbitration clause was executorial and confined to questions arising during the execution of the contract ; [5] and, though in one case doubts were expressed as to the legality of a clause so referring all disputes which might arise,[6] it has since been decided that such a clause is valid, though in a case of ambiguity the bias of construction would be towards the more limited meaning.[7] It is no longer an objection to the validity of the arbitration clause that the arbiter is referred to as the holder of an office, and not by name.[8]

Objections to Engineer's Award.—But while in such cases contractors who have chosen to submit to the arbitration of a party who has almost necessarily an adverse interest are generally bound by their contract, it is an implied condition—not easy to apply in particular cases—that the circumstances must be such as to admit of the possibility of the determination of the matter in dispute in a judicial spirit. In considering the circumstances which will entitle the contractors to maintain that the arbitration clause is not binding, English authorities [9] must be read with caution, because the English Courts, under sec. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), have a discretionary power to entertain a case in spite of an arbitration clause, a power which the Scotch Courts do not possess.[10] In neither country is it relevant merely to aver that the arbiter is biased in favour of his employers. That the contractors must expect. They are not entitled, to adopt a happy phrase of Lord Bowen's, to expect "the icy impartiality of a Rhadamanthus." [11]

[1] *Sellar* v. *Highland Rly.*, 1918, S.C. 838 ; affd. 1919, S.C. (H.L.) 19.

[2] *Johnston* v. *Cheape*, 1817, 5 Dow, 247 ; *Chapman* v. *Edinburgh Prison Board*, 1844, 6 D. 1288.

[3] *Phipps* v. *Edinburgh and Glasgow Rly. Co.*, 1843, 5 D. 1025.

[4] *Buchan* v. *Melville*, 1902, 4 F. 620. This seems inconsistent with a dictum of Bankton (i. 23, 14) that the award of an arbiter who is judge in his own cause "is liable to reduction upon iniquity."

[5] *Trowsdale & Sons* v. *Jopp*, 1865, 4 M. 31, where this is treated as settled law. And see opinion of Lord M'Laren in *Buchan* v. *Melville*, 1902, 4 F. 620.

[6] *Dickson* v. *Grant*, 1870, 8 M. 566.

[7] *Mackay* v. *Parochial Board of Barry*, 1883, 10 R. 1046 ; *Beattie* v. *Macgregor*, 1883, 10 R. 1094.

[8] Arbitration (Scotland) Act, 1894 (57 & 58 Vict. c. 13), sec. 1.

[9] See Russell, *Arbitration*, 11th ed. 102.

[10] *Howden* v. *Powell Duffryn Steam Coal Co.*, 1912, S.C. 920 ; *Scott* v. *Gerrard*, 1916, S.C. 793 ; *Crawford Brothers* v. *Commissioners of Northern Lighthouses*, 1925, S.C. (H.L.) 22.

[11] *Jackson* v. *Barry Rly. Co.* [1893], 1 Ch. 238, 248. See *Scott* v. *Carluke Local Authority*, 1879, 6 R. 616.

The plea for disqualification may be rested either on the particular nature of the dispute which has arisen, or on the prior actings of the arbiter. It is not a good objection that the parties are at variance on the question whether delay was caused by the actings of the official who is to arbitrate,[1] nor that he may be called upon to decide whether the advice which he had given to his employers was good.[2] It is irrelevant to aver that the arbiter has already, in the course of his duty as architect or engineer, expressed an unfavourable opinion of the work on which he has ultimately to decide : [3] that he has expressed an opinion on the question at issue ; [4] that he has taken up a position of antagonism to the contractors, and declared their contract at an end ; [5] that he has referred to his employers as his clients ; [6] that he has given an estimate of what the work ought to cost ; [7] that he has acted professionally in another litigation between the same parties.[8] In *Crawford Brothers* v. *Commissioners of Northern Lighthouses*[9] one question between the parties was whether delay on the part of the contractors justified the employers in taking the work out of their hands. Under an arbitration clause the employers' engineer was arbiter. The objection that in such a question he was practically both judge and witness was repelled in the Court of Session ; in the House of Lords it was unnecessary to pronounce upon it, in respect of an undertaking that if any question arose involving a conflict of evidence, and placing the engineer in the position of judge and witness, it should be determined by the Court of Session. *Bristol Corporation* v. *Aird*[10] seems to lay down the rule that if there is a probable conflict on a matter of fact, as distinguished from professional opinion, the Courts may entertain an action in spite of an arbitration clause, but this decision turned mainly on the discretionary power possessed by the Courts in England, and has been definitely rejected as an authority in Scotland.[11]

Where the official selected as arbiter has definitely prejudged the question, the arbitration cannot be enforced. This was held where he had written to the contractors, after the dispute had arisen, and when he had no duty to communicate his views, that he had formed an opinion adverse to their claim.[12] And where an architect had taken up the position that he was the mere mouthpiece of the employers' will, the employers were barred from maintaining that a certificate by the architect was a condition precedent to payment.[13] Where a reduction of the agreement to refer had been brought on the ground of misrepresentation, and the employers had called their architect as a witness, and examined him not merely on the question of

[1] *Trowsdale & Son* v. *North British Rly. Co.*, 1864, 2 M. 1334 ; *Trowsdale & Son* v. *Jopp*, 1865, 4 M. 31. See also *Ives & Barker* v. *Williams* [1894], 2 Ch. 478.

[2] *Eckersley* v. *Mersey Harbour Board* [1894], 2 Q.B. 667.

[3] *Scott* v. *Carluke Local Authority*, 1879, 6 R. 610 ; *Mackay* v. *Parochial Board of Barry*, 1883, 10 R. 1046.

[4] *Halliday* v. *Duke of Hamilton's Trs.*, 1903, 5 F. 800 ; *Low & Thomas* v. *Dumbarton County Council*, 1905, 13 S.L.T. 620 ; *Jackson* v. *Barry Rly. Co.* [1893], 1 Ch. 238.

[5] *Scott* v. *Gerrard*, 1916, S.C. 793.

[6] *Scott* v. *Gerrard, supra.* Lord Salvesen pointed out that the statement correctly described the position of an engineer or architect appointed as arbiter. But an undertaking to act in the interests of the person appointing him will disqualify an arbiter (*Pekholtz* v. *Russell*, 1899, 7 S.L.T. 135), or any statement which implies that he considers himself bound to decide in favour of the employers (*Hickman & Co.* v. *Roberts* [1913], A.C. 229).

[7] *Trowsdale & Son* v. *Jopp*, 1865, 4 M. 31.

[8] *Addie & Sons* v. *Henderson & Dimmack*, 1879, 7 R. 79.

[9] 1925, S.C. (H.L.) 22.

[10] [1913], A.C. 241.

[11] *Scott* v. *Gerrard*, 1916, S.C. 793 ; *Crawford Brothers, supra.*

[12] *M'Lachlan & Brown* v. *Morrison*, 1900, 8 S.L.T. 279 (O.H., Lord Kyllachy).

[13] *Hickman & Co.* v. *Roberts* [1913], A.C. 229.

misrepresentation but on the question of the execution of the contract which they afterwards proposed to refer to him as arbiter, it was held that the contractors were not bound to submit.[1] In *M'Dougall* v. *Laird & Sons* [2] an auction sale of the materials of a building about to be demolished contained provisions as to the methods by which the successful bidder should carry out the work, provided for a deposit by him of £30, and contained a clause that all disputes should be referred to one of the partners of the auctioneer's firm. In an action concluding for the repayment of the deposit the auctioneers lodged defences, maintaining that the conditions of demolition had not been implemented, and pleading that the matter should be referred to the arbiter. It was held that as they had taken up the position of parties to the action, involving possible liability for expenses, instead of relying on their status as mere stakeholders, their partner was disqualified from acting as arbiter. But where the arbiter nominated was the employer himself, it was held that he was not disqualified because he had defended an action in which the contractor maintained that the arbitration clause had not validly been made part of the contract, and given evidence in his own behalf.[3] In these circumstances, it was observed, no other course was open to him.

Architect's Certificates. Similar principles are applicable to the case where a building contract contains a provision that the production of a certificate by the employers' architect is to be a condition precedent to payment of the contract price, or of any instalment.[4] Proof that the architect did not act fairly or impartially, falling short of proof of dishonesty or collusion with the employer, allows the latter to insist on the certificate as a condition.[5] Where it has not been granted it is irrelevant for the contractors to aver that the work has been properly completed, and the certificate wrongfully withheld.[6] Where road trustees provided, in a contract with a road contractor, that no additional work should be done, with a view to extra payment, without a written order from the trustees, or their road surveyor, it was irrelevant to allege—no written order having been given—that extra work was done, and that many of the trustees were aware of the fact.[7] But proof that the architect is fraudulently withholding the certificate, in collusion with the employers, will entitle the contractors to damages, the measure of damages being the amount due for their work.[8] And the employers are not entitled to take advantage of the illness, incapacity, or mere neglect of their architect.[9] In a case where fraud was not averred it was proved that the architect had refused to apply his mind to the question whether payment was due to the contractors or not, and had intimated that he would not grant a certificate unless he were instructed by the employers to do so. The employers had supported him in this attitude, and it was held that they were barred by their conduct in the matter from maintaining the plea that the architect's certificate was a condition precedent to payment.[10]

[1] *Dickson* v. *Grant*, 1870, 8 M. 566.
[2] 1894, 22 R. 71.
[3] *Buchan* v. *Melville*, 1902, 4 F. 620.
[4] See Hudson, *Building Contracts*, 5th ed., i. 279, where colonial cases are collected; Emden, *Building Contracts*, 4th ed., 105.
[5] *Nott* v. *Cardiff Corporation* [1918], 2 K.B. 146; revd., on another ground, as *Brodie* v. *Cardiff Corporation* [1919], A.C. 337.
[6] *Clarke* v. *Watson*, 1865, 18 C.B. (N.S.) 278; *Eaglesham* v. *M'Master* [1920], 2 K.B. 169.
[7] *Brown* v. *Rollo*, 1832, 10 S. 667.
[8] *Ludbrook* v. *Barrett*, 1877, 46 L.J. C.P. 798; *Smith* v. *Howden Sanitary Authority*, 1890, Hudson, *Building Contracts*, 4th ed., ii. 156; *Clarke* v. *Watson*, *supra*.
[9] *Kellett* v. *New Mills Urban Council*, 1900, Hudson, *Building Contracts*, 4th ed., ii. 298.
[10] *Hickman & Co.* v. *Roberts* [1913], A.C. 229.

(6) *Implied Terms as to Quality of Performance*

Contractual obligations to pay money, or to abstain from some particular act or course of conduct, do not raise any question as to the standard of performance. The question is raised where the obligation is to perform some work, or to supply, temporarily or permanently, some property. It is a question which cannot be answered fully without dealing with the law of negligence, and therefore is in large part beyond the scope of a book upon contract. But some aspects of it call for notice here.

Employment. Spondet peritiam artis.—When the obligation is to perform work, the standard to which the obligant must attain depends, in the absence of any express provision, on whether he does or does not profess, expressly or impliedly, to be possessed of expert skill or knowledge in the particular line. If he does not, his obligation is in general to exhibit reasonable care; "a criterion not less just because it is versatile, accommodating itself to circumstances, and according with the common sense of mankind."[1] If, however, the obligant is a member of any trade or profession, he must, according to the maxim *spondet peritiam artis*, exhibit the degree of knowledge or skill reasonably to be expected from an average member of his vocation, and will be liable in damages if injury results from his failure, though he may not have been negligent in the sense that he failed to take reasonable care or to exercise the degree of skill or knowledge he in fact possessed.[2] A person who is not a member of any recognised trade or profession will incur the same liability if he holds himself out as possessing special skill, or if his words or acts lead to the reasonable inference that he makes that claim. So persons who were not registered dentists, and did not state that they were, but advertised that they were prepared to perform operations usually undertaken only by dentists, were held liable in damages when in operating they caused injury which should have been avoided if they had possessed the skill of an average dentist.[3] In most cases, such as that of a plumber,[4] an architect,[5] a storekeeper,[6] the trade or professional standard is to be ascertained by the evidence of persons similarly engaged; in the case of a law agent it has been treated as falling within judicial knowledge. While if the question is one of reasonable care the standard may depend upon whether the party was or was not acting gratuitously, it is conceived that the rule of *spondet peritiam artis* applies in either case.[7]

Exceptions to Rule.—An exception to the rule of *spondet peritiam artis* is established in the case of an advocate;[8] also, in England, in the case of anyone exercising the functions of an arbiter. So an architect, though in preparing plans or in superintending the erection of the building he must exhibit reasonable professional skill,[9] in granting certificates in exercising

[1] Bell, *Com.*, i. 488.

[2] Bell, *Prin.*, sec. 153; *Com.*, i. 489, and Lord M'Laren's note at p. 530. The Act 1478, c. 11, relating to ignorant smiths, and referred to in Bell's *Commentaries* (i. 489, note 2), is repealed by the Statute Law Revision (Scotland) Act, 1906 (6 Edw. VII. c. 38). The case of a person professing exceptional skill, and paid accordingly, *e.g.*, a distinguished artist or surgeon, is considered in Beven, *Negligence*, 4th ed., 1325.

[3] *Dickson* v. *Hygienic Institute*, 1910, S.C. 352.

[4] *M'Intyre* v. *Gallacher*, 1883, 11 R. 64.

[5] *Jameson* v. *Simon*, 1899, 1 F. 1211.

[6] *Snodgrass* v. *Ritchie & Lamberton*, 1890, 17 R. 712; *Brabant* v. *King* [1895], A.C. 632.

[7] Bell, *Com.*, i. 530, Lord M'Laren's note; *Kay* v. *Simpson*, 1801; Hume 328; *Hay* v. *Baillie*, 1868, 7 M. 32, opinion of Lord Neaves (agent for the poor).

[8] *Batchelor* v. *Pattison*, 1876, 3 R. 914.

[9] *Jameson* v. *Simon*, 1899, 1 F. 1211.

arbitrational functions, and was held to incur no liability when, owing to incorrect measurements, he granted a certificate for more than had actually been done.[1]

Standard of Skill Law Agents. —A law agent impliedly undertakes to exercise reasonable care, and also to apply reasonable knowledge of law. The former obligation is sufficient to render him liable in such cases as forgetting to attend a diet of court,[2] failure to cite witnesses,[3] or to intimate a sist of diligence.[4] The general rule as to professional skill has been authoritatively, though somewhat vaguely, laid down by Lord Chancellor Cottenham: "Professional men, possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be liable for errors in judgment, whether in matters of law or of discretion. Every case, therefore, must depend upon its own peculiar circumstances: and when an injury has been sustained, which could not have arisen except from the want of such reasonable skill and diligence, or the absence of such reasonable skill and diligence, the law holds the attorney liable. In undertaking the client's business he undertakes for the existence and employment of these qualities, and receives the price of them." [5] On a question of law the agent is bound to know elementary rules—an instance suggested being the ordinary rules of succession.[6] Lord Cottenham, in *Hart* v. *Frame*, expressed the opinion that to misconstrue a statute, expressed, in his lordship's view, in plain language, would infer liability.[7] It was decided by Lord Skerrington that a law agent, who had failed to bring an action within the six months allowed by the Public Authorities Protection Act, 1893, was liable in damages, on the ground that he ought to have known (or not taken the risk if he was doubtful) that his client's case was covered by the Act, although the particular point was undecided in Scotland, and not covered by any conclusive authority in England.[8] But this decision is not really reconcilable with *Free Church* v. *MacKnight's Trs.*,[9] where an agent had failed to notice a decision of the House of Lords in an English case, construing a revenue statute and therefore binding in Scotland, but inconsistent with existing Scotch authority. It was decided that there was no ground of liability.

In conveyancing, Court procedure, or diligence, it has been laid down that it is the duty of a law agent to follow the usual and established forms, if such exist, and that if he departs from them he cannot defend himself on

[1] *Chambers* v. *Goldthorpe* [1901], 1 K.B. 624. See observations in Beven, *Negligence*, 4th ed., 1337.

[2] *M'Kechnie* v. *Halliday*, 1856, 18 D. 659.

[3] *Ritchie* v. *Macrosty*, 1854, 16 D. 554; *Urquhart* v. *Grigor*, 1857, 19 D. 853.

[4] *Anderson* v. *Torrie*, 1857, 19 D. 356.

[5] *Hart* v. *Frame*, 1839, M'L. & R. 595, at p. 614.

[6] Per Lord Brougham, *Purves* v. *Landale*, 1845, 4 Bell's App. 46, at p. 58. See *Blair* v. *Assets Co.*, 1896, 23 R. (H.L.) 36. In *Shane* v. *Girvan*, 1927, S.L.T. 460, Lord Constable's judgment seems to imply that a law agent is bound to know the criminal provisions of the Bankruptcy Act. Knowledge of its civil provisions, *e.g.*, as to the valuation and declaration of securities, is required. *Brown* v. *M'Kie*, 1852, 14 D. 358.

[7] *Hart* v. *Frame*, *supra*, note 5. This opinion was *obiter*; the real charge against the agent was that he had followed a local practice without considering whether it was warranted by the statute or not.

[8] *Simpson* v. *Kidston, Watson & Co.*, 1913, 1 S.L.T. 74 (O.H.).

[9] 1916, S.C. 349. The Lord President (Strathclyde) seems to have misread the case of *Simpson*, treating it as a case where the law agent was ignorant of the existence of the statute, whereas the actual charge was that he misconstrued it. Ignorance of its existence, or failure to keep it in mind at all material times, was considered in England a clear ground for the liability of a solicitor. *Fletcher* v. *Jubb* [1920], 1 K.B. 275.

the plea that he misapprehended a difficult question of law.[1] In buying land or lending on heritable security it is within the agent's mandate and part of his duty to search the records for prior encumbrances, and failure in this respect is not excused by proof of a local custom.[2]

With regard to investments it is clear law that their value or sufficiency is not a subject on which a law agent, merely in respect of his professional status, makes any claim to expert knowledge.[3] In advising trustees, he is probably bound to exhibit adequate knowledge as to the securities sanctioned by statute or under the particular trust deed—a question of law.[4] Merely as agent to a trust, he is under no obligation to volunteer advice as to investments acquired without his assistance.[5] As a law agent is bound, in procuring a bond, to see that a clear title is obtained,[6] it seems a fair inference that in any case he will be liable if he advises an investment which does not in fact afford the obligation which *ex facie* it expresses, or which is reducible under the bankruptcy laws. Cases in which attempts have been made to impose a wider liability on a law agent have all related to investments in land or heritable securities. Excluding cases where the agent has been held liable on the ground that he had failed to obey express instructions,[7] that he had sacrificed the pursuer to his own interests,[8] or those of another client,[9] there is only one narrow and circumstantial case in which the action has been successful.[10] But opinions have been expressed that a law agent, in recommending an investment, or in bringing an investment to the notice of his client, which implies recommendation, is bound to exercise reasonable care, and will be liable if the investment be one which no reasonable law agent would have recommended.[11]

Contracts for Supply of Property.—The question of the standard incumbent on a party who has undertaken to supply property, temporarily or permanently, is of importance in contracts of sale, lease, and hiring.

Sale of Goods.—The question of the implied obligations of a seller of goods with regard to their condition now depends on section 14 of the Sale of Goods Act, 1893.[12] "Subject to the provisions of this Act and of any statute in that behalf[13] there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

[1] *Hart* v. *Frame*, 1839, M'L. & R. 595 ; *Clark* v. *Sim*, 1833, 6 W. & S. 452 ; *Stevenson* v. *Rowand*, 1830, 4 W. & S. 177. Contrast *Hamilton* v. *Emslie*, 1868, 7 M. 173 (diligence), where the regular practice was doubtful.

[2] *Tully* v. *Ingram*, 1891, 19 R. 65 ; *Fearn* v. *Gordon & Craig*, 1893, 20 R. 352 ; *M'Connachie* v. *Macqueen's Trs.*, 1913, 1 S.L.T. 41 (O.H., Lord Ormidale). The liability of the agent is to clear the record of the undiscovered burden (*Campbell* v. *Clason*, 1838, 1 D. 270).

[3] See *Wernham* v. *M'Lean, Baird & Neilson*, 1925, S.C. 407.

[4] See opinion of Lord Shand on *Rae* v. *Meek*, 1888, 15 R. 1033 (1889, 16 R. (H.L.) 31), approved by Lord President Balfour in *Johnstone* v. *Thorburn*, 1901, 3 F. 497.

[5] *Curror* v. *Walker's Trustees*, 1889, 16 R. 355.

[6] Authorities in note 6, *supra*.

[7] *Oastler* v. *Dill*, 1886, 14 R. 12 ; *Black* v. *Curror & Cowper*, 1885, 12 R. 990.

[8] *Wernham* v. *M'Lean, Baird & Neilson*, 1925, S.C. 407.

[9] *Maclure, Nasmyth, Brodie & Macfarlane* v. *Stewart*, 1887, 15 R. (H.L.) 1.

[10] *Ronaldson* v. *Drummond & Reid*, 1881, 8 R. 767. See comments by Lord Shand in *Rae* v. *Meek*, 1888, 15 R. 1033 (1889, 16 R. (H.L.) 31), and by Lord Fraser, Ordinary, in *Stirling* v. *Mackenzie, Gardner & Alexander*, 1886, 14 R. 170.

[11] See opinion of Lord Rutherfurd Clark in *Stirling* v. *Mackenzie, Gardner & Alexander*, 1886, 14 R. 170 ; of Lord President Robertson in *Cleland* v. *Brownlie, Watson & Beckett*, 1892, 20 R. 152 ; of Lord Kyllachy, Ordinary, in *Johnstone* v. *Thorburn*, 1901, 3 F. 497.

[12] As to the common law, see Ersk. iii. 3, 10 ; Bell, *Prin.*, sec. 95 ; *Baird* v. *Pagan*, 1765, M. 14240 ; *Whealler* v. *Methuen*, 1843, 5 D. 402.

[13] *E.g.*, Anchor and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), sec. 2 ; Fertilisers and Feeding Stuffs Act, 1926 (16 & 17 Geo. V. c. 45), sec. 2.

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose [1] for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment,[2] and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit [3] for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other

[1] There is a strong body of English authority to the effect that the sub-section applies to the sale of an article which is commonly used for one purpose only, *e.g.*, articles of food or drink (*Frost* v. *Aylesbury Dairy Co.* [1905], 1 K.B. 608; *Wren* v. *Holt* [1903], 1 K.B. 610; *Wallis* v. *Russell* [1902], 2 Ir. R. 585), a hot water bottle (*Preist* v. *Last* [1903], 2 K.B. 148), a carriage pole (*Randall* v. *Newson*, 1877, 2 Q.B.D. 102), and that the buyer, merely by asking for the article, indicates that his purpose is to use it for the purpose for which it is commonly used. The attitude of the Scotch Courts, on this question, is open to doubt. Before the Act, decisions on an analogous provision of the Mercantile Law Amendment (Scotland) Act, 1856, sec. 5 (now repealed), which referred to goods "expressly sold for a specified and particular purpose," established that the implied warranty did not apply unless the purpose disclosed was one other than that for which the goods in question were usually required. As it was put by Lord Shand: "The provision of the Act does not create or provide a warranty by the seller that the goods shall be suited for the general purpose for which such goods are used, but for a specified and particular purpose, when that purpose is expressly stated" (*Hamilton* v. *Robertson*, 1878, 5 R. 839). See *Hardie* v. *Austin & M'Aslan*, 1870, 8 M. 798, and *Hardie* v. *Smith & Simons*, 1870, 42 Sc. Jur. 457 (turnip seed); *Hamilton* v. *Robertson*, 1878, 5 R. 839 (entire horse); *Dunlop* v. *Crawford*, 1886, 13 R. 973 (milk cows). In *Williamson* v. *Macpherson* (1904, 6 F. 863), opinions were expressed by the Lord Ordinary (Kincairney) and L.J.C. Kingsburgh that these cases were still authoritative under the Sale of Goods Act. As a special purpose other than the ordinary one was disclosed it was unnecessary to decide the point, but the balance of recent authority indicates that the English rule, above stated, would be accepted in Scotland. Where food unfit for human consumption has been supplied at a restaurant the relevancy of an action based on implied warranty of fitness, and not merely on negligence, has been sustained, in cases where the actual question decided was the method of proof (*Govan* v. *M'Killop*, 1907, 15 S.L.T. 510, 658; *Stocks* v. *Holstein*, 1907, 15 S.L.T. 339; *Clelland* v. *East of Scotland Public House Trust*, 1908, 16 S.L.T. 65). In *Duke* v. *Jackson* (1921, S.C. 362) the pursuer had been injured by an explosive substance contained in a bag of coal. His action was dismissed as irrelevant, because he did not aver that the article sold, *i.e.*, the coal, was not reasonably fit for his purpose. The Lord Ordinary (Anderson), without adverse comment on appeal, rejected the argument that the coal was not sold for a particular purpose.

Although the sale may be in writing, the fact that the buyer disclosed the particular purpose for which he required the article may be proved by parole evidence (*Jacobs* v. *Scott*, 1899, 2 F. (H.L.) 70; *Gillespie Bros.* v. *Cheney Eggar & Co.* [1896], 2 Q.B. 59).

The particular purpose may be re-sale in a particular market, the conditions of which are known to the seller (*Jacobs* v. *Scott*, *supra*; *Macfarlane* v. *Taylor*, 1868, 6 M. (H.L.) 1); or ordinary use under special and trying conditions (*Williamson* v. *Macpherson*, 1904, 6 F. 863; *Knutzen* v. *Mauritzen*, 1918, 1 S.L.T. 85; *Bristol Tramways Co.* v. *Fiat Motors Ltd.* [1910], 2 K.B. 831).

[2] "When a merchant deals in particular goods, and tenders them as fitted for a particular purpose, and they are bought on that basis, there is a strong presumption that the buyer purchases in reliance on the seller's knowledge, and also that the seller takes that for granted. These presumptions may be displaced, and it may be shewn that, in point of fact, the buyer did not rely on the seller at all, but solely on his own knowledge, or solely on the advice of someone else" (per Lord Kincairney, Ordinary, in *Williamson* v. *Macpherson*, 1904, 6 F. 863, at p. 875). The presumption of reliance on the seller's skill and knowledge was displaced when the seller (a publican) was asked for *A.'s* beer. The presumption was that the buyer relied on the reputation of *A.'s* brewery, not on the publican (*Wren* v. *Holt* [1903], 2 K.B. 148). As to sales to an expert in the particular commodity, see *Sumner, Permain & Co.* v. *Webb* [1922], 1 K.B. 55, note at p. 57. The implied condition of reasonable fitness is not excluded by the fact that the seller may have no means of knowing of the defect (*Wren* v. *Holt*, *supra*), and was held to be applicable where both parties knew that the seller had only one possible source of supply, and that it was doubtful whether that source would yield goods reasonably fit for the purpose or not (*Manchester Liners* v. *Rea* [1922], 2 A.C. 74).

[3] It has been laid down that "reasonably fit" means as fit as human care and skill can make it (*Hyman* v. *Nye*, 1881, 6 Q.B.D. 685), a criterion which surely cannot apply to the case where goods are sold of different qualities and at different prices, *e.g.*, a cheap and an expensive watch. See opinions as to the meaning of "in all respects reasonably fit," as used in the Housing Act, 1925 (*Morgan* v. *Liverpool Corporation* [1927], 2 K.B. 131).

trade name,[1] there is no implied condition as to its fitness for any particular purpose :

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ;[2] provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed :

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade :

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.[3]

Sale of Heritage. In a sale of heritage the obligation of the seller to furnish what he has sold, as it has been construed, may in substance amount

[1] It is decided, both in Scotland and England, that the proviso refers only to manufactured goods, not to raw materials, such as coals, though they may be sold under a trade name, *e.g.*, Strathaven Coals (*Crichton & Stevenson* v. *Love*, 1908, S.C. 818 ; *Gillespie Bros.* v. *Cheney, Eggar & Co.* [1896], 2 Q.B. 59). If the trade name is the name of the maker, it falls within the proviso if, on the particular facts, the party using the name indicates a particular thing, as in the case of a sale of articles as Patterson's Smoke Prevention Suction Draught (*Paul* v. *Corporation of Glasgow*, 1900, 3 F. 119) ; not where the name merely indicates any article made by the maker named, as in the case of an order for Fiat motors, where it was proved that the word Fiat did not refer to the character of the motor, but solely to the maker (*Bristol Tramways Co.* v. *Fiat Motors Ltd.* [1910], 2 K.B. 831). According to a decision of the Court of Appeal, the proviso is not applicable unless an affirmative answer can be given to the question, as put by Bankes, L.J., "Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the seller's skill or judgment, however great that skill or judgment may be ?" (*Baldry* v. *Marshall* [1925], 1 Q.B. 260). A name guarantees nothing (*Rowan* v. *Coats Iron & Steel Co.*, 1885, 12 R. 395).

[2] "Merchantable quality" is not a synonym for saleable ; goods may be unmerchantable although their defects cannot be discoverable until after use (*Williamson* v. *Macpherson*, 1904, 6 F. 863). It probably means such quality as a reasonable buyer would regard as satisfying his contract, assuming him to be aware of the true facts. The condition applies although the sale may be by a patent or trade name, if the goods, from causes not attributable to the buyer, arrive in a defective state (*Pommer & Thomsen* v. *Mowat*, 1906, 14 S.L.T. 373). Goods are not of merchantable quality, when supplied to a retailer, if any serious expenditure is necessary to make them saleable (*Jackson* v. *Rotax Motor Co.* [1910], 2 K.B. 937). The majority of the Court held that goods were not of merchantable quality when they were so branded as to make their sale an infringement of a third party's trademark (*Niblett* v. *Confectioners' Materials Co.* [1921], 3 K.B. 387)—a decision proceeding mainly on the ground that the seller, in such a case, failed to fulfil the condition that he had a right to sell. But it is not an implied condition that the goods shall be saleable under the law of the country to which, to the seller's knowledge, they were to be exported (*Sumner, Permain & Co.* v. *Webb* [1922], 1 K.B. 55). It is, it is conceived, settled in England that the condition of merchantable quality applies to goods sold over the counter, though the defect may be one over which the shopkeeper can have no control (*Wren* v. *Holt* [1903], 2 K.B. 148 ; *Geddling* v. *Marsh* [1920], 1 K.B. 668 ; *Morelli* v. *Fitch* [1928], 2 K.B. 636). So when wine was sold in a bottle which, when the cork was drawn, broke and injured the buyer, the shopkeeper who sold it was liable in damages (*Morelli* v. *Fitch*, *supra*). It would seem that these decisions cover the case of a latent flaw, undiscoverable by either manufacturer or retailer. In *Gordon* v. *M'Hardy* (6 F. 210), a case founded on negligence, it was held that a grocer was not liable for selling a tin of salmon which had become poisonous. The Lord Justice-Clerk said : "I am of opinion that a grocer who gets a quantity of tins of preserved food and sells them to the public as he got them, cannot be liable for the condition of the contents of the tins if he buys from a dealer of repute." Presumably this statement is to be limited to questions of negligence ; if applied to breach of contract, it is in conflict with the English cases.

[3] See *Douglas* v. *Milne*, 1895, 23 R. 163. In *Baldry* v. *Marshall* [1925], 1 K.B. 260, the seller of a motor car gave a limited guarantee, and stated that it expressly excluded "any other guarantee or warranty, statutory, or otherwise." The car was not reasonably fit for the purpose disclosed by the buyer, and it was held that the limitation of liability did not preclude rejection, because reasonable fitness is a condition and not a warranty. But this seems to proceed on the technical distinction, in English law, between a condition and a warranty, and to be inapplicable to Scots law. And the decision is in conflict with the general principle that the words used by one party to a contract should be read in the sense in which the other, as a reasonable man, but not necessarily an expert in English law, would read them.

to an implied term or warranty of quality. A seller is bound, in the words of Lord Balgray, "To give a valid disposition to a free and unfettered subject, and it is a subject *Totus teres atque rotundus* which he must give."[1] He does not fulfil his obligation if he tenders a property subject to a bond,[2] burdened with a feu-duty larger than is stated.[3] subject to a reservation of minerals,[4] fettered by building restrictions,[5] or affected by a servitude.[6] But an undisclosed mid-superiority, though in fact resulting in a claim for a casualty, was not regarded as a failure by the seller of the *dominium utile* to furnish what he had sold.[7] And where a property is sold as of a given acreage it is no objection that the acreage cannot be made up without taking into account land occupied by a public road.[8]

Apart from the obligation to furnish what he has sold a seller of land may be under implied obligations, based on the principle that he must not derogate from his own grant, and limiting the use of property which he retains.[9] It is conceived that the law goes no further, and that a seller of land does not impliedly warrant that it is suitable for the purpose for which the buyer may have stated that he wants it, or that it is, in any sense of that expression, of merchantable quality. An action by a buyer of a cellar, based on the ground that he had bought it for use as a spirit store, and found it too damp for that purpose, was dismissed, partly on the ground that the pursuer had examined the cellar before he bought it, but also on the ground that it was irrelevant in the absence of averments of fraud or misrepresentation by the seller.[10] The opinions in *Louttit's Trs.* v. *Highland Railway*[11] may admit of being read, and have been read by the framer of the rubric, as laying down the general proposition that a sale of heritable subjects always implies a right of access, but the judges were considering the case of the right to an access already existing at the date of sale, and the general proposition seems to be negatived by the decision in *Cullens* v. *Cambusbarron Co-operative Society*.[12]

Sale of Debt.—In the sale or assignation of a debt it is settled that the credit gives no implied warranty of the solvency of the debtor.[13] His warrandice, express or implied, is *debitum subesse*—that a debt exists to which no legal objection can be successfully taken by the party who is *ex facie* the debtor.[14] So where a bond for a gaming debt was assigned, and the executors of the debtor denied liability, it was held that the assignee could recover from the cedent what he had paid.[15] An express clause of warrandice from fact and deed involves the same obligation.[16] The warrandice is that the debt is enforceable against all the obligants, and therefore applies to a

[1] *Urquhart* v. *Halden*, 1835, 13 S. 844, 849.
[2] *Horne* v. *Kay*, 1824, 3 S. 81; *Christie* v. *Cameron*, 1898, 25 R. 824.
[3] *Clason* v. *Steuart*, 1844, 6 D. 1201; *Bremner* v. *Dick*, 1911, S.C. 887.
[4] *Robertson* v. *Rutherford*, 1841, 4 D. 121; *Whyte* v. *Lee*, 1879, 6 R. 699; *Crofts* v. *Stewart's Trs.*, 1926, S.C. 891; revd. 1927, S.C. (H.L.) 65. As to knowledge by the seller that the minerals were reserved, see *Crofts* v. *Stewart's Trs.*, and *Gall* v. *Gall*, 1918, 1 S.L.T. 261.
[5] *Urquhart* v. *Halden*, 1835, 13 S. 844, 849; *Louttit's Trs.* v. *Highland Rly.*, 1892, 19 R. 791.
[6] *Welsh* v. *Russell*, 1894, 21 R. 769. See observations by Lord Stormonth Darling, Ordinary, on the statement by Erskine (ii. 3, 31), that the servitude must be "uncommonly heavy."
[7] *Brownlie* v. *Miller*, 1878, 5 R. 1076; affd. 1880, 7 R. (H.L.) 66.
[8] *Kelvinside Estate Co.* v. *Donaldson's Trs.*, 1879, 6 R. 995.
[9] *Supra*, p. 299.
[10] *Rutherford* v. *Edinburgh Co-operative Building Co.*, 1873, 11 S.L.R. 28 (2nd Division).
[11] 1892, 19 R. 791. [12] 1895, 23 R. 209. And see *supra*, p. 300.
[13] Stair, ii. 3, 46, More's *Notes*, xciii.; Ersk. ii. 3, 25; Bell, *Prin.*, p. 1469.
[14] Erskine and Bell, *ut supra*.
[15] *Ferrier* v. *Graham's Trs.*, 1828, 6 S. 818.
[16] *Ferrier*, *supra*, *Sinclair* v. *Wilson & M'Lellan*, 1829, 7 S. 401.

case where, though the principal debtor is bound, a cautioner is not.[1] When the debt is fortified by a security the cedent impliedly warrants not merely that the debtor is bound but also that the security is valid and effectual as a real right in the subjects over which it extends.[2] The implied obligation of warrandice *debitum subesse* cannot be sued upon by an assignee who knew of the defect when he accepted the assignation.[3] And where *A.* undertook to accept an assignation of a particular bond, which he had an opportunity of examining, and the objection to its validity was patent on the face of it, it was decided that he could not refuse to carry out his bargain on the ground that he had subsequently discovered the objection.[4] The assignee, it is conceived, is not bound to try the question of the validity of the bond in an action against the debtor. He may insist that the cedent shall either establish the validity of the debt, or repay.[5] Should he choose to take action himself, and successfully, he has no claim against the cedent for the expenses he has incurred.[6]

Leases. In leases the implied obligations undertaken by the landlord in reference to the conditions of the subjects let depend on the character of the lease.

Lease of House.—In the lease of a house the obligation of the landlord is to provide "a reasonably habitable and tenantable subject, and one which is wind and watertight."[7] "The extent of this obligation will vary according to the value and rental of the subjects, and the reasonable requirements of a tenant who hires a house of given accommodation and rental."[8] It is therefore a circumstantial question in each case whether the landlord's obligation has been fulfilled, and the cases cited below are of value chiefly as illustrations.[9] It has been laid down that a tenant does not establish a case of defect by proof that the accommodation given is not of the highest possible standard, or, in the case of drainage, that the system would be condemned by modern sanitary science.[10] During the lease the landlord undertakes to maintain the house in the same reasonably habitable and tenantable condition. Apart from a statutory provision,[11] his obligation is not a warranty that no defect will occur, but an undertaking to repair

[1] *Reid* v. *Barclay*, 1879, 6 R. 1007.

[2] This is assumed as clear law in *Forbes* v. *Welsh & Forbes*, 1894, 21 R. 630. Obviously the cedent cannot be supposed to warrant that the security will not be reducible in the debtor's bankruptcy.

[3] So held in *Leith Heritages Co.* v. *Edinburgh & Leith Glass Co.*, 1876, 3 R. 789, in spite of an express clause of absolute warrandice.

[4] *Forbes* v. *Welsh & Forbes*, 1894, 21 R. 630.

[5] *Lord Melville* v. *Wemyss*, 1842, 4 D. 385; Mont. Bell, *Conveyancing*, 3rd ed., ii. 219.

[6] *Inglis* v. *Anstruther*, 1771, M. 16633; *Stephen* v. *Lord Advocate*, 1878, 6 R. 282.

[7] Per Lord Johnston, *Wolfson* v. *Forrester*, 1910, S.C. 675, 681. Ersk. ii. 6, 39; Bell, *Prin.*, sec. 1253. As to English law, which differs materially, see Foa, *Landlord and Tenant*, 6th ed., 161.

[8] Per Lord M'Laren, *Mechan* v. *Watson*, 1907, S.C. 25, 28.

[9] *Reid* v. *Baird*, 1876, 4 R. 234; *Marianski* v. *Jackson*, 1872, 9 S.L.R. 480; *Mechan* v. *Watson*, *supra*; *Morgan* v. *Liverpool Corporation* [1927], 2 K.B. 131. And see, as to the obligation of a builder to provide a damp course, *Speirs* v. *Petersen*, 1924, S.C. 428.

[10] *North British Storage Co.* v. *Steele's Trs.*, 1920, S.C. 194.

[11] The Housing (Scotland) Act, 1925 (15 Geo. V. c. 15), enacts, sec. 1 (1): "In any contract for letting for habitation a dwelling-house at a rent not exceeding twenty-six pounds, there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation." By sec. 1 (2) the landlord is given a right of access. In the Sheriff Court this section has been construed as a statutory warranty, applicable even when the landlord had no notice (*Oban Gas Co.* v. *Macdonald*, 1926, S.L.T. (Sh. Ct.) 97). The Court of Appeal, construing the same provision in the corresponding English statute, arrived at the opposite conclusion (*Morgan* v. *Liverpool Corporation* [1927], 2 K.B. 131).

defects on receiving notice. He is therefore not liable in damages for supervening defects of which he had no notice.[1] But a tenant states a relevant case for damages by averments that though the immediate cause of the defect *e.g.*, a burst pipe may be accidental, the liability to that accident was due to the defective character of the house at his entry.[2]

Lease of Shop, Office, Store. – In the lease of a shop, office, or store, there is an implied warranty, similar to that implied in the lease of a house, that the premises are fit for occupation, wind and watertight.[3] In the case of a store this extends to stability. The landlord impliedly undertakes that the store is strong enough to bear loading in the manner customary in the particular trade, not that it is strong enough to bear any weight which it is physically possible to put into it.[4] It is conceived that the law goes no further, and that there is no general implication of fitness for any particular business which the tenant may desire to carry on, even when he indicated his intention to the landlord. The presumption is that a tenant is cognisant of the requirements of his own business, and that he has satisfied himself of the suitability of the subjects which he proposes to take on lease. In *Murray* v. *Buchanan*,[5] the tenant of a flat in a tenement house had erected lace looms, and his use of them was interdicted by the Magistrates as endangering the stability of the tenement. He refused to pay his rent, averring that he had made known to the landlord the use to which he proposed to put the flat. This averment he failed to prove, and he was found liable to pay the rent, but the report states that the Court were of opinion that if it had been proved that the landlord had been informed of the tenant's purpose, "although it were not alleged she had come under any obligation to warrant the house to be fit for that purpose, yet that the defence of insufficiency was solid." This would seem to infer an expression of opinion that a landlord impliedly warrants that the purpose for which, to his knowledge, the premises are taken by the tenant can be lawfully carried on. It is, however, not supported by later authorities. Thus where a mill was let, the landlord was under no implied obligation to furnish an adequate supply of water.[6] In *Hart's Trs.* v. *Arrol* the law was laid down by Lord Kyllachy, Ordinary, with the approval of the Court: "On principle I can see no reason why, apart from express agreement, a failure of the purpose for which a tenant takes a house or shop should, even if the purpose is expressed in the lease, liberate the tenant from his obligations."[7]

Agricultural Leases. – In agricultural leases the implied obligation of the landlord is to furnish a subject in the state denoted by the word "tenantable."[8] Primarily that implies that the buildings and fences are in good repair, and that the building will, if treated with reasonable care, last for the period of the lease.[9] It has also been laid down that a landlord

[1] *Hampton* v. *Galloway*, 1899, 1 F. 501; *Wolfson* v. *Forrester*, 1910, S.C. 675; *Dickie* v. *Amicable Property Investment Society*, 1911, S.C. 1079, opinion of Lord Skerrington.

[2] *Fingland & Mitchell* v. *Howie*, 1926, S.C. 319.

[3] *North British Storage Co.* v. *Steele's Trs.*, 1920, S.C. 194.

[4] *Glebe Sugar Refining Co.* v. *Paterson*, 1900, 2 F. 615. The English Courts have held that in the lease of a store there is no implied warranty of stability; *Manchester Bonded Warehouse Co.* v. *Carr*, 1880, 5 C.P.D. 507.

[5] 1776, M. 16,636.

[6] *Aitchison* v. *Magistrates of Glasgow*, 1822, 1 S. 506; affd. 1825, 1 W. & S. 153.

[7] *Hart's Trs.* v. *Arrol*, 1903, 6 F. 36, at pp. 38, 40.

[8] Ersk. ii. 6, 39; Bell, *Prin.*, sec. 1253; Rankine, *Leases*, 3rd ed., p. 249.

[9] *Davidson* v. *Logan*, 1908, S.C. 350, contrasting the obligation of a tenant at ish; *Wight* v. *Newton*, 1911, S.C. 762, opinion of Lord Ardwall.

is bound "to give the tenant such additional buildings as will enable him to cultivate the land."[1] The question what repairs are necessary, or what additional buildings are required, will usually be determined by a remit to a man of skill. The obligation of the landlord covers the proper repair of the existing water supply;[2] does not extend to furnishing a water supply where none existed before, or involve a guarantee that the supply will continue to be adequate.[3] An opinion by Lord Ardwall[4] that the obligation of tenantable repair does not extend to the field drains on a farm is supported by reference to passages in Erskine and Bell, where the point is not mentioned. It is decided in England that a landlord gives no implied warranty that the land he lets is free from noxious substances, and that he was not liable for injury to cattle caused by their eating poisonous yew branches which were on the land at the time of entry and which the tenant might have seen.[5]

Contracts of Hire.—In the contract of hiring, a subject on which the law is far from clear, a distinction may be taken between a contract of hiring by description, *i.e.*, the hire of an article of a particular kind, and the hire of a specified article.[6] In the former case there is at least an implied warranty that reasonable care has been taken to supply an article fit for the purpose disclosed.[7] Cases in England relating to the hiring of carriage or horses seem to determine that there is an implied warranty that the carriage or horse supplied is as fit for its purpose as human care and skill can make it, but that there is no warranty against latent and undiscoverable defects.[8] In *Hyman* v. *Nye*, Mathew, J., was of opinion that there was no distinction in this respect between hiring and sale, but doubts have been indicated in a later case.[9] In *Robinson* v. *John Watson Ltd.*,[10] where a railway company supplied waggons for the carriage of coal, Lord M'Laren was of opinion that it was an implied term of the contract that the waggons should be fit for their purpose, not merely that reasonable care should have been taken to make them fit. In *Wood & Co.* v. *Mackay*,[11] where rope to be used as slings had been supplied to a stevedore by the owner of a ship, the same learned judge considered that the principle of the law of sale, under which it is an implied condition that the article is reasonably fit for the buyer's purpose, was not applicable. But, taking the case of a dealer who sells ropes and also lets them on hire, is there any reason why the implied condition as to their quality should not be the same in the one case as in the other?

The case of hiring a specific article was considered in *Robertson* v. *Amazon Tug Co.*[12] There *A.* had undertaken to take certain tenders, with a

[1] Per Lord Pres. Inglis in *Barclay* v. *Neilson*, 1878, 5 R. 909. There is no decision on the question how far this extends to new developments in agricultural practice.

[2] *Christie* v. *Wilson*, 1915, S.C. 645.

[3] *Russell* v. *Sime*, 1912, 2 S.L.T. 344 (O.H., Lord Ormidale).

[4] *Wight* v. *Newton*, 1911, S.C. 762, at p. 772.

[5] *Cheater* v. *Cater* [1918], 1 K.B. 247. Compare *Sutherland* v. *Hutton*, 1896, 23 R. 718. In *The Moorcock*, 1889, 14 P.D. 64, it was held that the owner of a jetty on a river who invited vessels to come there was bound to see that the mooring was safe, if that was within his powers; if not, and if he had no power to interfere with the bed of the river, his obligation was to inspect it, and give notice when it was dangerous. And see *Dig.*, xix. 2, 19.

[6] The distinction is taken in *Robertson* v. *Amazon Tug Co.*, 1881, 7 Q.B.D. 598.

[7] Bell, *Prin.*, sec. 141; Pothier, *Louage*, ii. 1, 4; *Wilson* v. *Norris*, 10th March 1810, F.C.; *Coughlin* v. *Gilkison* [1899], 1 Q.B. 145; contrasting the case of gratuitous loan.

[8] *Fowler* v. *Lock*, 1872, L.R. 7 C.P. 272; sequel, L.R. 10 C.P. 90; *Hyman* v. *Nye*, 1881, 6 Q.B.D. 685; *Marney* v. *Scott* [1899], 1 Q.B. 986. And see opinions in *Readhead* v. *Midland Rly.*, 1867, L.R. 2 Q.B. 412; affd. 1869, L.R. 4 Q.B. 379.

[9] *Geddling* v. *Marsh* [1920], 1 K.B. 668.

[10] 1892, 20 R. 144. [11] 1906, 8 F. 625. [12] 1881, 7 Q.B.D. 598.

particular tug, to South America. Owing to defects in the condition of the tug, of which neither party was aware, the voyage took longer than it should have done, and *A.* made a claim for damages. The majority of the Court refused to entertain it, on the ground that the owner of the tug had given no implied warranty that it was in good condition. The case of a particular horse hired for a day's hunting was instanced by Bramwell, L.J. There would, he considered, be no warranty that it was reasonably fit for hunting; there would be a warranty that it was in a condition to display any powers as a hunter which it possessed. Brett, L.J., considering the same case, held that the horse dealer would warrant nothing except that he had taken reasonable care to safeguard the horse from any injury arising after the contract was entered into. The law of Scotland seems to be in accordance with the opinion of Bramwell, L.J. A portion of a mill was hired, by a contract under which the hirer erected machinery; the millowner undertook to supply power from a steam engine which he worked on the premises. In an action of damages by the hirer, based on the faulty working and continued stoppages of the steam engine, the Court was of opinion that the millowner "was *ex lege* bound to warrant his engine to be sufficient and in good repair." [1]

[1] *Wilson* v. *Norris*, 10th March 1810, F.C.

CHAPTER XVIII

QUASI-CONTRACT AND IMPLIED OBLIGATIONS

Quasi-Contract in Civil and Scots Law.—The term "*quasi*-contract" had a very wide signification in Roman law. Under a division of obligations into four classes—obligations arising *ex contractu*, *quasi ex contractu*, *ex maleficio*, and *quasi ex maleficio*[1]—the second class comprised all obligations which could not be traced to any prior agreement between the parties, and which were not founded on any wrongdoing or negligence on the part of the obligee. Thus Gaius includes under obligations *quasi ex contractu* the reciprocal obligations of tutor and ward, the obligation of an heir to pay a legacy, the obligation to repay money paid by mistake, the rights and obligation of a *negotiorum gestor*.[2] In the *Institutes* there is added the obligation resulting from the fact that property is held in common;[3] in other passages the obligation to restore property given on a consideration which has failed,[4] or on an illegal consideration, or which has been extorted by violence.[5]

It cannot be said that the term *quasi*-contract has any definite meaning in the law of Scotland. The division of all obligations adopted in the civil law has been rejected as inadequate or misleading.[6] But *quasi*-contract is used as a convenient *nomen juris* for those obligations recognised by law on equitable grounds which resemble contracts in respect that they consist of an obligation to pay or do something, and not of an obligation to make reparation for injury caused by wrongdoing or negligence. Of these the obligation of restitution, in so far as it is connected with the law of contract rather than with the general law of property,[7] and the obligation to repay money paid by mistake (*indebiti solutio*),[8] have been already considered. The present chapter is concerned with the law of recompense and *negotiorum gestio*, and with certain implied obligations analogous in character.

Definition of Recompense.—The definition of recompense given in Bell's *Principles*—"Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify that other to the extent of his gain"[9]—is, as has been pointed out by Lord Dunedin,[10] expressed far too widely, and would cover cases where the gain was merely the incidental result of an act of which the doer reaped the full advantage, and where, therefore, he has suffered no loss. Stair, more correctly, speaks of "recompense of what we are profited by the damage of others, without their purpose to gift,"[11] a principle expressed in the maxim *nemo debet locupletari ex alienâ jacturâ*.[12] That maxim, however, is only a general principle of equity, not a fixed rule to be applied indiscriminately

[1] *Inst.*, iii. 13. [2] *Dig.*, xliv. 7, 5. [3] *Inst.*, iii. 27.
[4] *Dig.*, xii. 4. [5] *Dig.*, xii. 5.
[6] Stair, i. 3, 2; Bell, *Prin.*, sec. 525; *Allen* v. *M'Combie's Trs.*, 1909, S.C. 710.
[7] *Supra*, p. 57. [8] *Supra*, p. 60.
[9] Sec. 538. The definition is taken from Erskine, iii. 1, 11.
[10] *Edinburgh Tramways Co.* v. *Courtenay*, 1909, S.C. 99.
[11] Stair, i. 8, 3. [12] See *Dig.*, xii. 6, 14.

to all cases where it may be shown that *A.* has, directly or indirectly, profited by *B.'s* loss. Thus Lord Kames points out that a calamity by which *B.'s* goods are destroyed may, if the supply of goods be limited, enable *A.* to get a better price than he would have otherwise obtained without giving *B.* any claim for a share of that profit.[1] A study of the decisions does not encourage any attempt to frame a formula less far-reaching but sufficiently wide to cover the cases; but an attempt to systematise them may be made by considering (1) what acts, involving loss, admit of a claim which cannot be founded either on contract or delict, and (2) the nature of the advantage or enrichment which may make a man liable to the party at whose expense it has been obtained.

Express Contract Excludes Recompense.—It is not easy to state the limits within which a claim for recompense may be advanced, but it is conceived that if the relations of parties are regulated by a contract of which there is competent evidence, neither can ignore it and obtain better terms by framing his case as a claim for recompense. When goods have been sold for a fixed price the seller cannot claim more on the plea that he has undervalued the goods, and the buyer is consequently enriched at his expense. Where a contract for building a railway had been undertaken for a lump sum, and—after the work had been completed and *restitutio in integrum* was therefore impossible—the contractors averred that they had been induced to tender by a misrepresentation, the suggestion that they were entitled to ignore their contract, and claim payment in so far as the employers were enriched, was rejected by Lord Guthrie in the Court of Session and by Earl Loreburn in the House of Lords.[2] Where a contractor undertakes to furnish an article of a prescribed strength, for a contract price, the fact that he finds it necessary, in order to attain the required strength, to use methods more expensive than those stated in his specification does not entitle him to any extra payment.[3] If payment for goods or services is conditional on the occurrence of a certain event, the failure of the condition concludes any claim. The possibility that *A.* may be enriched at *B.'s* expense is then a contingency which *B.* may be assumed to have considered when he made the contract. So where a ship was chartered on a contract whereby no more than a certain sum was to be payable by the charterer if the ship were lost, a claim for a larger sum, based on the ground that the charterer had profited by the use of the ship, was repelled.[4] Recompense, it is submitted, is a remedy available only where there is either no contract, or where, if there is one, action upon it is in some way precluded.

Recompense where Proof of Contract Limited.—It would appear that a claim for recompense may be maintainable in cases where the pursuer's attitude is that he has rendered services under a contract to pay for them, but cannot found any claim upon the contract because it is one where proof

[1] *Principles of Equity*, 3rd ed., i. 139. In *Burns* v. *M'Lellan's Creditors*, 1735, M. 13,402, the report begins, "No law subjects a man to recompense or remuneration who reaps an occasional or consequential benefit from the deed of another done with no view to his interests." This was adopted by Lord Lee, *Yellowlees* v. *Alexander*, 1882, 9 R. 765, 769.

[2] *Boyd & Forrest* v. *Glasgow and South-Western Rly.*, 1914, S.C. 472; revd. 1915, S.C. (H.L.) 20. This argument apparently was not seriously pressed, the contractors' real claim being that they were entitled to imply a contract for payment *quantum meruit*.

[3] *Wilson* v. *Wallace*, 1859, 21 D. 507; *Tharsis Sulphur, etc., Co.* v. *M'Elroy*, 1877, 5 R. 161; revd. 1878, 5 R. (H.L.) 171; *Jackson* v. *Eastbourne Local Board*, 1886; Hudson, *Building Contracts*, 4th ed., ii. 81.

[4] *Heimdal* v. *Noble*, 1907, S.C. 249. See also *Brown* v. *Rollo*, 1832, 10 S. 667. *Menzies, Bruce-Low & Thomson* v. *M'Lennan*, 1925, 22 R. 299.

is limited to the defender's writ or oath, and neither of these methods of proof is available. In such circumstances parole evidence may be admissible on an action framed as a claim for reimbursement of expenditure, a point already considered.[1] Alternatively, and on the assumption that the pursuer can prove that the defender is *lucratus* by the services on which he founds, the action may be framed as a claim for recompense, measured, not by the pursuer's expenditure, as in a claim for reimbursement, but by the defender's gain. So in one case where the pursuer's averment was that he had repaired buildings on a verbal promise of payment ;[2] in another, that he had built a house on a verbal promise of a gift of the ground ;[3] in a third, that he had altered a villa in reliance on a verbal agreement to buy it ;[4] proof *prout de jure* was allowed in actions bound on the principle of recompense, where proof in an action based upon contract would have been limited to writ or oath. In *Newton* v. *Newton*,[5] *A.*, purchasing a house, had taken the title in favour of *B.* Proof of his averment that *B.* held in trust for him was limited to *B.'s* writ or oath, and failed. Parole evidence was allowed in support of a separate claim that *A.* had expended money on the improvement of the house in the mistaken belief that it was his own property, and he was found entitled to payment in so far as *B.* was *lucratus* by the improvements. In *Gray* v. *Johnston*[6] the pursuer averred that he had rendered services to the defender in reliance on a promise of a will in his favour. He disclaimed any action founded on contract, but advanced a claim for recompense, based on the ground that his services had proved beneficial. The action was dismissed, on the ground that there were no relevant averments to support a claim for recompense as distinguished from the other grounds of claim on which the pursuer founded.

Recompense where Contract Void.—The plea of recompense may be put forward where parties have acted under an actual agreement, but where, by some positive rule of law, that agreement is not enforceable. Thus where a pupil or minor enters into an agreement which cannot be enforced against him he will be liable in so far as a benefit to him has resulted.[7] If a particular method of contracting, which would otherwise be lawful, is prohibited by statute, a party who has obtained goods under the contract must pay the market price for them.[8]

Recompense for Extra Work.—Where a party acting under contract has supplied or done more than the contract demands, and the excess is accepted under circumstances which make rejection possible, a contract for additional payment may be held to be implied. So if the seller of goods delivers more than was ordered the buyer may reject the whole, or the extra quantity, but

[1] *Supra*, p. 176.

[2] *Mackay* v. *Rodger*, 1907, 15 S.L.T. 42 (O.H. Lord Salvesen).

[3] *Bell* v. *Bell*, 1841, 3 D. 1201.

[4] *Hamilton* v. *Lochrane*, 1899, 1 F. 478. On this very doubtful case, where proof in a claim for recompense was allowed although there were no averments that the defender was *lucratus*, see observations in *Gilchrist* v. *Whyte*, 1907, S.C. 984.

[5] 1925, S.C. 715.

[6] 1928, S.C. 659 ; L.J.C. (Alness) dissenting. For other aspects of this case, see *supra*, p. 176. Question whether the last paragraph of the rubric is justified by the opinions given ? The Lord Ordinary (Murray) held, p. 664, that error, on the part of the pursuer, was "of the essence of a claim for recompense." This statement is criticised by L.J.C. Alness at p. 681. It seems too broadly stated, in view of the cases where it has been held that a builder, who has failed to erect the building agreed upon, and cannot therefore claim the contract price, has a claim for recompense, *quantum lucratus* the employer, if the building is in fact retained. See *infra*, p. 327.

[7] Stair, i. 8 C. And see *supra*, pp. 78, 85.

[8] *Cuthbertson* v. *Lowes*, 1870, 8 M. 1073.

if he accepts it must pay for it at the contract price.[1] But an implied contract involves that each party had a choice in the matter, and therefore where a printing press was supplied of better and more expensive quality than had been ordered, it was held that as there was no excess which could be rejected there was no claim for anything more than the contract price.[2] And the authorities do not favour any claim for recompense in such circumstances.[3] Where a tenant was bound to make an embankment and made one more expensive and durable than his obligation required, his claim for recompense was rejected.[4] The same result was arrived at where an accountant, employed to furnish a state of accounts, produced a state much more elaborate than was warranted by the terms of his employment.[5] And it is clear that if any claim for recompense is founded on extra work it must be shewn that the employer has been the gainer by it. So where a building contract provided for girders of a specified weight, and heavier and more expensive girders were supplied, because the builder found that this was the cheapest way in which he could make the building sufficiently strong, it was held that any claim for extra payment was excluded by the fact that the heavier girder added nothing to the value of the building.[6]

Party Claiming Recompense must Shew Loss.—It is a general, though not quite a universal, rule that a party who is putting forward a claim of recompense must shew that he has suffered loss, either by expenditure from which he has not obtained the benefit contemplated, or by the rendering of services which have not been requited. If he has done something for his own benefit, and obtained the full advantage of it, he can found no claim on the ground that another party has incidentally profited. "Recompense is a remedial obligation well known to the law, but that obligation is founded on the consideration that the party making the demand has been put to some expense or some disadvantage, and by reason of that expense or disadvantage there has been a benefit created to the party from whom he makes the demand of such a kind that it cannot be undone. The best and most familiar example of that is the case of one building upon another's land. But in every case there must be, in order to ground the claim, the loss to one party resulting in a benefit to the other."[7] Thus, in the case from which this passage is taken, the proprietor of an entailed estate introduced a water supply to a particular part of his estate. A portion of the lands so supplied he excambed for other property, without making any arrangement about the water supply. His successor in the entailed estate claimed, on this principle of recompense, the value of the water used by the owner of the lands excambed and his tenants. It was held that the defender was entitled to absolvitor. The pursuer's remedy was to cut off the water; if he did not choose to do so he had suffered no loss for which recompense could be claimed.[8] Where a ship was in dock undergoing repairs for which underwriters were liable, and the owner took the opportunity to have her surveyed for reclassification at Lloyds, the underwriters, who had not been subjected to any delay or expense, could found no claim on the advantage

[1] Sale of Goods Act, 1893, sec. 30.
[2] *Wilmot* v. *Smith*, 1828, 3 C. & P. 453. See Bell, *Com.*, i. 48.
[3] As to claims for additional pay by salaried officials, see *supra*, p. 292.
[4] *Grant* v. *Macleod*, 1856, 19 D. 127.
[5] *Scott* v. *Marshall*, 1847, 10 D. 226.
[6] *Tharsis Sulphur, etc., Co.* v. *M'Elroy & Sons*, 1877, 5 R. 161; revd. 1878, 5 R. (H.L.) 171. See also *Wilson* v. *Wallace*, 1859, 21 D. 507.
[7] Per Lord President Inglis, *Stewart* v. *Steuart*, 1878, 6 R. 145, at p. 149.
[8] *Stewart* v. *Steuart*, *supra*.

which the owner had obtained.[1] In *Edinburgh Tramways Co.* v. *Courtenay*[2] the advertising rights on tramway cars was let to an advertising contractor, it being part of the bargain that he should supply the boards he might require for the purpose of his advertisements. New cars were built with boards already attached, this being done for the purpose of improving the cars. The contractor used the boards for his advertisements. An attempt to demand payment from him for this advantage failed. The tramway company had supplied the boards for the purpose of improving their own cars and had attained their object; they were not entitled to make any claim for the incidental advantage obtained by their advertising contractor. The Lord President (Dunedin) put the illustration that a man who heats his own house cannot recover part of the expense from his neighbour, on the plea that that neighbour is incidentally benefited by the warmth.[3] So operations on a river may benefit lower proprietors without subjecting them to any liability.[4]

Services to Common Property.—The exception to the rule that the party claiming recompense must shew loss is found in certain cases of common ownership or interest. Thus, if one proprietor expends money in a way beneficial to the common property, he may have a claim for recompense from his co-owners although his expenditure has met with an adequate return. The others have no right to take the advantage gratuitously.[5] So where repairs or the rebuilding of a mutual gable are required, the party who makes them, though primarily for his own advantage, is entitled to recover half the expense from the owner of the other house served by the gable.[6] But the beneficial act must be one which the proprietors who did it had a right to do: and, therefore, where a commoner had brought a portion of the commonty under cultivation it was held that he had no claim to reimbursement, because his proceedings, though they may have improved the value of the commonty, were of the nature of encroachments on the rights of the other commoners.[7]

Expense of Litigation.—If a litigant establishes a claim to property in which others have an interest, they cannot claim their share without bearing a proportional share of the expenses which he has incurred.[8] Their liability extends to a portion of the case in which their champion has been unsuccessful.[9] Similarly, if an action is raised against some of the co-owners of a particular property, on a ground which involves the liability of all the owners, co-owners who have not been called as defenders will be liable for a share of the costs of defence, unless, on becoming aware of the action, they expressly disclaim all responsibility for defending it.[10] But there is no ground for extending these rules to cases which lack the element of common property. The successful litigant may establish a precedent of value to others having similar claims, but must bear his own expenses.[11]

[1] *Ruabon S.S. Co.* v. *London Assurance Co.* [1900], A.C. 6. See also *Admiralty Commissioners* v. *S.S. Chekiang* [1926], A.C. 637; "*Cameronia*" v. "*Hauk*," 1928, S.L.T. 71 (O.H., Lord Constable).

[2] 1909, S.C. 99.

[3] *Orr* v. *Graham*, 1831, 10 S. 135.

[4] 1909, S.C., at p. 105.

[5] Kames, *Principles of Equity*, bk. i., pt. i., chap. iii., sec. 2, 2; *Dig.*, iii. 5, 21.

[6] *Stark's Trs.* v. *Cooper's Trs.*, 1900, 2 F. 1257.

[7] *Innes* v. *Hepburn*, 1859, 21 D. 832.

[8] *Forbes* v. *Ross*, 1676, M. 13414; *Campbell* v. *Creditors on the Equivalent*, 1725, M. 9276 *Cowan's Tr.* v. *Cowan*, 1888, 16 R. 7; *Sawers' Factor* v. *Sawers*, 1889, 17 R. 1.

[9] *Cowan's Tr.* v. *Cowan*, *supra*.

[10] *Bennett* v. *M'Lellan*, 1891, 18 R. 955. See *Dig.*, iii. 5, 31.

[11] More, *Notes to Stair*, i., liv.

Meliorations by *bona-fide* Possessor.—The strongest case for a plea of recompense is where a man has expended money under a mistake, and the benefit of his expenditure has passed to another. Thus if land is held honestly but under an invalid title, and the party so holding effects improvements or erects buildings, the true owner cannot recover the lands, and with them the improvements or buildings, except upon condition of paying the amount by which they have added to the value of the property.[1] So where the purchase of a property by the trustee in a judicial sale was reduced on the ground that he had no power to purchase,[2] and where a feu by a corporation was set aside on the ground that it had not been preceded by an Act of Council,[3] the party dispossessed was found to be entitled to the value of his improvements. And the same rule was applied to a case where the assignee of a policy of insurance had paid the premiums, and his assignation was ultimately reduced.[4]

***Mala-fide* Possession.** Lord Stair, founding on Roman law, states that "even he who *mala fide* buildeth upon another man's ground, or repaireth unnecessarily his house, is not presumed to do it *animo donandi*, but hath recompense by the owner *in quantum lucratus*."[5] But this has not been followed, and in the ordinary case if a man spends money on the improvement of property in the knowledge that his title is defective, he will have no claim when that title is ultimately reduced.[6] The question was directly raised, and decided contrary to the authority of Lord Stair, in *Barbour* v. *Halliday*,[7] where a law agent, who had the title-deeds of some urban property pledged to him, had obtained possession of it while the owner was absent from Scotland, and had built a house, was held to have no claim for the value of the house when the owner returned and claimed the property, on the ground that the weight of authority established that a claim for recompense was not open to a *mala-fide* possessor. And if a title is such that the objections to it are at once obvious, the holder of it may be a *mala-fide* possessor, in this connection, though it is not proved that he knew of the defect.[8] Expenditure in the knowledge that the title to possess is challenged is in the same position as expenditure *mala fide*.[9] Where there has been no challenge, the most recent case decides that actual *bona fides*, though without any colourable title, is sufficient.[10]

[1] *York Buildings Co.* v. *Mackenzie*, 1793, M. 13367; revd. 1795, 3 Paton, 378; sequel, 1797, 3 Paton, 579; *Binning* v. *Brotherstone*, 1676, M. 13401; *Magistrates of Selkirk* v. *Clapperton*, 1830, 9 S. 9; *Edinburgh Life Assurance Co.* v. *Balderston*, 1909, 2 S.L.T. 323; (O.H. Lord Mackenzie); *Newton* v. *Newton*, 1925, S.C. 715, narrated *supra*, p. 321.

[2] *York Buildings Co.* v. *Mackenzie*, *supra*.

[3] *Magistrates of Selkirk* v. *Clapperton*, *supra*.

[4] *Edinburgh Life Assurance Co.* v. *Balderston*, *supra*.

[5] Stair, i. 8, 6. The phrase *quantum lucratus*, constantly used in the Scotch cases, seems to have no classical authority. The texts in the *Digest*, dealing with questions of recompense, generally refer to the property, and not to the owner, and sanction a claim *quantum pretiosior res facta est* (vi. 1, 38; xx. 1, 29) or *si res melior sit* (v. 3, 38). Where the enrichment of the owner is spoken of, as in claims for recompense against pupils, the word used is *locupletior* (xiii. 6, 5).

[6] Ersk. iii. 1, 11; Bell, *Prin.*, sec. 538; *Barbour* v. *Halliday*, 1840, 2 D. 1279; *Duke of Hamilton* v. *Johnston*, 1877, 14 S.L.R. 298.

[7] 1840, 2 D. 1279.

[8] *Waugh* v. *Nisbett*, 1882, 19 S.L.R. 427; *Soues* v. *Mill*, 1903, 11 S.L.T. 98 (omission of search for incumbrances).

[9] *Waugh* v. *Nisbett*, 1882, 19 S.L.R. 427. In two very special cases recompense has been allowed where the possessor knew that his right was open to challenge. *Yellowlees* v. *Alexander*, 1882, 9 R. 765; *Steuart's Trs.* v. *Hart*, 1875, 3 R. 192.

[10] *Newton* v. *Newton*, 1925, S.C. 715. In *Soues* v. *Mill*, 1903, 11 S.L.T. 98, the Lord Ordinary (Kyllachy) held that a colourable title was essential.

The principle that a *bona-fide* possessor has a claim for recompense is not confined to cases of improvements on land; it will cover a claim for payment for the management of property reasonably believed to belong to the party who has managed it. In *Anderson* v. *Anderson*[1] *A.* had carried on a farm of which his father had been tenant, in the belief that he had entered into an arrangement with his brothers and sisters under which the farm was to be exclusively his. In an action of accounting it was proved that the agreement was that the farm was to be carried on by him for behoof of all. It was held that *A.* was entitled, in accounting, to take credit for a reasonable sum for his services as manager, either (as some of the Court thought) on the ground of an implied contract to pay him or (as was held by others) on the principle of recompense.

Temporary Titles.—If a party makes improvements on subjects to which he has a valid but temporary title there is a strong presumption that he made them for his own benefit, hoping to be recouped while his title lasted, and therefore that no claim for recompense will arise on the expiry of that title, though in circumstances in which the expectation of the maker of the improvements has been disappointed. On this principle a tenant has no claim at common law for his improvements on the subjects let,[2] even although the landlord, by taking advantage of an irritancy, has brought the lease prematurely to an end.[3] Such a claim may, however, be sustained on proof of a local custom to pay for improvements,[4] and was allowed in some very exceptional cases, where houses had been built on a title no higher than yearly tenancy, but on an understanding, which had been acted on for nearly a century, that the builders were to be regarded as colonists and not to be dispossessed.[5]

Improvements by Liferenter.—In the case where improvements have been made by a liferenter there is a very strong presumption that he made them with a view solely to his own advantage, and that no claim can be made by his representatives against the fiar.[6] Improvements on a glebe, it was held, gave no claim for recompense against the incumbent's successor.[7] In *Wallace* v. *Braid*[8] a party had executed extensive repairs on houses on the orders of a liferentrix, had not been paid, and had obtained from her an assignation of all claims that she might have against the fiar. On her death it was held that an action founding on this assignation, and on averments that the value of the property was improved, was irrelevant, on the ground that nothing had been averred to exclude the general presumption that improvements by a liferenter are made by him exclusively in his own interest. In *Rankin* v. *Wither*[9] a husband, who was entitled under his *jus mariti* to the rents of his wife's heritable property while the marriage subsisted, expended considerable sums in repairs. It was proved that the wife had

[1] 1869, 8 M. 157.

[2] Ersk. iii. 1, 11; Bell, *Prin.*, sec. 1255.

[3] *Scott's Exrs.* v. *Hepburn*, 1876, 3 R. 816, followed, as settling the law, in *Walker* v. *M'Knight*, 1886, 13 R. 599.

[4] *M'Intosh* v. *Ogilvy*, 1806, Hume, 822; *Officer* v. *Nicolson*, 1807, Hume, 827.

[5] See *M'Tavish* v. *Fraser's Trs.*, 1790, Hume, 546, and two following cases (Fort Augustus cases). See also *Macintyre* v. *Orde*, 1881, 18 S.L.R. 604.

[6] For cases where the presumption has been overcome, see *Reedie* v. *Yeaman*, 1875, 12 S.L.R. 625; *Morrison* v. *Allan*, 1886, 13 R. 1156; *Morgan* v. *Morgan's Factor*, 1922, S.L.T. 247. The rebuilding of a house is an exceptional case. If a liferenter rebuilds, the fiar is liable for its value when the succession opens to him. *Guthrie* v. *Lord M'Kerston*, 1672, M. 13414; *Haliday* v. *Gardine*, 1706, M. 13419. The same rule probably applies to the restoration of a ruin. *Jack* v. *Pollock*, 1665, M. 13412; *Scot* v. *Forbes*, 1755, M. 8279.

[7] *Dunbar* v. *Hay*, 1623, M. 13399.

[8] 1900, 2 F. 754.

[9] 1886, 13 R. 903.

expressed her intention to leave the property to him, but, as she died without a will, it passed to her heir. It was held that the husband had no claim against the heir, either on the plea that the money he had expended was a donation to his wife, which he was entitled to revoke (a plea refuted by the facts of the case), or on the ground of recompense, because it was proved that his expenditure had been made exclusively with a view to his own interests.

Creditor in Possession.—A creditor in possession of subjects conveyed to him in security is entitled to charge the debtor with the expenses of upkeep and necessary repairs, but this rests on contract, express or implied.[1] It is hard to see why a creditor who has chosen to make improvements on the subjects of his security should not be considered, like other possessors on temporary rights, to have made them for his own advantage. But in *Nelson* v. *Gordon* [2] it was held that a party who was in possession of subjects on an *ex facie* absolute disposition, explained by a relative minute of agreement to be only in security, was, when asked to denude and tendered payment of his debt, entitled to a proof of his averments that he had expended money by which the subjects were improved, in support of a plea that he was not bound to denude until this expenditure, in so far as beneficial, was repaid. And Lord President Inglis laid down the rule that it was settled "that if a party holding an *ex facie* absolute disposition, and being in possession of subjects, expends money on them, he is entitled to be reimbursed to the extent that the real owner is *lucratus* by his expenditure." Two cases, both very special, may be cited in support of this proposition. In *Lord Prestongrange* v. *Earl of Lothian*,[3] a wadsetter obtained decree in a declarator asking for authority to expend money on repair of a harbour, and recover it from the reverser in so far as the latter was *lucratus*, but the report bears that the action was undefended. In *Rutherford* v. *Rankine* [4] a creditor had built a house on subjects of which he had entered into possession, and in the belief, as he averred, that the right of redemption would never be exercised. He was held to be entitled to the value of the house, but the report gives no clue to the grounds on which this result was arrived at. On this state of the authorities it is submitted that it cannot be the law that a creditor in possession of subjects conveyed in security has a free hand to expend money thereon, and charge the debtor with his expenditure, simply on proof that the value of the subject (which the debtor may not wish to realise) has been increased.

Expenditure by Fiar or Landlord.—Expenditure by a party on subjects of which he is the owner, though for the time being they are enjoyed by another having a temporary right, is a case which also raises a strong presumption that the expenditure was made for the party's own purposes. And a landlord who has improved the subjects during the currency of a lease has no claim for recompense against the tenant.[5] But where a tenement held in liferent was destroyed by fire and rebuilt by the fiar, it was held that the rights of the liferenter were either to have the annual value of the subjects

[1] See Titles to Land Consolidation (Scotland) Act, 1868 (30 & 31 Vict. c. 101), sec. 119, import of words "I assign the rents" in Sched. FF.

[2] 1874, 1 R. 1093. See comments on the case by Lord Young (whose judgment as Lord Ordinary was recalled) in *Reedie* v. *Yeaman*, 1875, 12 S.L.R. 625; and *Rankin* v. *Wither*, 1886, 13 R. 903. As to the rights acquired when repairs are executed by a creditor in possession under warrant from the Sheriff, or decree of judge and warrant in the Dean of Guild Court, see Ersk. iii. 1, 34.

[3] 1626, M. 13402. [4] 1782, M. 13422. [5] *Drummond* v. *Swanston*, 1782, M. 2487.

before they were rebuilt, or the actual rents, less interest on the sum which the liar had expended.[1] In effect the decision was that the liar had a claim of recompense.

The case of expenditure on property known to belong to another, and with the intention of acting on behalf of the owner, may be a case of *negotiorum gestio*, which is considered on a later page.[2]

Recompense in Cases of Breach of Contract.—Recompense may be claimed where work has been done under a contract with a provision for payment on completion, and the party who has done the work has failed to observe the conditions laid down by the contract. Then, if his deviation is in matters of detail, he may claim the contract price, subject to a deduction of the amount necessary to bring the work into harmony with the contract conditions. But if the deviations are material, so that he has not produced the thing he undertook to furnish, he has no claim under the contract, and the other party is under no obligation to accept work which is not what he ordered.[3] But if he does choose to accept it, he is liable to pay in so far as he is enriched. Where what he accepts is a separate article, not affixed to land, or some service, there is little difficulty in holding that he is liable to pay in so far as he is enriched, or, in English law, that he has come under an implied promise to pay.[4] So, in *Abrahams* v. *Campbell*,[5] *C.* leased slides on six tramways running in Dumbarton, for advertising purposes. At that time no other cars were running. The tramway system was extended, with the result that the six cars on which *C.*'s advertisements were displayed ran only occasionally. It was held that *C.* was no longer liable for the hire agreed upon, because the corresponding service was no longer rendered, but that he was bound to pay a reasonable sum for the advertising which he had actually obtained. In *Graham* v. *United Turkey Red Co.*,[6] where an agent, being in breach of a material provision of his contract, was refused the stipulated commission, the suggestion that he might have a claim in so far as his employers had gained by his introductions found some judicial support. There is more difficulty in a claim for recompense in building contracts, where the uncompleted or imperfect work may consist of excavation, or of buildings so affixed to the land that they have become *partes soli*. English law, if the contract is not divisible, then rejects any claim, in the absence of any special circumstances from which a promise to pay may be inferred, the reason being that the owner of the land has practically no option to reject the work, and the law of England, though ready to imply a promise where it is quite clear that none was intended, shrinks from that implication in cases where, if the party had considered whether he should give a promise, he would not have been in all respects a free agent.[7] But as the obligation of recompense does not depend on the fiction of a promise, there would seem, in Scotland, no more difficulty in sustaining such a claim in building than in other contracts. So Lord President Robertson, after explaining that if a builder departed materially from the contract terms the owner might rescind the contract and call upon him to remove his building, pointed out that if the owner

[1] *Hacket* v. *Watt*, 1672, M. 13412.

[2] *Infra*, p. 334.

[3] As to the right of rejection, see *infra*, Chap. XXXIV.

[4] *Munro* v. *Butt*, 1858, 8 E. & B. 738.

[5] 1911, S.C. 353.

[6] 1922, S.C. 533.

[7] *Sumpter* v. *Hedges* [1898], 1 Q.B. 673; *Wheeler* v. *Stratton*, 1911, 105 L.T. 786; holding that a promise to pay was not implied merely because the employer made use of the contractor's work, or received an allowance for it when getting the work completed by a new contractor. See review of the English cases by Lord Atkinson in *Boyd & Forrest* v. *Glasgow and South-Western Rly.*, 1915, S.C. (H.L.) 20, 25; and notes to *Cutter* v. *Powell*, 2 Smith, *Leading Cases*, 12th ed.

allowed the building to remain he would be liable to a claim for recompense, a claim "not for *quantum meruit* the builder, but for *quantum lucratus est* the proprietor."[1]

Building Contracts.—The principles laid down by Lord President Robertson in *Ramsay* v. *Brand*[2] would seem to apply to the case where a builder or contractor fails to finish his work, and the employer completes it himself. The contractor, on these principles, should be entitled to the value of the work he has done, *quantum lucratus est* the employer. It has, however, been held in England that in these circumstances the contractor has no claim.[3] This was held on the ground that the contractor's claim must rest on an implied contract to pay him, and that no contract could be implied where the employer had no chance of refusing the contractor's work unless he was prepared to abandon his property. But the cases in Scotland with regard to claims made by *bona-fide* possessors prove that, in a claim based on recompense and not on implied contract, the defender may be liable though the facts left him no choice except to take the property as improved or to abandon it altogether; and therefore it is thought that in the circumstances figured a claim for recompense might be maintained. In *Kerr* v. *Dundee Gas Co.*,[4] where a contractor failed when the work was partly done, a claim by the trustee for the value of the work was admitted, but the question of its validity does not appear to have been mooted.

Recompense and Implied Contract. When goods have been supplied, or services rendered, without any express provision as to terms, it may often be unnecessary to decide whether a claim for payment should be rested on implied contract or on the principle of recompense. Thus where payment has been awarded to an architect for plans which had been used,[5] to a tutor for tuition given,[6] to an employee for an invention installed in his employer's works,[7] some of the judges based their decision on an implied contract, others on recompense. In *Anderson* v. *Anderson*,[8] *A.* had managed a farm in the belief that he was sole tenant. It was proved that others were joint-tenants, and held that he was entitled to remuneration from them for his services as manager. Lord Deas sustained this claim as based on an implied agreement (which the facts seem to exclude); Lord Neaves, on the principle of recompense. In theory, these separate grounds of judgment might lead to separate results. An action based on implied contract involves a claim for payment *quantum meruit*, measured by the ordinary rate of payment for the particular goods or services in question: an action based on recompense involves a claim *quantum lucratus*, measured by the advantage which the recipient has obtained. But this distinction is generally obscured by the fact that the only way in which it can be determined how far a man has been enriched by goods or services of which he has had the benefit is by ascertaining what he would have had to pay if he had obtained them by express contract. There may, however, be cases where a claim based on implied contract is excluded yet are based on recompense may be open. Thus where it was decided that an architect had neither express nor implied authority to order

[1] *Ramsay* v. *Brand*, 1895, 25 R. 1212; *Steel* v. *Young*, 1907, S.C. 360. See comments on these cases in *Forrest* v. *Scottish County Investment Co.*, 1915, S.C. 115; affd. 1916, S.C. (H.L.) 28; *Speirs Ltd.* v. *Petersen*, 1924, S.C. 428, where action on the contract was sustained.

[2] *Supra.*

[3] *Sumpter* v. *Hedges* [1898], 1 Q.B. 673.

[4] 1861, 23 D. 343.

[5] *Landless* v. *Wilson*, 1880, 8 R. 289.

[6] *Hardinge* v. *Clarke*, 1856, 18 D. 612.

[7] *Mellor* v. *Beardmore & Co.*, 1927, S.C. 597, narrated *supra*, p. 291.

[8] 1869, 8 M. 157.

plans from a measurer it was held that the employer was bound to pay the measurer for the part of the plans of which he had made use.[1] The grounds of this decision were not given, but it seems to rest on the principle of recompense, and a case presenting somewhat similar feature was decided in England on the principle that if *A.* proffered goods or services to *B.*, and *B.* knew that they were not meant as a gift, he came under an implied promise to pay if he made use of them.[2] While no contract can be inferred with a party who has no power to contract the supply of money, goods, or services to him will raise an obligation to pay in so far as he is enriched. This has been decided in the case of a pupil ;[3] of a married woman who had no power to bind herself by a personal obligation ;[4] of a trustee who had no power to bind the trust estate ;[5] and is probably applicable to any case of borrowing *ultra vires*.[6] If work is done on a particular article without any authority from its owner a claim founded on implied contract is excluded because the owner has no opportunity of rejecting the work.[7] So where repairs on a ship were carried out to an extent which the owner had not authorised it was held that as he must either use the ship as repaired or abandon her, the mere fact that he used her, and that the repairs had increased her value, inferred no contract on his part to pay the repairer.[8] In such circumstances it would seem an undecided question whether in Scotland a claim for recompense might be maintainable.

Unauthorised Use of Property.—A rule which rests on recompense, or, in some cases, on the obligation of restitution, rather than on any implied contract, is that if a party obtains possession of property without any contract, and makes use of it, he will be liable to pay for it. So if goods are delivered at the wrong house, and consumed, they must be paid for.[9] Where oil which had been stolen was bought by a party who knew nothing of the theft, and he used it with other materials in making lard, he was found liable to the true owner for the value of the oil.[10] Similarly, if property is used in the knowledge that its owner did not intend it to be used gratuitously, an obligation to pay for it will be inferred by law. Thus where land is occupied without any lease a sum equivalent to rent is due.[11] Where a passenger travelled by an excursion train, and took luggage with him, knowing that the railway company did not carry luggage free in excursion trains, he was found liable in a charge for its carriage.[12] Where *A.* hired

[1] *Knox & Robb* v. *Scottish Garden Suburb Co.*, 1913, S.C. 872.

[2] *Ramsden & Carr* v. *Chessum*, 1913, 30 T. L.R. 68 (H.L.). An implied promise, in such circumstances, is the nearest English equivalent to an obligation of recompense. See *supra*, p. 286, note 3.

[3] *Scott's Tr.* v. *Scott*, 1887, 14 R. 1043.

[4] *Henderson* v. *Dawson*, 1895, 22 R. 895 ; *Laing* v. *Provincial Homes Co.*, 1909, S.C. 812.

[5] *Ralston* v. *M'Intyre's Factor*, 1882, 10 R. 72 ; opinion of Lord Rutherfurd Clark.

[6] See opinions of Lords Haldane and Dunedin in *Sinclair* v. *Brougham* [1914], A.C. 398, contrasting the Roman with the English law, which excludes any such claim except *in rem*, on the principle of following trust money. In *Tharsis Sulphur, etc., Co.* v. *M'Elroy & Son* (1878, 5 R. (H.L.) 171) Lord Blackburn said, "You are never liable to pay for goods unless you have expressly or impliedly agreed to pay for them." If "impliedly" covers all grounds of liability other than express contract the statement is true but meaningless ; if the word is used less widely, Lord Blackburn seems to overlook the principle of recompense.

[7] *Forman* v. *The "Liddesdale"* [1900], A.C. 190 ; *Sumpter* v. *Hedges* [1898], 1 Q.B. 673 ; *Vigers* v. *Cook* [1919], 2 K.B. 475.

[8] *Forman* v. *The "Liddesdale,"* *supra*.

[9] *Findlay* v. *Munro*, 1698, M. 1767.

[10] *International Banking Co.* v. *Ferguson, Shaw & Co.*, 1910, S.C. 182. See also *Oliver & Boyd* v. *Marr Typefounding Co.*, 1901, 9 S.L.T. 170.

[11] *Supra*, p. 40.

[12] *Rumsey* v. *North-Eastern Rly.*, 1863, 14 C.B. N.S. 641.

sacks from a railway company, and was informed that *B.*, the owner of the sacks, demanded a payment if they were kept beyond a certain time, it was held that he was liable to pay, although he had no contract with *B.*, and had paid the railway company for the use of the sacks.[1]

No Recompense where Payment Made.—A claim for recompense based on the ground that the defender has made use of goods, or services, supplied by the pursuer involves the assumption that the defender, if no recompense was due, would get the goods or services for nothing. So it is not maintainable if he has paid for them under a contract with a third party. If *A.* employs *B.* to do a particular piece of work at a contract price, and *B.* gets the work done by *C.*, any claim for payment from *A.* made by *C.* must be based on the ground that *B.* had *A.'s* authority to employ him. There can be no claim for recompense, because *A.*, having paid *B.* for the work, is not gratuitously enriched at *C.'s* expense. In *Robertson* v. *Beatson, M'Leod & Co.*[2] *B.*, an accountant, was employed to carry out an amalgamation between two companies, and was paid £200 to cover his charges, outlays, and expenses. The accountant, without the knowledge of his principals, had employed a law agent to draw up an agreement which was subsequently adopted by the companies. In an action by the law agent against the parties who had employed the accountant, it was held that the appointment of an accountant to carry out an amalgamation gave him no authority to employ a law agent at his employers' expense, and that the use of the document which the law agent had drawn involved no obligation to pay for it, in respect that it was used on the footing that it had already been paid for in the general payment to the accountant. So in a building contract for a lump sum a sub-contractor, who supplies goods under a contract with the builder, has no claim against the employer, even where he has been invited to tender by the employer's architect, and the builder has been directed by the architect to accept the tender. These facts do not amount to privity of contract between the employer and the sub-contractor, and the former, having paid the builder for the whole work, has not profited gratuitously at the sub-contractor's expense.[3]

Limits of Law of Recompense.—If *A.* does work or supplies goods under contract with *B.*, and in reliance on *B.'s* credit, he cannot found any claim against *C.* on the ground that *C.* has ultimately had the benefit, unless he can establish that the relationship between *B.* and *C.* is that of agent and principal.[4] "There is no such doctrine in the law of Scotland as that every person who has profited by work done under a contract is to be liable for the work so done."[5] So where a subject in which a party has a subordinate interest, such as that of a security holder, is repaired at the instance and on the credit of its owner, the tradesman has no claim against the security holder in respect that his security has been improved.[6] Conversely, if a pledgee or hirer orders repairs on the article, any claim on the owner must be rested on authority, express or implied, to pledge his credit. So where the hirer of a motor car was taken bound to keep it in repair, but expressly forbidden to subject it to any lien, it was held that a repairer could not

[1] *Chisholm* v. *Alexander & Son*, 1882, 19 S.L.R. 835. This seems an extreme case.
[2] 1908, S.C. 921. See also *Thomson, Jackson, Gourlay & Taylor* v. *Lochhead*, 1889, 16 R. 373.
[3] *Hampton* v. *Glamorgan C.C.* [1917], A.C. 13.
[4] As to the liability of an undisclosed principal, see *supra*, p. 128.
[5] Per Lord Kyllachy, *Cran* v. *Dodson*, 1893, 1 S.L.T. 354.
[6] *Selby's Heirs* v. *Jollie*, 1795, M. 13438; *Cran* v. *Dodson*, *supra*.

assert a lien against the owner.[1] If goods are sold, the seller has no claim against a sub-purchaser.[2] Whether he would have a claim against a mere donee is a question on which authority is lacking, but it is submitted that he would have none. Where a partner undertakes to contribute some particular property to the firm, and obtains it on his own credit, the firm is under no liability to the person who supplies it.[3]

Defender not *lucratus*.—Where expenditure has been incurred in circumstances which, under the rules stated in the preceding pages, would justify a claim of recompense, it must also be shewn that the party against whom the claim is made has been enriched, in the sense which the decisions have given to the maxim *nemo debet locupletari ex alienâ jacturâ*.

Creditor Receiving Payment.—A man is not *lucratus*, so as to be subjected to a claim for recompense, if the only advantage he has obtained is the payment of a debt lawfully due to him. A creditor receiving payment is not liable to a party from whom the debtor may have borrowed the money. Equity, as is explained by Lord Kames, will withstand, by affording a claim of recompense, an attempt to obtain a gain at another's expense; it will not interfere in a question between two parties *certantes de damno evitando*—striving to escape the loss threatened by the insolvency of their common debtor.[4] So those who have expended work in the repair of subjects forming part of a bankrupt estate have no claim to any preference over other creditors on the plea that their work has increased the value of the bankrupt's assets.[5] And where the trustee in a trust deed for creditors granted by a farmer expended money in labour and seed for the farm, but without obtaining a completed assignation to the lease, it was held, in the ensuing sequestration of the debtor, that the trustee could claim no preference over the other creditors, and was merely entitled to an ordinary ranking for his advances.[6] The question whether a trustee in bankruptcy, who has expended money on subjects covered by a bond, has any claim against the bondholder, was raised but not decided in *Buchanan* v. *Stewart*.[7]

Claim Limited by Defender's Gain.—If the claim for recompense is founded on expenditure on a particular subject, it is limited in two ways. No more can be recovered than has actually been expended.[8] Thus where an assignee of a policy of insurance paid the premiums, and the assignation was ultimately reduced, it was held that his claim for recompense was not for the difference between the amount paid under the policy and the surrender value at the time of the assignation, but only for what he had actually expended.[9] And it must be shewn that the value of the subject has been increased. So where the claim of a *bona-fide* possessor was considered, a distinction was drawn between expenditure which merely preserved the subjects in their existing state and expenditure which improved them, the latter only being allowed as a claim against the owner. Where a trust estate consisted of certain policies of insurance, and the trustee paid the premiums, it was held that his

[1] *Lamonby* v. *Foulds*, 1928, S.C. 89. *Contra*, on the ground of implied authority, *Albemarle Supply Co.* v. *Hird* [1928], 1 K.B. 307.

[2] *Rotherham Alum and Chemical Co., in re*, 1883, 25 Ch. D. 103. See opinion, Lindley, L.J., at p. 111.

[3] *White* v. *Macintyre*, 1840, 3 D. 334; *Lockhart* v. *Brown*, 1888, 15 R. 742.

[4] Kames, *Principles of Equity*, 3rd ed., i. 153.

[5] *Burns* v. *M'Lellan's Creditors*, 1735, M. 13402. Cf. *Stirling* v. *Pearson*, 1841, 4 D. 251; *Wylie's Exrx.* v. *M'Jannet*, 1901, 4 F. 195.

[6] *Mess* v. *Sime's Tr.*, 1898, 25 R. 398; affd. 1898, 1 F. (H.L.) 22. [7] 1874, 2 R. 78.

[8] *Edinburgh Life Assurance Co.* v. *Balderston*, 1909, 2 S.L.T. 323.

[9] *Binning* v. *Brotherstone*, 1676, M. 13401.

claim for reimbursement was a claim of recompense. He was not therefore entitled to insist on a sale of the policies to meet his advances, when it was shewn that a sale would merely meet his claim, whereas if he had originally surrendered the policies instead of paying the premiums a certain sum would have been secured. His claim, therefore, was held to be premature, and could not be enforced until it was discovered, on the policies becoming payable, whether the estate was *lucratus* by his expenditure or not.[1] And it follows from the principle that the pursuer in an action for recompense must shew that the defender has made a profit, that a party who has made improvements on lands which he has obtained on a voidable title from *A.* cannot have any claim against a singular successor who has acquired *A.'s* right after the improvements were made. He has paid for the subjects with the improvements, and is not a gainer. So where heritors built a house for a schoolmaster on ground to which they had obtained no title, but with the consent of the owner, it was held that they had no claim when dispossessed by a party who had bought the owner's whole estate after the house was erected.[2]

Sacrifice in Common Calamity. The exceptional case in which a claim for recompense may be relevant against a party who has gained nothing is where a sacrifice is made by one to avert a danger threatening himself and others. Then the others are liable in contribution. In maritime law this principle is worked out in the law of general average, or *lex Rhodia de jactu*, a subject too special to be discussed here.[3] In analogous cases, not definitely covered by the law of general average, a claim of the nature of recompense would be competent. So where a ship was taken by a privateer and held to ransom, it was decided that the owners of the cargo were bound to contribute.[4] And where one of two cautioners intervened on the bankruptcy of a contractor for whom they had undertaken liability, and completed the work, and it was proved that if he had not intervened the loss to the cautioners would have been greater, it was held that he was entitled to recover half his expenditure from the other cautioner.[5]

No Profit by Fraud.—A liability closely resembling that resulting from the principle of recompense arises from the application of the rule that no one is entitled to profit by another's fraud; *i.e.*, that if the fraud of *C.* has resulted in a gain to *A.* at the expense of *B.*, *A.* cannot retain that gain in a question with *B.*, even although he was in no way connected with, or responsible for, the fraudulent actings of *C.*[6] Thus a will improperly induced is subject to reduction, though the beneficiaries may be innocent third parties.[7] Where the question at issue was whether a firm, and its remaining partner, were liable for sums embezzled by the other partner, acting in a matter which was not within the ordinary course of the business of the firm, it was laid down as clear law that the firm would be liable to the extent to which the funds embezzled had been used for firm purposes,[8] and that, it being admitted that the money had been lodged in the firm's account, the onus of proof lay on the firm to shew that they had not been enriched. In *Clydesdale Bank* v.

[1] *Brown* v. *Meek's Tr.*, 1896, 4 S.L.T. 46.

[2] *Beattie* v. *Lord Napier*, 1831, 9 S. 639; *Innes* v. *Duke of Gordon's Exrs.*, 1827, 6 S. 279, 1830, 4 W. & S. 305 (claim against succeeding heir of entail).

[3] See Bell, *Com.*, i. 517; Lowndes, *General Average*.

[4] *Lord Salton* v. *Ritchie*, 1710, M. 13421.

[5] *Marshall* v. *Pennycook*, 1908, S.C. 276.

[6] The same rule holds in cases of breach of trust (*Smith* v. *Patrick*, 1901, 3 F. (H.L.) 14).

[7] *Taylor* v. *Tweedie*, 1865, 3 M. 928.

[8] *New Mining, etc., Syndicate* v. *Chalmers & Hunter*, 1912, S.C. 126. Cf. *Jacobs* v. *Morris* [1902], 1 Ch. 816.

Paul,[1] a stockbroker had given his clerk authority to bind him in transactions on the Stock Exchange. As the result of transactions for his own benefit, the clerk had incurred a large deficit, for which, by a misuse of the powers entrusted to him, he had made his employer liable. The clerk then raised money by means of a forged cheque, paid off part of the deficit, and ultimately absconded. It was held that an action by the bank which had paid the cheque against the stockbroker might be sustained without deciding the question whether a principal incurred any vicarious liability for the fraud of his agent, on the ground that the defender had profited by the fraud from which the pursuers had suffered loss, in respect that the proceeds of the fraud had been applied to meet a debt on which he was liable.

Cautionary Obligations.—It is probably the law that if a debtor fraudulently induces a third party to guarantee his debt, the creditor, though innocent of the fraud, cannot enforce the guarantee unless he has given some consideration for it, either by abstaining from suing the debtor or by making fresh advances to him.[2] So where the tutor of a lunatic had been allowed to enter into office without finding caution for his intromissions, and afterwards induced his sister to sign a bond of caution, it was held that the sister, on being sued on the bond by a *curator bonis* subsequently appointed on the lunatic's estate, was entitled to a proof of her averment that she had been induced to sign the bond by fraud on the part of the tutor, on the ground that, in the circumstances, the bond was a gratuitous advantage to the lunatic's estate.[3] In *Sutherland* v. *Low*, *A.*, who was in debt to *B.* and known by *B.* to be insolvent, induced *C.* to guarantee the debt. The means he used amounted to fraud. It was held that *C.* could reduce the guarantee. It was not necessary to base the decision on the general ground that no one can profit by fraud, because it was proved that *B.* was implicated in the measures whereby *A.* had obtained the guarantee, but opinions were indicated that if the guarantee was a gratuitous advantage to *B.* he could not have resisted the action of reduction even if he had been entirely innocent of the fraud.[4]

Payment by Money obtained by Fraud.—It is not easy to draw a distinction between a guarantee for a debt obtained by fraud practised on the guarantor, and actual payment with money fraudulently obtained. But in the latter case the party who has been paid is entitled to keep the money. A creditor who is offered or has received payment is not bound to inquire how his debtor's funds were acquired.[5] In *Gibbs* v. *British Linen Co.*[6] a bank held shares in security of a debt. They were registered in the names of officials of the bank. The debtor sold the shares; transfers were granted by the bank officials to the purchaser; the price was received by the bank and applied towards the reduction of their debt. The shares proved valueless, and it was proved that the purchaser was induced to buy by fraud on the part of the seller but that the bank was not in any way implicated in the fraud. An action by the purchaser of the shares against the bank, concluding for reduction of the sale and repayment of the price, was unsuccessful. The

[1] 1877, 4 R. 626. See also a complicated case of fraud, *Traill* v. *Smith's Trs.*, 1876, 3 R. 770.
[2] *Wardlaw* v. *Mackenzie*, 1859, 21 D. 940; *Sutherland* v. *Low*, 1901, 3 F. 972.
[3] *Wardlaw* v. *Mackenzie*, *supra*. [4] 1901, 3 F. 972.
[5] *North British Bank* v. *Ayrshire Iron Co.*, 1853, 15 D. 782; *Gibbs* v. *British Linen Co.*, 1875, 4 R. 630 (where the earlier English authorities are commented on by Lord Shand); *Thomson* v. *Clydesdale Bank*, 1891, 18 R. 751; affd. 1893, 20 R. (H.L.) 59 (stockbroker paying client's money to his own account).
[6] 1875, 4 R. 630.

mere fact that the bank officials had granted the transfers did not make them the agents of the sellers, and the plea that they had profited by the fraud practised by the sellers was repelled on the ground that by releasing their security and discharging their debt they had given consideration for the advantage they had obtained. These decisions do not cover the case where the creditor is aware that the debtor is committing a fraud in tendering payment. He cannot then retain the payment in a question with the party defrauded. Where the question was whether a bank could retain securities lodged by a stockbroker and belonging to his clients, all the judges pointed out that the bank would have no case if they knew that the stockbroker was committing a fraud, and observed that the same rule would apply to a payment of money.[1] And no one can keep a payment which he knows to be made in breach of trust.[2]

Negotiorum gestio.—Where one party incurs expense on behalf of another without any mandate or other authority, the case may fall under the law of *negotiorum gestio*.[3] The *negotiorum gestor* has a claim for reimbursement wider than a claim for recompense, in respect that he may recover expenditure even although it has not proved to be of any advantage to the party on whose account it was made. So repair of a house, made by a *negotiorum gestor*, will give him a claim for his expenditure, though the house be accidentally destroyed.[4]

To found a claim for expenditure which has not proved beneficial it is conceived that the party claiming to be a *negotiorum gestor* must shew that his intervention was justified by something of the nature of an emergency. If *A.* ultroneously intervenes to transact *B.'s* affairs, when *B.* is perfectly competent to manage them himself, he has no claim unless he can prove that his expenditure has made *B. lucratus*.[5] From the case of *Wallace* v. *Braid* [6] it would seem doubtful whether he has any claim even in that event. A party who had conveyed his property to a creditor by an *ex facie* absolute disposition, left it by will to *A.* in liferent and *B.* in fee. *A.* paid the debt, and received a reconveyance to herself in liferent and *B.* in fee. She did not obtain an assignation of the debt. It was held on her death that *B.* was under no obligation to her representatives. The debt was one for which *B.* was not personally liable, and though, by *A.'s* payment, the property which he obtained was disburdened, and he was therefore so far *lucratus*, this fact did not lay him under any liability.

The circumstances which have been held to amount to *negotiorum gestio* are where the property of a party has been managed for him in his absence ;[7] when an executor was abroad, delayed to execute a mandate, and rents were uplifted and legacies discharged by the husband of the testatrix ;[8] where a relative has incurred expenditure in the management of property belonging to one who becomes insane, but without obtaining any legal title ;[9] where a business was managed during the imprisonment of the party who was

[1] *Thomson* v. *Clydesdale Bank*, *supra* ; *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740.
[2] *Taylor* v. *Forbes*, 1827, 5 S. 785 ; revd. 1830, 4 W. & S. 444.
[3] *Dig.*, iii. 5 ; *Code*, ii. 18 ; Stair, i. 8, 3 ; Ersk. i. 3, 52 ; Bell, *Prin.*, sec. 540. The criterion of the liability of a *negotiorum gestor* depends upon the urgency of the circumstances which induce him to intervene ; *Bannatine's Trs.* v. *Cunninghame*, 1872, 10 M. 319.
[4] Stair, *ut supra* ; *Dig.*, iii. 5, 10 and 22.
[5] Ersk. i. 3, 53 ; *Dig.*, iii. 5, 6.
[6] 1900, 2 F. 754.
[7] Authorities in note 4, p. 274. *Smith's Reprs.* v. *Earl of Winton*, 1714, M. 9275.
[8] *Bannatine's Trs.* v. *Cunninghame*, 1872, 10 M. 319.
[9] *Graham* v. *Ker*, 1757, M. 3529 ; affd. 1758, 2 Paton, 13 ; *Dunbar* v. *Wilson & Dunlop's Tr.*, 1887 ; 15 R. 210, *Fernie* v. *Robertson*, 1871, 9 M. 437.

carrying it on ; [1] where someone without any definite authority has managed property for pupils or minors.[2] Probably *negotiorum gestio* would be a basis on which a finder might rest a claim for the recovery of expenses incurred in the preservation of the thing found.[3]

Employment by *negotiorum gestor*. A party who performs services on the employment of a *negotiorum gestor* is entitled to sue the person for whom his employer was acting. In *Fernie* v. *Robertson* [4] an old woman was the owner of a house. She was imbecile, and her affairs were managed for her by her daughter, who, however, had no legal title. The daughter ordered repairs of the house. After the death of the proprietor it was held that the tradesmen who had carried out the repairs had a right to payment from the heir, at least in so far as he was *lucratus*. The daughter, it was observed, was in the position of a *negotiorum gestrix* ; any debts she incurred for reasonable repairs were the debts of her mother for whom she was acting, and therefore the debts of her heir as representing her. In *Dunbar* v. *Wilson & Dunlop's Tr.*[5] the proprietor of an estate became imbecile. No curator was appointed, but a relative, with the assistance of the law agents who had formerly acted for the proprietor, carried on the management of the estate. It was held that the law agents were entitled to their professional charges. "If a man is not able to manage his affairs, and has a relative who is willing to take the responsibility, there are many cases in which, without their coming to the Court, the family agent is consulted, and the management goes on with his assistance. To say that he must be punished because he does not insist on the parties coming to the Court for a proper judicial management is, I think, extravagant." [6]

Agency by Necessity.—The principle of agency by necessity, in many respects analogous to *negotiorum gestio*, has been developed independently and on more narrow and technical lines.[7] The earlier cases related exclusively to the power of the captain of a ship, in cases of emergency, to dispose of the cargo.[8] This he may be entitled to do, as agent by necessity for the cargo owners. To give such authority it must be proved that there was no means of salving the cargo, and that it was not commercially possible to communicate with its owner or owners, and obtain his or their instructions. If these conditions are not fulfilled the purchaser obtains no title,[9] and the shipowner is liable in damages.[10] It is not sufficient that the captain acted in what he conceived to be the best interests of all concerned, or even that it may appear that the course he adopted was really the best, if he had failed to take steps to discover whether some means of salvage were available.[11]

[1] *Gemmell* v. *Annandale*, 1899, 36 S.L.R. 658.

[2] *Fulton* v. *Fulton*, 1864, 2 M. 893 ; *Paterson* v. *Greig*, 1862, 24 D. 1370. In this case the party intervening may be designated a pro-tutor or pro-curator, but, as pointed by Lord Neaves in *Fulton* v. *Fulton*, these are merely forms of *negotiorum gestio*.

[3] In England it is decided that the finder has no lien—*Nicholson* v. *Chapman*, 1793, 2 H.Bl. 254—and his right to recover expenses seems doubtful. See opinion of Scrutton, L.J., in *Jebara* v. *Ottoman Bank* [1927], 2 K.B. 254.

[4] 1871, 9 M. 437.

[5] 1887, 15 R. 210.

[6] Per Lord Young in *Dunbar* v. *Wilson & Dunlop's Tr.*, 1887, 15 R. 210, 214.

[7] There is no authority which would preclude, in Scotland, the application of the rules of *negotiorum gestio* to cases dealt with in England under the head of agency by necessity.

[8] Bell, *Prin.*, sec. 450 ; *Com.*, i. 584 ; Bowstead, *Agency*, 7th ed., 106 ; Carver, *Carriage by Sea*, 7th ed., sec. 297 ; Scrutton, *Charter Parties*, 12th ed., p. 304.

[9] *Atlantic Mutual Insurance Co.* v. *Huth*, 1880, 16 Ch. D. 474. There is an exception to this where the law of the place where the sale was held gives the purchaser a good title. *Cammell* v. *Sewell*, 1860, 5 H. & N. 728.

[10] *Springer* v. *Great Western Rly.* [1921], 1 K.B. 257.

[11] *Atlantic Mutual Insurance Co.* v. *Huth*, *supra*.

The fact that part of the cargo, being perishable, demands immediate sale, does not justify a sale of the whole.[1] Communication with the owner, if possible in the ordinary course of business, is in all cases essential, and extends to the case where there are a number of owners, and communication with some of them may be impossible.[2] The same principle, subject to the same limitations, applies to carriers by land, as in the case where the transport of perishable goods by rail is interrupted by a strike.[3] The principle of agency by necessity has been applied to a seller of goods when, owing to war conditions, delivery had become impossible, though in the particular case resale was not justified because the goods sold were not perishable.[4] In a subsequent case, however, Scrutton, L.J., expressed the opinion that the principle was limited to cases relating to contracts of carriage.[5]

[1] *Springer* v. *Great Western Rly.* [1921], 1 K.B. 257.

[2] *Acatos* v. *Burns,* 1878, 3 Ex. Div. 282; *Australasian Steam Navigation Co.* v. *Morse,* 1872, L.R. 4 P.C. 222 (where communication was found to be impossible); *Springer* v. *Great Western Rly., supra.* If the owner refuses to consent, however unreasonably, there can be no agency by necessity; *Acatos* v. *Burns.*

[3] *Sims* v. *Midland Rly.* [1913], 1 K.B. 103; *Springer* v. *Great Western Rly., supra.*

[4] *Prager* v. *Blatspiel* [1924], 1 K.B. 566 (M'Cardie, J.). Cf. *Pommer & Thomsen* v. *Mowat,* 1906, 14 S.L.T. 373 (O.H. Lord Dundas).

[5] *Jebara* v. *Ottoman Bank* [1927], 2 K.B. 254.

CHAPTER XIX

IMPOSSIBILITY OF PERFORMANCE

Principle of Law.– The law as to impossibility of performance may be taken as a subordinate, though very important, branch of the question how far and in what circumstances an unexpressed term may be read into a contract.[1] An attempt to consider it may start with an obvious distinction between obligations impossible at the date of contracting, and obligations which become impossible of fulfilment by the occurrence of some subsequent event.

Grounds of Impossibility. An obligation may be impossible in three senses.

It may be impossible in fact, in respect that it involves an undertaking to produce a result unattainable by the laws of nature.

It may be impossible in law, if it is an engagement to do something which by the law of Scotland cannot be effected.

It may be impossible for the individual obligant to fulfil his agreement, through causes which affect him only.

The first two cases present questions practically of the same character; the third involves different considerations.

Physical Impossibility.—A contract to do something known by all reasonable men to be physically or legally impossible is void, and the party who has so bound himself is not liable in damages for non-performance.[2] The reason probably is that no serious consent can be supposed, but the rule may extend to cases where that reason is inapplicable, as where parties contract for a result both deem possible, but its impossibility is part of the stock of knowledge of the average man.[3] But it would seem that a binding obligation might result from a contract to do something known to be impossible at the date of contracting, if it appeared that both parties expected it to have become possible at the date fixed for performance, either by an advance in scientific knowledge, or by a change in the law.[4]

[1] See *supra*, Chap. XVIII.

[2] *Dig.*, iii. 20 (*De Inutilibus Stipulationibus*); xliv. 7, 31; Stair, i. 10, 13; Ersk. iii. 3, 84. The Act 12 James VI. c. 140 (1592, c. 140). "Aganis unlawfull condicionis in contractis or obligationis" (see *Campbell* v. *Dunn*, 1828, 6 S. 679, 687) is repealed by the Statute Law Revision (Scotland) Act, 1906 (6 Edw. VII. c. 38). But if the contract has been framed as an obligation to perform an impossibility merely by inadvertence, the Court may enforce it in the terms which were substantially those intended. Thus in the articles of roup of lands to be feued it was provided that the feuar was to be bound to erect buildings of a certain value, "within two years after 17th December 1873." The feu-charter was not granted until 1876, and contained an obligation taken verbatim from the articles of roup. It was held, in a question with a singular successor (who was therefore not bound by the articles of roup) that the obligation in the feu-charter, although in its exact terms impossible of fulfilment, was not to be held *pro non scripto*, but was to be read as an obligation to erect the buildings within two years of the date of the charter (*Magistrates of Glasgow* v. *Hay*, 1883, 10 R. 635).

[3] The Indian Contract Act, 1872, sec. 56, gives, as an illustration of a contract void from impossibility, an agreement to discover treasure by magic. But would a contract with a water diviner not be enforceable? (see *Pritty* v. *Child*, 1902, 71 L.J. K.B. 512).

[4] *Clifford* (*Lord*) v. *Watts*, 1870, L.R. 5 C.P. 577, per Willes, J., at p. 585. This opinion, however reasonable, is not in accordance with civil law; *Inst.*, iii. 19, 2; *Dig.*, xlv. i. 83 and 137.

Act Supposed to be Possible.—The rule which avoids impossible agreements applies only to those which are, in the words of Stair, "manifestly impossible," not to cases where there is a contract to do something reasonably believed by both parties to be possible, and where the impossibility depends on the application of scientific principles which are not familiar to the ordinary man. Cases of the latter kind present a question of construction, in which it will generally be held that the party who undertook the obligation took the risk of the possibility. A party who asks for tenders according to a plan and specification does not impliedly undertake that the execution of the work according to the specification will prove to be possible. It is the duty of tenderers to consider this for themselves.[1] In *Gillespie* v. *Howden* *A.* undertook to build a ship with certain specified dimensions and with a fixed carrying capacity. When built her carrying capacity was considerably less than that required by the contract. In answer to an action for damages, *A.* maintained that it was impossible to build a ship which would satisfy the conditions of the contract. The alleged impossibility depended upon intricate calculations. It was held to be no defence.[2] So where, in a contract for engineering work, part of the agreement was to make girders of a specified size and weight, and the builders found that it was necessary for their stability to make them heavier, it was held that they could not demand, as an extra charge on the contract price, the expense thereby occasioned.[3] On the other hand, in *Lord Clifford* v. *Watts*,[4] a mineral lease provided for payment of royalties, and the tenants undertook to mine so many tons per annum. It was held that they were excused on proof that there was not enough mineral in the mine. This was in reality a refusal by the Court to read into the contract a provision for a fixed rent, which, if intended, should have been expressed.

There are certain cases which might be considered as cases of impossibility, where parties contract on the assumption of the existence of a particular thing which without their knowledge has already ceased to exist. But these cases have been treated by the Court on the basis of want of real consent arising from mutual error or mistake, and will be considered in a subsequent chapter.[5]

Acts Legally Impossible.—Illustrations of agreements to do something which is legally impossible may be found in cases of the sale of articles which are *extra commercium*. To such things the purchaser acquires no title, and it would seem to follow that the contract to sell them infers no obligation.[6]

Commercial Impossibility.—It is no defence to an action founded on contract that the contract is one which it is impossible for the obligant to fulfil for causes personal to him only, such as that he has not enough money; that the organisation of his works will not enable him to fulfil the contract within the specified time; that all his other workmen will strike if he retains the pursuer in his service,[7] or gives facilities which he has undertaken to

[1] *Thorn* v. *Mayor of London*, 1876, 1 A.C. 120.

[2] *Gillespie* v. *Howden*, 1885, 12 R. 800.

[3] *Tharsis Sulphur, etc., Co.* v. *M'Elroy*, 1877, 5 R. 161; revd. 1878, 5 R. (H.L.) 171; *Thorn* v. *Mayor of London*, 1876, 1 App. Cas. 120.

[4] 1870, L.R. 5 C.P. 577.

[5] *Infra*, Chap. XXVI.

[6] *Edinburgh Presbytery* v. *Edinburgh University*, 1890, 28 S.L.R. 567 (Presbytery records); *Magistrates of Dumbarton* v. *Edinburgh University*, 1909, 1 S.L.T. 51 (burgh charter); *Mackay* v. *Wood*, 1889, 17 R. 38 (seats in parish church). See *Inst.*, iii. 19; Pothier, *Vente*, sec. 10. There is an obvious distinction between such contracts, which by law cannot be carried out at all, and contracts which can be performed, but only by the commisson of an illegal act.

[7] *Mennie* v. *Blair*, 1852, 14 D. 359,

give ;[1] that the result will be a ruinous loss. Thus the argument put forward by shipowners who were in breach of a contract to send their ship for repairs, that it was not commercially possible for them to fulfil their contract, was held to mean nothing more than an allegation that they would be the losers if they carried out their contract, and to be clearly irrelevant.[2] Where it was pleaded that it was impossible to obey a decree ordaining a party to restore furniture obtained on hire, because decree of cessio had been pronounced against him and the furniture had been attached by the landlord under sequestration, it was held that as the impossibility merely consisted in the party's inability to pay his debts, it had no legal effect.[3] So the sale or lease of property which does not belong to the seller or lessor (*res aliena*) forms a binding contract, in respect of which, though performance may be impossible to the particular party, damages are due.[4]

A builder or contractor may bind himself to perform a practical impossibility ; for example, to complete his work at a fixed date, under a penalty, with a clause in the contract allowing the other party to order alterations without prejudice to the enforcement of the penalty. A bargain so one-sided will not be inferred, or read into a contract couched in ambiguous terms.[5] But if the contract is clear, the party who has agreed to it cannot escape by shewing that the alterations ordered made it impossible for him to finish at the date prescribed. He will be liable in the penalty.[6] He can escape only by shewing that his delay was due to alterations ordered beyond those sanctioned by the contract.[7]

Control of Third Party.—Where a man vouches for the conduct of a third party, he may be undertaking an obligation which it is impossible for him to fulfil, unless he has the power to control or influence that third party's conduct. But here the impossibility is merely relative to the obligant, and does not affect the validity of the obligation. The common case is a cautionary obligation or guarantee for the payment of a debt or the fulfilment of a contract. A lessee, by assigning his lease, undertakes that he will obtain the consent of the landlord, if such consent be necessary to the validity of the assignation, and is not excused by the landlord's refusal.[8] Where *A.*, contracting with *B.*, undertook to make a road through ground belonging to *C.*, under the impression that he had power to compel *C.* to make it, the fact that it was found that he had no power to coerce *C.* did not excuse him.[9]

[1] *Milligan* v. *Ayr Harbour Trustees*, 1915, S.C. 937.

[2] *Hong-Kong and Whampoa Dock Co.* v. *Netherton Shipping Co.*, 1909, S.C. 34 ; see also *Davidson* v. *Macpherson*, 1889, 30 S.L.R. 2. In a very special case (*Wilkie* v. *Bethune*, 1848, 11 D. 132) it was held that an obligation by a farmer to supply his workmen with a certain amount of potatoes, as part of their wages, could not be enforced when, owing to blight, potatoes had largely risen in price. The Court read the contract as an agreement to supply food, and held that the master's obligation was limited to a sum which would purchase an equivalent amount of other food—a sum much less than the value of the potatoes withheld. But it was remarked that the contract was one *inter rusticos*, and that ordinary commercial contracts were on a different footing.

[3] *Rudman* v. *Jay*, 1908, S.C. 552. The question was whether the enforcement of the decree by imprisonment amounted to a legal wrong.

[4] *Dig.*, xviii. 1, 28 ; xix. 2, 9 ; *Code*, iv. 5, 6 ; Sale of Goods Act, 1893, sec. 12 ; *Purie* v. *Lord Couper*, 1632, M. 16583 ; *Reid's Tr.* v. *Watson's Trs.*, 1896, 23 R. 634.

[5] *Dodd* v. *Churton* [1897], 1 Q.B. 562 ; *Robertson* v. *Driver's Trs.*, 1881, 8 R. 555.

[6] *Steel* v. *Bell*, 1900, 3 F. 319 ; *Jones* v. *St John's College*, 1870, L.R. 6 Q.B. 115. In such cases there is usually a provision for a certificate by the architect. It is the builder's duty to obtain this, and, if he does not, he cannot found any argument on the impossibility of fulfilling his contract in time.

[7] *Duncanson* v. *Baylis*, 1869, 7 S.L.R. 139.

[8] *Lloyd* v. *Crispe*, 1813, 1 Taunt. 249 ; *Canham* v. *Barry*, 1855, 15 C.B. 597.

[9] *Moore* v. *Paterson*, 1881, 9 R. 337.

A party who buys shares in a company where the directors have a discretionary power to refuse to register a transferee of whom they do not approve, nevertheless is bound to have the seller's name removed from the register, and, if he is refused by the directors, must furnish a transferee whom they will accept.[1] In building contracts, if the employer undertakes to do certain things—*e.g.*, lay foundations—as preliminary to the work, and the contractor enters into a sub-contract which is impeded by the delay of the employer, the rule, in the absence of any provision to the contrary, is that the contractor undertakes that the employer will implement his contract, and will be liable to the sub-contractor for delay attributable to his failure.[2]

Supervening Impossibility. Turning to cases where an obligation, possible at the time of contracting, becomes impossible by an alteration in the circumstances before the date of performance, the legal effect may depend upon the nature of the circumstances from which the impossibility results. The cases to be considered are: (1) an alteration in the law; (2) an alteration in circumstances material to the contract; (3) an alteration in the condition of the obligant.

(1) *Alteration in the Law*

1. An alteration in the law[3] may affect existing contracts in three ways: (*a*) It may make performance of the contractual obligations illegal;[4] (*b*) it may make performance impossible, either directly or through the legislative abrogation of the conditions under which alone it could be given; (*c*) it may render the obligation undertaken more burdensome, or the advantages stipulated for less lucrative.

Supervening Illegality.—(*a*) If, before the time fixed for performance, an alteration in the law has made the act prestable under the contract illegal, performance is excused.[5] So where dealing in a particular commodity is prohibited without a permit, and a permit is refused, a contract for the sale or export of that commodity is avoided.[6] A partnership is dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.[7]

Supervening Impossibility.—(*b*) An alteration in the law which renders performance impossible has the same effect in avoiding the contract as an

[1] *Stevenson* v. *Wilson*, 1907, S.C. 445, per Lord President Dunedin, at p. 455.

[2] *M'Alpine* v. *Lanarkshire and Ayrshire Rly. Co.*, 1889, 17 R. 113. And see Hudson, *Building Contracts*, 5th ed., 246. See also argument in *Adams* v. *Great North of Scotland Rly. Co.*, 1889, 16 R. 843, decided on the ground that an arbiter's award was final.

[3] A declaration of war is in substance equivalent to an alteration in the law, because it brings into active operation the law prohibiting contracts with alien enemies.

[4] An exceptional case, where a statute imposed a penalty on the performance of the contractual obligation, without rendering performance impossible, or expressly declaring it to be illegal, has been considered but not decided. *Trinidad Shipping Co.* v. *Alston* [1920], A.C. 888.

[5] The general effect of a change in the law is well expressed in an early English case. "Where the question is whether a covenant be repealed by Act of Parliament there is the difference, viz., where *H.* covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant; so if the covenant to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which was then unlawful, and an Act comes in and makes it lawful to do it, such Act of Parliament does not repeal the covenant" (*Brewster* v. *Kitchell*, 1697, 1 Salkeld, 198; approved, Malins, V.-C., in *Newington Local Board* v. *Cottingham Local Board*, 1879, 12 Ch. D. 725, 731).

[6] *Anglo-Russian Merchant Traders and Batt., in re* [1917], 2 K.B. 679.

[7] Partnership Act, 1890, sec. 34. *Stevenson* v. *Cartonnagen Industrie* [1918], A.C. 239, partnership with alien enemy.

alteration which renders it illegal. So where *A.* contracted to leave a piece of ground unbuilt upon, and a railway company acquired it under statutory powers and built a station, no damages could be claimed from *A.*[1] An agreement to sell a particular parcel of corn was avoided when that parcel was requisitioned by the Government.[2] The same result followed when a contractor's work was stopped, and his plant commandeered.[3] A contract of service was avoided when the servant was conscripted.[4] If performance depends on the existence of some legal form, and that form is abolished, the contract falls, and with it any obligation purely subsidiary. So where in a feu-contract the disponer undertook that his heirs and successors should enter with the superior, and, in the event of their not doing so, would pay any casualty of composition exigible by the superior, and by a subsequent statute (Conveyancing (Scotland) Act, 1874) entry with the superior, as it had until then been known, was rendered a legal impossibility, it was held that as the obligation to enter had ceased to be enforceable, the obligation to pay the casualty in the event of not entering also fell.[5] If, however, an obligation is definitely alternative, and one method of performance is rendered illegal or impossible, performance by the other method may be enforced.[6]

Supervening Illegality, whether Temporary.—There is more difficulty where the contract is of extended duration or where the time for performance is indeterminate. As no court can predict how long a war may last, a contract, if affected by a declaration of war, is avoided at once.[7] And probably if performance is rendered illegal or impossible by statute the contract is at once avoided, without regard to the possibility that the statute may be repealed before the date when performance becomes due. Administrative measures raise a question of degree. Where there was a five years' contract for the supply of gas to a town, and, under regulations issued by a competent military authority, lighting in the town had been prohibited, it was held that the contract could not be regarded as avoided when the regulations had been in force for nine months only, though it was observed that a statute prohibiting lighting during the whole five years would have avoided it at once.[8] Where a ship has been requisitioned the question whether a charter-party is avoided would seem to turn on the probability or otherwise of her release during the period for which the charter has to run.[9] In one case it was decided that where the export of confectionery was prohibited by an Order in Council having statutory force the party who had contracted to export it was not justified in cancelling his contract at once, and, as the Order was repealed within the time fixed for delivery, was liable in damages. But this decision was probably affected by the consideration

[1] *Baily* v. *De Crespigny*, 1869, L.R. 4 Q.B. 180; *Newington Local Board* v. *Cottingham Local Board*, 1879, 12 Ch. D. 725. If in such cases it is possible for the party who is under the obligation to safeguard it by arrangements with the body exercising its statutory powers he is bound to do so. *Leith School Board* v. *Rattray's Trs.*, 1918, S.C. 94.

[2] *Shipton, Anderson & Co.* v. *Harrison* [1915], 3 K.B. 676.

[3] *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1918], A.C. 119.

[4] *Marshall* v. *Glanvill* [1917], 2 K.B. 87.

[5] *Caledonian Insurance Co.* v. *Matheson's Trs.*, 1901, 3 F. 865.

[6] *Dig.*, xlv. 1, 16; More, *Notes to Stair*, i. cxxi.; *Brightman* v. *Bunge, etc., Co.* [1924], 2 K.B. 619.

[7] *Geipel* v. *Smith*, 1872, L.R. 7 Q.B. 404; *Horlock* v. *Beal* [1916], 1 A.C. 486.

[8] *Leiston Gas Co.* v. *Leiston Urban Council* [1916], 2 K.B. 428.

[9] *Tamplin S.S. Co.* v. *Anglo-American, etc., Co.* [1916], 2 A.C. 397; *Modern Transport Co.* v. *Duneric S.S. Co.* [1917], 1 K.B. 370. The observations on the Tamplin case in *Bank Line Co.* v. *Capel* [1919], A.C. 435, leave the law on this point doubtful.

that it was common knowledge at the time that such Orders were experimental and temporary.[1]

Alteration in Foreign Law.—According to the most recent English authority, an alteration in the law of a foreign country, in the case of a contract which is to be performed there, and which renders performance illegal, is to be regarded as on the same footing with an alteration in British law. A ship belonging to Spanish owners was chartered to carry jute from Calcutta to Spain. Freight was payable by the consignees, also Spaniards, at the port of discharge, but the charterers—a British firm—were liable in the event of the consignees' failure. Subsequent to the date of the charter-party a Spanish law was promulgated limiting the amount of freight, and making it illegal in Spain either to charge or to receive more. The consignees refused payment of the freight agreed upon, which exceeded the new statutory limit. In an action against the charterers it was decided that their obligation was to pay in Spain, and that they were not bound to pay what was illegal there either for them to pay, or for the shipowners to receive.[2]

Change in Law Affecting Value.—The validity of a contract is, however, not affected by a change in the law which does not make performance impossible, but does alter the value of the rights conferred, or the burden of the obligation imposed.[3] So where an alteration of the law relating to close time for salmon rendered a lease of salmon fishings less valuable for the tenant, it was held that he took the risk of such an occurrence, and had no right to an abatement of the rent.[4] Where the licence of a public-house was extinguished under the provisions of a statute (Licensing Act, 1904) which had been passed during the occupant's tenancy, it was held that the lease had not been thereby brought to an end.[5] So an obligation is enforceable although subsequent legislation has made it more difficult or expensive to perform. Thus the obligation of a railway company to make a level-crossing was held to subsist, though subsequent legislation, by introducing Board of Trade regulations on the subject, had made it a more expensive operation than it was at the date of the contract.[6] An obligation by a superior to relieve the vassal of a specified tax or rate remains binding though

[1] *Millar* v. *Taylor* [1916], 1 K.B. 402. In *Trevalion* v. *Blanche*, 1919, S.C. 617; Lord Dundas expressed the opinion that both parties to a contract must have known that an Order limiting the release of spirits from bond might at any time be revoked or altered.

[2] *Ralli* v. *Compania Naviera* [1920], 2 K.B. 287. It was observed that *Barker* v. *Hodgson* (1814, 3 M. & S. 267), where Lord Ellenborough drew a sharp distinction between illegality by British and by foreign law, was no longer authoritative. In *Jurdal* v. *Estrella* (1916, S.C. 882) the effect of a change in foreign law was mooted, though it was unnecessary to decide it. The Lord Ordinary (Dewar) was of opinion, founding on the earlier English cases, that it left the contract unaffected. See also opinion of Scrutton, L.J., in *Kursell* v. *Timber Operators* [1927], 1 K.B. 298.

[3] Cases in following notes, and *Duke of Sutherland* v. *Marquis of Stafford*, 1892, 19 R. 502; *Leiston Gas Co.* v. *Leiston Urban Council* [1916], 2 K.B. 428, narrated *supra*, p. 341; *Macmaster* v. *Cox, M'Euan & Co.*, 1920, S.C. 566; revd. 1921, S.C. (H.L.) 24. The rule is a general, not an absolute, one. Legislative changes, without rendering performance of an obligation illegal or impossible, may so transform it as to amount to frustration of the adventure. See *infra*, p. 352. And the general rule is not applicable to contracts of very ancient date. *Magistrates of Arbroath* v. *Strachan's Trs.*, 1842, 4 D. 538; *Magistrates of Perth* v. *Lord Kinnoull*, 1872, 10 M. 874.

[4] *Holliday* v. *Scott*, 1830, 8 Sh. 831.

[5] *Grimsdick* v. *Sweetman* [1909], 2 K.B. 740. Cp. *Donald* v. *Leitch*, 1886, 13 R. 790; *Hart's Trs.* v. *Arrol*, 1903, 6 F. 36.

[6] *Summerlee, etc., Steel Co.* v. *Caledonian Rly. Co.*, 1909, S.C. 536 (opinion of Lord Dundas, at p. 543). See also *Caledonian Insurance Co.* v. *Matheson's Trs.*, 1901, 3 F. 865 (opinion of Lord Low (Ordinary), at p. 868).

the tax or rate may have been increased, and may exceed the feu-duty.[1] The effect of an alteration of custom or excise duties is now determined by statute[2]; at common law,[3] or in cases where the statutory provisions do not apply[4] the loss falls where it lights.

(2) *Alteration in Circumstances Material to the Contract*

Possibility as Implied Term.—A change in circumstances may render the performance of contractual obligations impossible, or, without producing any actual impossibility, may render performance a thing so different from what the parties originally contemplated that, if given, it would amount in substance to the fulfilment of a different contract. To cases of this latter kind the term "frustration of the adventure" is commonly applied. Both cases have generally been treated, in recent decisions, as involving the same fundamental question– is the Court justified in reading into the contract an implied term providing for its avoidance on the occurrence of the events in question? Neither one party to the contract, nor the Court, have any power to dissolve or avoid a contract except in accordance with that contract's provisions, but it is not always necessary that these provisions should be expressed. The Court may be justified in supplying implied terms which would probably have commended themselves to the parties, as fair and reasonable men, had the question which has arisen occurred to them.[5]

Though in most cases questions of impossibility have been treated as involving an implied term of the contract, another explanation, applicable mainly to cases of frustration of the adventure, has been suggested. If it can be shewn that performance, if given, would in substance be the fulfilment of a new and not of the original contract neither party can be bound to perform, because contractual obligation depends on agreement, and neither has agreed to anything but the original contract.[6]

Express Provision for Developments.—A change of circumstances cannot affect a contract if it has been foreseen and expressly provided for. So where a contract for the export of jute contained a clause excepting "war, civil strife, and or any other unforeseen circumstances," and providing for later

[1] *Dunbar's Trs.* v. *British Fisheries Society*, 1877, 5 R. 350; affd. 1878, 5 R. (H.L.) 221; *Lindsay* v. *Bett*, 1898, 25 R. 1155; *North British Rly.* v. *Magistrates of Edinburgh*, 1920, S.C. 409.

[2] Finance Act, 1901 (1 Edw. VII. c. 7), sec. 10; in substance re-enacting the provisions of the Customs Consolidation Act, 1876.

[3] *M'Clelland* v. *Adam*, 1795, M. 14247; *Malloch* v. *Hodgton*, 1849, 12 D. 215.

[4] *Bowhill Coal Co.* v. *Tobias*, 1902, 5 F. 262 (incidence of export duty on coal).

[5] Of the numerous judicial expositions of this principle it may be sufficient to quote Earl Loreburn (*Tamplin S.S. Co.* v. *Anglo-American, etc., Co.* [1916], 2 A.C. 397, 403. "When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of someone else or an Act of Parliament give the necessary jurisdiction. But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree." See also Lord Wrenbury, *Bank Line Co.* v. *Capel* [1919], A.C. 435, 461; Lord Dundas (adopting and applying Earl Loreburn's statement), *M'Master* v. *Cox, M'Euan & Co.*, 1920, S.C. 566, 579 (revd. 1921, S.C. (H.L.) 24), Lawrence, J., *Scottish Navigation Co.* v. *Souter* [1917], 1 K.B. 222, 241.

[6] See per Lord Dunedin, *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1918], A.C. 119; per Lord Chan. Finlay, *Bank Line Co.* v. *Capel* [1919], A.C. 435.

shipment in these contingencies, it was held that the argument that the contract was avoided by the prohibition of the export of jute was unmaintainable.[1] But any term in a contract is open to construction; and a clause will not necessarily be read as intended to apply to circumstances entirely unforeseen merely because words are used wide enough to cover them. "Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with the foundation.[2] Thus the stereotyped exception, in charter-parties, of "arrests and restraints of princes, rulers, and peoples" is limited to temporary obstructions from these causes; it cannot be extended to cover events, such as a war leading to a blockade, which render the contemplated use of the ship impossible.[3] A provision in a contract for the construction of a reservoir under which an extension of time might be allowed by the engineer if completion were unduly delayed or impeded "by reason of any difficulties, impediments, obstructions, doubts, disputes, or difficulties whatsoever or howsoever occasioned," wide as it was, did not extend to the enforced stoppage of work and seizure of the contractor's plant by the Ministry of Munitions, acting under statutory powers conferred after the date of the contract.[4] A reference to strikes in a charter-party did not preclude a plea of frustration due to a strike which precluded the export of coal for more than six months.[5]

Impossibility Induced by Party.– According to English authority a party whose conduct has contributed to the event by which the contract is affected is not entitled to plead that it is thereby avoided, on the principle that no one is allowed to take advantage from his own wrong. So an express provision for the avoidance on the occurrence of a certain event is to be read subject to the qualification that the conduct of the party treating the contract as void shall not have been the means whereby the occurrence was induced.[6] In *Mertens* v. *Home Freeholds Co.*[7] a house was in course of building when legislative action imposed the necessity of a licence. It was known that licences were granted or withheld according to the stage which the building had reached. The builder deliberately delayed his work, and a licence was refused. He could not, it was found, maintain that the contract was avoided, in respect that the obstacle to performance was induced by his own default. In a Scotch case, however, a contract was held to be avoided although the cause of avoidance was due to the negligence of the party founding on it. A ship was hired to the Admiralty until notice of her discharge should be given. On 9th September she was wrecked, owing to the faulty navigation of the officer in charge. Notice to terminate the contract was not given till 25th October. The owner claimed hire from 9th September to 25th October. This claim was repelled, on the ground that the wreck of the ship necessarily put an end to the contract. A claim for damages was indeed open to the owner, but a claim for hire, being a claim involving that the contract was

[1] *Scott* v. *Del Sel*, 1922, S.C. 592; affd. 1923, S.C. (H.L.) 37.
[2] Per Lord Haldane, *Tamplin S.S. Co.* v. *Anglo-American, etc., Co.* [1916], 2 A.C. 397, 406.
[3] *Geipel* v. *Smith*, 1872, L.R. 7 Q.B. 404; *Jackson* v. *Union Marine Insurance Co.*, 1874, L.R. 10 C.P. 125.
[4] *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1918], A.C. 119.
[5] *The Penelope* [1928], P. 180.
[6] *New Zealand Shipping Co.* v. *Société des Ateliers de France* [1919], A.C. 1.
[7] [1921], 2 K.B. 526.

still in existence, was unmaintainable.[1] It seems difficult to reconcile this with the English cases, and it does not appear that the Court of Session had before it the argument that a party should not profit by his own wrongful act.

Avoidance of Contract.—Where neither of the parties is responsible for the event which precludes performance, the result, if it affects the contract at all, is not to render it voidable at the instance of one or other party, but automatically to avoid it, so that neither party remains under any obligation. So where it was found that a lease of rooms on the route of a procession was avoided when the procession was postponed, it was observed that the contract was at an end, so that the lessee could not, had he so chosen, have demanded possession of the rooms.[2] If, in cases where the contract is avoided, the parties proceed to act on the assumption that it still exists the result is that a new contract between them must be implied, and therefore any exceptional term of the original contract, such as an arbitration clause, is no longer applicable.[3] And neither party is under any obligation to give notice that he holds the contract to be no longer in force. Either is entitled to wait until performance is demanded and to plead avoidance in answer to that demand.[4]

Tempus inspiciendi.—Where, before the time fixed for performance has arrived, events sufficient to avoid it on the ground of impossibility have occurred, either party may assume that the contract is at an end if in the circumstances a reasonable man would have concluded that the obstacle to performance would be permanent. The question is to be decided on the facts as they presented themselves at the time, unaffected by subsequent developments.[5] Where a Greek ship was chartered to load at a port in the Black Sea, and, as a consequence of war between Greece and Turkey, the passage of the Dardanelles was closed to ships of Greek nationality, it was held that the captain might reasonably assume that the contract was determined, and therefore that he was not bound to proceed with the loading of the cargo. The question was not affected by the fact that a period of grace was subsequently allowed by the Turkish Government which would have enabled the ship to pass the Dardanelles had her loading been continued.[6] But Bailhache, J., refused to apply the principle of this decision to the case of a charterer who stopped loading on the occurrence of a strike of ship engineers (which, if continued, would have precluded the voyage), on the ground that the possibility that a strike might end at any moment should be within the contemplation of any reasonable man.[7] And the mere fact that a party has good reason to believe that an alteration of circumstances will render performance impossible does not justify him in assuming the avoidance of the contract before the expected event has actually occurred. If he so anticipates the event he will not be saved from liability in damages

[1] *London and Edinburgh Shipping Co.* v. *The Admiralty*, 1920, S.C. 309. Lord Sumner's statement of the law seems quite inconsistent with this case. "I think it is now well-settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration." *Bank Line Co.* v. *Capel* [1919], A.C., at p. 452.

[2] *Krell* v. *Henry* [1903], 2 K.B. 740, per Vaughan Williams, L.J., at p. 751. See also opinions in *Robinson* v. *Davison*, 1871, L.R. 6 Ex. 269.

[3] *Hirji Mulji* v. *Cheong S.S. Co.* [1926], A.C. 497.

[4] *Bank Line Co.* v. *Capel* [1919], A.C. 435.

[5] Roman law holds that the contract is at once dissolved, but the English decisions do not justify a statement so unqualified as that of Paulus. "*Cum quis rem profanam aut Stichum dari promisit, liberatur, si sine facto ejus res sacra esse cœperit aut Stichus ad libertatem pervenerit, nec revocatur in obligationem si rursus lege aliqua et res sacra profana esse cœperit et Stichus en libero servus effectus sit.*" *Dig.*, xlv. i. 83. As to the permanency of legislative or administrative measures, see *supra*, p. 341.

[6] *Embiricos* v. *Reid* [1914], 3 K.B. 45.

[7] *Ropner* v. *Ronnebeck*, 1914, 20 Com. Cas. 95.

by the fact that his anticipation proves to be correct. So where a shipowner was bound to provide a ship at a port in the Black Sea, subject to a restraint of princes clause, he was not justified in declaring that his contract was at an end on the mere probability (justified by the event) that the Dardanelles would be closed to British ships.[1]

Development of Law of Impossibility.—The question how far a contract is affected by a material change of circumstances is one on which the law is in a transitional stage. The earlier authorities hold that impossibility of fulfilment is no answer to a demand based on a contractual obligation; that the maxim *lex non cogit ad impossibilia* referred exclusively to the remedy for failure, excluding indeed any demand for specific implement, but leaving the party in default liable in damages. Impossibility might be a defence in the case of obligations imposed by law independently of contract, it did not affect the liability of a party on an obligation he had voluntarily undertaken.[2] The most recent authorities tend towards the establishment of the rule that continued possibility is in general an implied condition of a contract, and therefore, subject to the considerations discussed in the preceding paragraphs, that supervening impossibility involves its dissolution or avoidance.[3] If an attempt to summarise the existing state of the law may be hazarded it would be that the supervening impossibility of performance of any material obligation under the contract, not due to the act of either of the parties, but arising from circumstances beyond the control of either, avoids the contract; that the tendency of recent cases has been to apply the same rule when supervening events have left performance indeed possible, but possible only under such altered conditions as would, had they been foreseen, have prevented the parties, as reasonable men, from entering into the contract, or agreeing to the particular terms; with exceptions (1) where the contract is to be performed within a specified time, and the alteration of circumstances has occasioned delay [4]; and (2) in cases falling within an established rule of shipping law.[5] The law now recognises that while it is possible for parties

[1] *Watts, Watts & Co.* v. *Mitsui* [1917], A.C. 227.

[2] Stair, i. 17, 10; Ersk. iii. 3, 86; Bell's *Prin.*, sec. 29 (much amplified by later editors); *Paradine* v. *Jane*, 1648, Aleyn 26. It was there laid down "where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he ought to have provided against it by his contract." Equivalent words were used by Lord Kinnear in 1903 (*Hart's Trs.* v. *Arrol*, 6 F. 36, 41), but could hardly be used now. The modern view is expressed by Lord Wrenbury (*Horlock* v. *Beal* [1916], 1 A.C. 486, 525): "When a contract has been entered into and by a supervening cause beyond the control of either party the performance has become impossible. I take the law to be as follows—if a party has expressly contracted to do a lawful act, come what will, if in other words he has taken upon himself the risk of such a supervening cause, he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance."

[3] See an exposition of the development of the law of England by M'Cardie, J., in *Blackburn Bobbin Co.* v. *Allen* [1918], 1 K.B. 540 (C.A. [1918], 2 K.B. 467). As to the tendency of recent decisions see Lord Haldane in *Bank Line* v. *Capel* [1919], A.C. 435, and of Scrutton, L.J., in *Leiston Gas Co.* v. *Leiston Urban Council* [1916], 2 K.B. 428. It would appear that these authorities are applicable in Scotland.

[4] See *infra*.

[5] In a voyage charter-party the charterer undertakes an absolute obligation, on receiving due notice of the arrival of the ship, to have the cargo ready to load, and is not excused by unforeseen events which render this impossible. *Arden S.S. Co.* v. *Weir*, 1904, 6 F. 294; revd. 1905, 7 F. (H.L.), 126; *Danmark* v. *Poulsen*, 1913, S.C. 1043. Carver, *Carriage by Sea*, 7th ed., sec. 252. The consignee at the port of discharge, in the absence of any provision for a fixed number of days, is not bound to do more than to facilitate discharge within a time reasonable in the circumstances of the particular case. *Rickinson* v. *Scottish Co-operative Society* [1918], S.C. 440.

to bind themselves to perform some particular act no matter what may happen, it is rarely their intention to do so, and that to enforce performance after a material change of circumstance would often be to bind the parties to a contract which they did not intend to make.

Rei interitus.—The clearest case for the avoidance of a contract by a change in circumstance is where the performance of the contractual obligation is dependent on the existence of a particular thing, and that thing is either destroyed, or so altered that it is no longer fitted for the contractual purposes. Such an event is in Scots law usually termed *rei interitus*. In a case which may be regarded as a leading one in Scotland as well as in England, the owner of a music hall let it for certain nights to Taylor, who proposed to give concerts, and in view thereof incurred expense in advertising. Before the date of the first concert the hall was destroyed by an accidental fire. Taylor sued for damages. It was held that in such a contract the continued existence of the hall was an implied term, and that its destruction annulled the contract, leaving neither party under any obligation.[1] So the accidental destruction of an article hired,[2] or entrusted to another in order that some work may be done upon it,[3] ends the contract for the future, though it does not necessarily exclude liability for the loss of the thing.

The principle of *rei interitus*—that a contract may be avoided by the destruction of a thing necessary to its performance—applies to the case where the thing, though not actually destroyed, is accidentally rendered unsuited for the contractual purposes. So a charter-party was dissolved when the ship was stranded, and efforts to get her off were abandoned. It was immaterial that she still presented the appearance of a ship, and that articles on board could be, and in fact were, salved.[4] In *Nickoll & Knight* v. *Ashton, Eldridge & Co.*[5] the contract was for the delivery of a cargo to be loaded at Alexandria in a particular ship during a specified month. Certain possible causes of delay, *e.g.*, blockade, were expressly provided for. The ship was stranded, and, although saved, was so delayed as to make it impossible for her to arrive at Alexandria in time. It was held that as she had ceased to be for the time being a cargo-carrying ship, the obligations under the contract were determined. It was urged that the principle of *Taylor* v. *Caldwell*[1] was limited to cases of the destruction of a thing necessary to the fulfilment of the contract, but held that the doctrine was wider, and covered the case where the thing, though not physically destroyed, had accidentally become unfitted for the purposes of the contract.

Without attempting to follow the principle of *rei interitus* throughout the whole range of contracts, its application may be illustrated in cases of lease, sale, and contracts of *locatio operis*.

[1] *Taylor* v. *Caldwell*, 1863, 3 B. & S. 826. The following extract from the opinion of Blackburn, J., has been constantly cited: "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

[2] Bell, *Prin.*, sec. 141; Bell, *Com.*, i. 483; Pothier, *Obligations*, sec. 636, *Louage*, sec. 199; *London Shipping Co.* v. *The Admiralty*, 1920, S.C. 309.

[3] *Dig.*, xix. 2, 13; *Stevenson* v. *Maule*, 1920, S.C. 335.

[4] *London and Edinburgh Shipping Co.* v. *The Admiralty*, 1920, S.C. 309.

[5] [1901], 2 K.B. 126. [6] 1863, 3 B. & S. 826.

***Rei interitus* in Leases.**—In leases it is an established rule in the law of Scotland—differing, in this respect, from the law of England [1]—that the accidental destruction of a house which is the subject of a lease has the effect of putting an end to the contract, and liberating both landlord and tenant from its obligations. Neither, in the absence of express stipulation, is bound to rebuild; the landlord is not liable in damages for failure to provide a house; the tenant is not liable for any further instalments of the rent.[2] And, as the lease is at an end, the landlord cannot insist, on rebuilding the house, that the tenant shall resume his tenancy.[3] A merely general obligation by either landlord or tenant to keep the subjects in repair, or to insure,[4] does not amount to an undertaking to restore them if accidentally destroyed.[5]

Partial Destruction.—If the subject of the lease is injured—for instance, by fire—so as to be temporarily unfitted for the purposes of the contract, the legal result is a question of degree. If the damage done to a house, shop, or business premises is so great as to unfit them for a considerable length of time for the tenant's purposes, he may appeal to the law of *rei interitus*, and proclaim the lease at an end, but "a tenant may reasonably be called on to submit to considerable inconvenience." [6]

Sterility.—In agricultural leases there is ample authority for the statement that any *damnum fatale* which reduces the subjects to complete and permanent sterility will put an end to the lease.[7] And if a mineral lease was construed as a conveyance of a particular seam, and not as a mere licence to dig in a particular place, to which the principle of *rei interitus* is obviously inapplicable, it might be held that the tenant was entitled to throw up the lease.[8] Certain earlier cases went further, and gave the tenant the right, while preserving the lease for the future, to refuse payment of the rent when the

[1] As to English law, see Leake, *Contracts*, 7th ed., 507.

[2] Bell, *Prin.*, sec. 1208; Rankine, *Leases*, 3rd ed., 226; *Walker* v. *Bayne*, 30th May 1811, F.C.; revd. 1815, 3 Dow, 233; 6 Paton, 217; *Duff* v. *Fleming*, 1870, 8 M. 769; *Allan* v. *Roberton's Trs.*, 1891, 18 R. 932; *Dickie* v. *Amicable Property Investment Co.*, 1911, S.C. 1079, per Lord Skerrington, at p. 1084.

[3] *Duff* v. *Fleming*, *supra*, per Lord Neaves, 8 M., at p. 772.

[4] *Duke of Hamilton's Trs.* v. *Fleming*, 1870, 9 M. 329; *Clark* v. *Hume*, 1902, 5 F. 252.

[5] *York Buildings Co.* v. *Adams*, 1741, M. 10127; *Walker* v. *Bayne*; *Duff* v. *Fleming*; *Allan* v. *Roberton's Trs.*, *supra*. In *Clark* v. *Glasgow Assurance Co.* (1850, 12 D. 1047; revd. 1854, 1 Macq. 668), a feu-contract laid upon the feuar the obligation to keep a mill in repair, and to insure. It was accidentally burned, and he was held bound to rebuild it. Considering the permanency of the relations under a feu-contract, and the obligation to insure, the decision probably carried out the intention of the parties. But the Lord Chancellor (Cranworth), in giving judgment, proceeded on the analogy of English cases relating to leases, and laid down the rule that the law with respect to accidental destruction was the same in both countries. The case of *Walker* v. *Bayne* (*supra*) he disposed of by misrepresenting the facts, stating, mistakenly, that in that case there was no obligation on the tenant to keep the subjects in repair. This opinion was soon afterwards repudiated by the judges of the Second Division (*Duff* v. *Fleming*, *supra*), and the distinction between the law of Scotland and England has been judicially recognised in both countries (*Lofft* v. *Dennis*, 1859, 1 E. & E. 474, per Lord Campbell, C.J., at p. 481; *Allan* v. *Markland*, 1882, 10 R. 383, per Lord Shand, at p. 389; *Dickie* v. *Amicable Property Investment Co.*, 1911, S.C. 1079, per Lord Skerrington, at p. 1084).

[6] *Drummond* v. *Hunter*, 1869, 7 M. 347; *Duff* v. *Fleming*, 1870, 8 M. 769; *Allan* v. *Markland*, 1882, 10 R. 383. The words quoted are from the opinion of Lord Shand in the last case.

[7] Stair, i. 15, 2; Bankton, i. 2, 14; Mackenzie, *Inst.*, iii. 3, 5; Bell, *Prin.*, sec. 1208; *Lindsay* v. *Home*, 1612, M. 10120 (farm "destroyed by overblowing with sand"); *Duff* v. *Fleming*, 1870, 8 M. 769, opinion of Lord Neaves.

[8] *Murdoch* v. *Fullerton*, 1829, 7 S. 404, explained by Lord Chancellor Selborne in *Gowans* v. *Christie*, *infra*, 11 M. (H.L.) 4. See opinions in *Shotts Iron Co.* v. *Deas*, 1881, 8 R. 530; a case turning on the interpretation of an express provision for avoidance.

crop, or other return, had for the time being failed.[1] But doubts have been cast on these cases in the House of Lords, where it was pointed out that a tenant expects his return on the average of the years of the lease, and would be unduly favoured if he were relieved from rent in unsuccessful years.[2] The principle, it is conceived, is that while the continued existence of the subjects let may be an implied condition between landlord and tenant, there is no such implied condition that the subjects shall continue to afford a profit in any enterprise which the tenant proposes to carry on. And the same principle was applied in a later case, where it was held that the lease of a public-house remained binding on the tenant in spite of the loss of the licence.[3]

Abatement of Rent on Partial Destruction. When a part of the subjects let is accidentally destroyed, the tenant is entitled to an abatement of his rent corresponding to the loss he has sustained.[4] This principle was applied in a case where a portion of the steading of a farm was destroyed by fire. There the Lord President (Inglis), after a review of the cases, said: "It is quite established by the cases that when through no fault of his own a tenant loses part of the subject let to him, he is entitled to an abatement of his rent, that is to say, he ceases to be the debtor of his landlord to the extent to which he is entitled to an abatement."[5] The same principle has frequently been applied where a tenant has been deprived of part of the subjects let by some act of his landlord, and where, therefore, he might have the choice of other remedies.[6]

While partial physical destruction of the subjects let will entitle a tenant to a reduction of rent, he can found no such claim—nor can he abandon the lease—in respect of circumstances which impair or defeat the object for which the lease was entered into, but leave the subjects physically unaffected.[7] Thus the tenant of a public-house can neither claim a reduction of rent, nor reduce the lease, in the event of a refusal to renew the licence.[8] Nor is the lease of a dwelling-house affected by the fact that the tenant, as a person of enemy nationality, is forbidden to reside in the district.[9]

***Rei interitus*: Sale.** In sale, if there is an agreement to sell a specific article, and the article is accidentally destroyed before the risk has passed to the buyer, the agreement is thereby avoided.[10] But if specific goods have

[1] *Earl of Eglinton* v. *Tenants*, 1742, M. 10128; *Foster & Duncan* v. *Adamson*, 1762, M. 10131, see remarks of the reporter, Lord Kames. See also cases of damage by enemy forces—*Tacksmen of Customs* v. *Greenhead*, 1667, M. 10121; *Strachan* v. *Christie*, 1751, M. 10129.

[2] *Gowans* v. *Christie*, 1871, 9 M. 485; affd. 1873, 11 M. (H.L.) 1. See also *Dryburgh* v. *Fife Coal Co.*, 1905, 7 F. 1083; *Fleeming* v. *Baird & Co.*, 1871, 9 M. 730.

[3] *Hart's Trs.* v. *Arrol*, 1903, 6 F. 36.

[4] Stair, i. 15, 3; *Muir* v. *M'Intyre*, 1887, 14 R. 470 (earlier cases cited there). Cp. *Dougall* v. *Magistrates of Dunfermline*, 1908, S.C. 151. If the landlord has warranted the tenant against the particular loss, he is liable in damages (*Welsh* v. *Russell*, 1894, 21 R. 769).

[5] *Muir* v. *M'Intyre*, 1887, 14 R. 470, at p. 472.

[6] *Campbell* v. *Watt*, 1795, Hume, 788; *Brown* v. *Brown*, 1826, 4 S. 489; *Critchley* v. *Campbell*, 1884, 11 R. 475; *Duncan* v. *Brooks*, 1894, 21 R. 760.

[7] Pothier (*Louage*, sec. 152) holds that the lease of an inn would fall if a change in the road deprived it of custom. In *Campbell* v. *Watt* (1795, Hume 788), the tenant of an inn was found entitled to an abatement of rent, and not bound to accept the landlord's offer to cancel the lease, where the road had been diverted, and the landlord had built another inn on the new road. In *Craig* v. *Millar* (1888, 15 R. 1005); Lord Justice-Clerk Moncreiff and Lord Trayner treat *Campbell* v. *Watt* as a case of partial *rei interitus* or sterility, but, according to the report, the decision proceeded on the ground that the landlord had impliedly agreed not to set up a rival inn.

[8] *Donald* v. *Leitch*, 1886, 13 R. 790; *Hart's Trs.* v. *Arrol*, 1903, 6 F. 36.

[9] *London and Northern Estate Co.* v. *Schlesinger* [1916], 1 K.B. 20.

[10] Sale of Goods Act, 1893, sec. 7; *Leitch* v. *Edinburgh Ice and Cold Storage Co.*, 1900, 2 F. 904.

been sold, and the property in them has passed to the buyer, the risk, in the absence of any agreement to the contrary, lies with him,[1] and therefore their accidental destruction, while it relieves the seller of the obligation to deliver, does not relieve the buyer of his obligation to pay the price. It does not therefore avoid the contract, it only relieves one party of his obligation.[2] But an agreement whereby the seller undertakes the risk may be inferred from the terms of the contract, although the property in the goods may have passed to the buyer.[3] And if the loss of the thing sold is due to the fault of the seller, or of those for whom he is responsible (*e.g.*, if it is stolen or broken by his servants), the loss so resulting will fall upon him.[4] If, again, delivery is delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.[5]

The Sale of Goods Act, 1893, does not deal with the case of the partial destruction of a *res* which forms the subject of an agreement to sell. It would probably be treated as a question of degree. If the injury was sufficient to make the article no longer adapted for its normal purpose, the contract would be avoided; a lesser injury might leave the buyer bound to accept the article and pay the price.[6]

Unascertained Goods.—It is somewhat doubtful how far the principle of *rei interitus*, or any analogous principle, applies to an agreement to sell unascertained goods, for instance, to sell a specified quality of some particular commodity. The agreement is avoided by legislation prohibiting dealings in that commodity.[7] In the ordinary case the maxim *genus nunquam perit* applies, and therefore the seller is not excused by the accidental destruction of the stock of that commodity on which he relied.[8] A *genus*, however, may perish, or become unprocurable. In *Blackburn Bobbin Co.* v. *Allen*[9] the contract was for the supply of Finnish birch. Owing to war conditions it became impossible to procure it. As there was no proof that the buyers had any notice of the seller's sources of supply it was held that the contract remained binding. But where both parties were aware that the commodity sold must be imported from a particular country, and war with that country was declared, Russell, J., decided, apart from the objection that the contract became illegal in respect that it involved trading with the enemy, that it

[1] Sale of Goods Act, 1893, sec. 20; *Anderson* v. *Morice*, 1876, 1 App. Cas. 713.

[2] So before the Sale of Goods Act, although the property in goods did not pass to the buyer until delivery, the risk passed to the buyer if he had a *jus ad rem specificam*. He was liable for the price (Bell, *Com.*, i. 179; *M'Donald* v. *Hutchison*, 1744, M. 10070; *Hansen* v. *Craig & Rose*, 1859, 21 D. 432; *Anderson & Crompton* v. *Walls & Co.*, 1870, 9 M. 122; *Walker* v. *Langdale Chemical Manure Co.*, 1873, 11 M. 906; *Hunter* v. *Wilsons*, 1667, M. 10067 (sale of heritage)). Lord Stair regarded the point as then unsettled (i. 14, 7).

[3] *Dunlop & Co.* v. *Lambert*, 1839, M'Lean & Rob. 663; *Henckell du Buisson* v. *Swan & Co.*, 1889, 17 R. 252; *Delaurier* v. *Wyllie*, 1889, 17 R. 167; *Pommer & Thomsen* v. *Mowat*, 1906, 14 S.L.T. 373. See English authorities on the effect of an agreement to insure (Benjamin, *Sale*, 6th ed., 454).

[4] Sale of Goods Act, 1893, sec. 20; *Kinnear* v. *Brodies*, 1901, 3 F. 540 (accident caused by defective state of thing sold). Cp. *Robb* v. *Gow*, 1905, 8 F. 90, per Lord President (Dunedin), at p. 101 (contract to deliver shares). In *Campbell* v. *Barry* (1748, M. 10071) cattle were sold, and lost owing to the fault of the seller's servants, yet the buyer was held liable for the price. But this seems to be inconsistent with sec. 20 of the Sale of Goods Act.

[5] Sale of Goods Act, 1893, sec. 20; *M'Lean* v. *Grant*, 1805, M. App. *voce* Reparation, No. 2.

[6] See *Anderson* v. *Morice*, 1876, 1 App. Cas. 713 (ship sunk when part of a cargo had been loaded). Cp. *Allan* v. *Markland*, 1882, 10 R. 383, and other cases on leases, *ante*, p. 348; *Nickoll & Knight* v. *Ashton, Eldridge & Co.* [1901], 2 K.B. 126, narrated *infra*, p. 642.

[7] *Anglo-Russian Merchant Traders and Batt, in re* [1917], 2 K.B. 679.

[8] *Anderson & Crompton* v. *Walls & Co.*, 1870, 9 M. 122.

[9] [1918], 2 K.B. 467.

had ceased to be enforceable on the ground that the *genus* had perished owing to causes for which neither party was responsible.[1]

Rei interitus : locatio operis. — In the contract of *locatio conductio operis*, where one party undertakes to construct a particular thing, the accidental destruction of that thing while in course of construction raises the question whether the workman has any claim for the labour and materials he has expended, or whether, on the principle of *rei interitus*, the contract is brought to an end. To the solution of this problem the Scottish and English Courts have applied different principles. In Scotland, it has been regarded as a question of the law of property. The Courts have applied the maxim *res perit domino*, and inquired in whom was the property of the thing, so far as constructed, when it accidentally perished.[2] That consideration leads to a distinction between two cases: the first, where work is done on the employer's property in such a way that, on the principle of accession, the property in the thing produced passes to the employer before it is completed; the second, where the work consists in the construction of a new thing, which does not become the property of the employer until it has been completed. As an instance of the first case a building has been given; of the second, a statue. The materials used in a building become the property of the owner of the soil as soon as they are affixed thereto; the materials used in the construction of the statue remain the property of the sculptor until it is ready for delivery. Applying, therefore, the maxim *res perit domino*, in the case of the building the risk of accidental destruction is with the owner of the land: in the case of the statue, with the sculptor. So in the former case the builder has a right to be paid for the value of his work and materials, in the latter he must bear the loss.[3] So, in one case, where the wall of an uncompleted building fell,[4] in another, where a bridge, partially constructed, was accidentally destroyed,[5] it was held that the contractor had a claim for his work and materials. In neither case was there any express provision as to the time of payment. A provision for payment on completion might affect the result; although where a tenant undertook to spend £800 in erecting new machinery, and the landlord became liable for £400 on the tenant leaving the machinery in good working order and repair, it was held that the tenant could claim £400, in spite of the fact that the machinery which he had erected had been accidentally destroyed.[6]

English Authorities. — In England it has been decided that where machinery in course of construction was destroyed by fire the result was to bring the contract to an end, and that the contractor had no claim for work or materials, even on the assumption that the machinery had become the property of the employer. To found a claim on the part of the contractor, in the case of destruction by *vis major*, he must prove something amounting to an agreement to pay for the work actually done.[7]

[1] *Badische Co., in re* [1921], 2 Ch. 331, explaining *Veithardt & Hall* v. *Rylands* [1917], 86 L.J. Ch. 604.

[2] *Dig.*, xix. ii. 36, 37, 59; Pothier, *Louage*, sec. 434; Girard, *Manual de Droit Romaine*, 2nd ed., p. 560; *M'Intyre* v. *Clow*, 1875, 2 R. 278; *Richardson* v. *Dumfriesshire Road Trs.*, 1890, 17 R. 805; *Brewer* v. *Duncan & Co.*, 1892, 20 R. 230.

[3] Bell, *Com.*, i. 486. See opinion of Lord Ardmillan in *M'Intyre* v. *Clow*, *supra*. Cp. *Constable* v. *Robinson's Trs.*, 1808, M. App. *voce* Mutual Contract, No. 5; 1st June 1808, F.C.

[4] *M'Intyre* v. *Clow*, *supra*, Lord Deas dissenting. The onus lies on the contractor to prove that the work, so far as constructed, was conform to contract.

[5] *Richardson* v. *Dumfriesshire Road Trs.*, *supra*.

[6] *Duke of Hamilton's Trs.* v. *Fleming*, 1870, 9 M. 329.

[7] *Appleby* v. *Myers*, 1867, L.R. 2 C.P. 651; "*The Madras*" [1898], P. 90. In *M'Intyre* v. *Clow* (1875, 2 R. 278), the Lord President distinguished *Appleby* v. *Myers* on the ground that

Impossibility Due to Act of Third Party.—A contractual obligation may become impossible owing to the unwarrantable act of a third party. The result would seem to be not yet fully settled. When there was a contract to supply esparto grass to be loaded at Algiers it was held that disturbance in the country, rendering it impossible to procure it, was no excuse for non-fulfilment.[1] On the other hand, in *Porter* v. *Tottenham Urban Council*,[2] in a contract between a builder and an urban authority, under which they undertook to give access to the site by a particular date, it was decided that they gave no implied warranty against unjustifiable interference by a third party (in the particular case, by unfounded legal proceedings). The inference would seem to be that such interference would have been a valid excuse for failure on their part to give access at the appointed time. In *Milligan* v. *Ayr Harbour Trs.*,[3] the defenders' harbour was governed by private Acts of Parliament which were construed as binding them, on the application of a shipowner, either to supply labour for unloading a ship, or to give facilities to labourers supplied by the shipowner. They refused to do either in the case of an application by Milligan, on the ground that their labourers had refused to work on his ship, and that, if they gave facilities to outside labourers, the result would be a strike. The Harbour Trustees were found liable in damages. Obligations in private Acts of Parliament were on the same footing as obligations undertaken contractually, and these were not excused by a mere apprehension that inconvenient consequences would follow on fulfilment. In the opinion of Lord Guthrie damages would still have been due if the harbour labourers had rendered it impossible to admit outside labour.

Frustration of the Adventure.—Passing from cases where fulfilment of the contract, as originally conceived, has become physically impossible, there remain for consideration cases where no physical impossibility is involved, but where emerging circumstances may have effected a radical change in the nature of the obligations undertaken by one or both parties. If it can be shown either from the nature of the contract, or from external facts judicially known or proved, that foreknowledge of the events which have actually occurred would have precluded the contract, or materially altered its terms, it may be held that the basis of the contract is gone, and that neither party can enforce performance. To such cases the term frustration of the adventure is generally applied.

Non-Occurrence of Expected Event.—One argument in support of a plea of frustration may be that the parties contracted on the assumption that a particular event would occur, and on the implied condition that the non-occurrence of that event would avoid the contract.

Coronation Cases. The postponement of the coronation of Edward VII., in June 1902, and the consequent abandonment of a procession and naval

machinery unfinished is useless, a remark, however, equally applicable to a wall or a bridge. The true distinction is that the Scotch Courts treat the question as one of property, the English, admittedly disregarding the civil law, as one of the implications of a contract.

[1] *Jacobs* v. *Credit Lyonnais*, 1884, 12 Q.B.D. 589. See also *Ashmore* v. *Cox* [1899], 1 Q.B. 436.

[2] [1915], 1 K.B. 776.

[3] 1915, S.C. 937. In this case the Lord Justice-Clerk and Lord Dundas lay it down that emerging impossibility is no answer to a claim for damages for failure to fulfil a contractual obligation, but these statements, it is submitted, can hardly be justified. It is clear that, taking the obligation of the Harbour Trustees as equivalent to one resting on contract, the destruction of the harbour would have formed a good answer to a demand for performance. Is there any reason for giving a different effect to the exclusion of outside labourers, had that been an actual experience instead of a mere apprehension ?

review which had been arranged, led to a series of cases dealing with the rights of parties who had entered into contracts based on the expectation that these events would take place. The leading case is probably *Krell* v. *Henry*.[1] There by written agreement *H.* had leased from *K.* the use of a room on 26th and 27th June, the dates for which the procession had been arranged. The agreement did not refer to the object of the lease, but the rent made it clear that the purpose was to view the procession. Part of the rent was payable (and paid) at once, the remainder was payable on 24th June, by which date it was known that the procession was to be postponed. For this balance *K.* sued. It was held, on the principle of *Taylor* v. *Caldwell*,[2] that it was an implied condition of the contract that the procession should take place, and as it was postponed owing to a cause for which neither party was responsible, the contract was resolved as at the date when the postponement was announced, and neither party was under any liability for the future. Other cases decided that if the lessee had agreed to pay before the postponement was announced he was liable; if the payment was due after that date he was under no liability.[3] The actual fact of payment was immaterial: if it had been paid in advance, though not due till after the postponement, it could be recovered.[4] So even if the lessor of a room had incurred expense in preparing it for the use of the lessee, he could not recover anything, unless he had taken the precaution of making some portion of the rent payable at a date before the postponement of the procession.[5] It is very difficult to appreciate the grounds on which a different principle was applied to a case where the use of a ship was hired for the date fixed for the naval review. On the review being postponed, the hirer refused to carry out the contract, but was held liable in damages.[6] The distinction taken was that there was no particular fitness in the ship for seeing the review; any other ship would have done as well. But it may be replied that the number of ships which could be in the neighbourhood at the time was not unlimited, and that there was no particular fitness in the room which was let in *Krell* v. *Henry*;[7] any other room on the route of the procession would have done as well.

In so far as the Coronation cases decide that money paid in advance cannot be recovered if the fulfilment of the consideration for which it was paid becomes impossible and consequently cannot be demanded, it is settled that they are not authoritative in Scotland. Our law, applying the doctrine of restitution, and the *condictio causa data, causa non secuta* of the civil law, holds that payments made for a consideration that has failed may be recovered.[8] This distinction between the law of Scotland and England may strengthen doubts whether the principle recognised in these cases—that the non-occurrence of an expected event avoids a contract based on the assumption that it would occur—is one which the Scotch Courts would accept. A party who books a seat in advance for some performance gains the advantage of securing the right to be present, and may gain the oppor-

[1] [1903], 2 K.B. 740.

[2] 1863, 3 B. & S. 826.

[3] *Civil Service Co-operative Society* v. *General Steam Navigation Co.* [1903], 2 K.B. 756; *Blakely* v. *Muller & Co.* [1903], 2 K.B. 760, note; *Chandler* v. *Webster* [1904], 1 K.B. 493.

[4] *Elliott* v. *Crutchley* [1906], A.C. 7.

[5] *Civil Service Co-operative Society, supra*; *Elliott* v. *Crutchley, supra*, a case turning on the construction of an express provision for such payment.

[6] *Herne Bay Steamboat Co.* v. *Hutton* [1903], 2 K.B. 683.

[7] [1903], 2 K.B. 740.

[8] *Cantiere San Rocco* v. *Clyde Shipbuilding Co.*, 1922, S.C. 723; revd. 1923, S.C. (H.L.) 105, narrated *supra*, p. 58.

tunity of selling that right at an advanced price; it is not clear that either the parties, or reasonable men in their position, would have refused to contract, or materially altered the terms of the contract, if the possibility of the performance in question being precluded by emerging circumstances had been present to their minds. In an analogous case where the release of spirits from bond was regulated by a system of permits, the Court declined to infer, in a contract under which a permit was sold, any implied condition which would annul the contract if the Order requiring permits were withdrawn.[1]

Change in Economic Conditions.—So far as the existing authorities go no change in economic conditions, however serious, and however deeply it may affect the contract, can amount to frustration such as to avoid it. There is no implied condition of commercial possibility.[2] Thus where, on the declaration of war with Germany, a drug, procurable from that country only, rose very greatly in price, the Courts had no doubt that this left a contract to supply it unaffected, and the argument turned on the application of a particular clause of exemption:[3] A rise in freights, similarly, is no ground for the avoidance of a contract.[4] A policy of marine insurance remains binding though supervening events, such as a war, may have naturally affected the risk.[5] If in a sale the obligation of the seller is to provide a policy covering war risks, he is bound to do so though war may be declared after the contract was made.[6] A contract for the export of wheat from America was not affected when, owing to war conditions, the normal method of financing such transactions, known to the buyers as well as to the sellers, became impracticable.[7] The fact that exceptional and temporary legislation was deemed necessary when contracts involving employment of labour were altered in their incidence by a general rise of wages indicates that the common law afforded no remedy for an economic change of this kind.[8]

Frustration by Delay.—With the exception of a change in general economic conditions a contract may be avoided, on the principle of frustration, by any events which so transform the obligations undertaken as to justify the argument that performance, if given, would be performance of a different contract to that to which the parties agreed.[9] But the event generally relied upon, apart from cases of legislative or administrative prohibition, already referred to,[10] has been one which has caused delay. This raises a question of degree.[11] Thus while the temporary absence of a servant through illness does

[1] *Trevalion* v. *Blanche*, 1919, S.C. 617.

[2] There is an exception to this rule in marine insurance. The subject matter insured may be a constructive total loss when it is reasonably abandoned "because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." Marine Insurance Act, 1906, sec. 60.

[3] *Wilson* v. *Tennants* [1917], A.C. 495; *Blacklock & M'Arthur* v. *Kirk*, 1919, S.C. 57; *Dixon* v. *Henderson, Craig & Co.* [1919], 2 K.B. 778.

[4] *Bolckow, Vaughan & Co.* v. *Compania Minera*, 1916, 33 T.L.R. 111.

[5] *Brown* v. *Maxwell*, 1824, 2 Sh. App. 373.

[6] *Birkett, Sperling & Co.* v. *Engholm*, 1871, 10 M. 170. This case was not cited in *Groom* v. *Barber* [1915], 1 K.B. 316, where Atkin, J., came to the opposite conclusion.

[7] *Comptoir Commercial Anversois* v. *Power, Son & Co.* [1920], 1 K.B. 868.

[8] Courts (Emergency Powers) Acts, 1917 and 1919; 7 & 8 Geo. V. c. 25; 9 & 10 Geo. V. c. 64 (repealed 17 & 18 Geo. V. c. 42).

[9] See the Coronation cases, *supra*, p. 352. *Scott* v. *Del Sel.*, 1922, S.C. 592; affd. 1923, S.C. (H.L.) 37; and Lord Sands' illustration (p. 597) of the effect on a contract for the daily delivery of milk of a tiger at large in the vicinity.

[10] *Supra*, p. 340.

[11] A dictum of Bailhache, J., has been often referred to. "The commercial frustration of an adventure by delay means the happening of some unforeseen delay, without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract in

not avoid his contract, his absence for a period material in the circumstance would have that effect.[1] If during the currency of his engagement a seaman is removed from his ship the question whether his contract is ended depends on the probability of his absence being temporary or prolonged.[2] In a leading case,[3] where a charter-party provided that a ship should proceed to a port of loading with all reasonable dispatch, unless prevented by perils of the sea, and by perils of the sea her arrival was delayed for seven months, it was held that the charterer, though by the terms of his contract he had no claim for damages, was entitled to declare the contract at an end, in respect that, taking into consideration the object for which the ship was required, a tender of performance seven months too late was not an offer to implement the original contract. In *Tamplin S.S. Co.* v. *Anglo-American, etc., Co.*,[4] a ship, specially designed for the carriage of oil, was chartered for five years from 1912. In 1915 she was requisitioned by the Admiralty, used as a transport, and so altered as to be unfitted for the carriage of oil. The shipowner maintained that the charter-party was avoided, on the principle of frustration of the adventure. The House of Lords, by a majority, refused to give effect to this contention. Lord Parker, with whom Lord Buckmaster concurred, rested his judgment mainly on the ground that the requisition was covered by the restraint of princes' clause in the charter-party: Lord Loreburn, admitting that the doctrine of frustration would have been applicable had the interruption been of a permanent character, was of opinion that it had not been shewn that the requisition amounted to frustration, in view of the possibility that she might be released, and re-adapted for the carriage of oil, while the charter-party was still in operation. Subsequent cases have tended to uphold the principle of frustration where the period of interruption cannot be estimated, and where therefore it is impossible to say what conditions may rule when the work comes to be resumed.[5] So where, in an engineering contract of six years' duration, the work was stopped and the contractor's plant was requisitioned by the Minister of Munitions, the contract was avoided.[6] In *Bank Line Co.* v. *Capel*[7] the *Quito* was in February 1915 chartered for twelve months, to run from her delivery at a coal port. The charterers had an option to cancel if she were requisitioned by the Government at any time during the currency of the charter. The object of the charterer—cross channel carriage

the only way in which fulfilment is contemplated and practicable is so inordinately postponed that the fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made." *Admiral Shipping* v. *Weidner, Hopkins & Co.* [1916], 1 K.B. 429. The decision was reversed, but the dictum approved. *Scottish Navigation Co.* v. *Souter* [1917], 1 K.B. 222. A statement from the negative side may be quoted from an opinion of Lord Shaw: "Frustration can only be pleaded when the events and facts on which it is founded have destroyed the subject matter of the contract, or have, by an interruption of performance thereunder so critical and protracted as to bring to an end in a full and fair sense the contract as a whole, to supersede it, that it can be truly affirmed that no resumption is reasonably possible." *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* [1926], A.C. 108, 114.

[1] *Craig* v. *Graham*, 1844, 6 D. 684; *Manson* v. *Downie*, 1885, 12 R. 1103; *Poussard* v. *Spiers & Pond*, 1876, 1 Q.B.D. 410.

[2] *Melville* v. *De Wolf*, 1855, 4 E. & B. 844; *Horlock* v. *Beal* [1916], 1 A.C. 486.

[3] *Jackson* v. *Union Marine Insurance Co.*, 1874, L.R. 10 C.P. 125.

[4] [1916], 2 A.C. 397. The minority (Lords Haldane and Atkinson) held, with the majority of the Court of Appeal, that the contract was avoided.

[5] Cases *infra*, and *Hirji Mulji* v. *Cheong S.S. Co.* [1926], A.C. 497.

[6] *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1918], A.C. 119. Any difficulty in the case arose from the fact that there was an express provision under which the engineer might allow an extension of time.

[7] [1919], A.C. 435.

of coal—did not render the date of delivery a point of cardinal importance. In May, when the *Quito* was still undelivered, and when therefore the option to cancel was not operative, she was requisitioned. Correspondence between the parties, relating to the possibility of obtaining her release, ceased in August. Thereafter the owner sold her, on condition of her being released, and by his efforts she was released in September. The charterers demanded performance of the charter-party. Their claim was successfully met by the plea that the adventure had been frustrated, and the contract avoided. An interruption for an indefinite period was a strong case for the principle of frustration, because in a business question it was important for each party to know his obligations with regard to the ship; the express cancelling clause did not prove that requisition, amounting to frustration, had been provided for by the parties, it was to be read as giving the charterers an option to cancel in the event of any requisition, even for a period too short to cause any material interruption of the contract. Lord Sumner expressed the opinion that the doctrine of frustration should not be extended, but the case seems an authority for the proposition, difficult to maintain on the prior authorities, that any delay in the performance of a contract not due to the act of either party will avoid it, unless the delay is definitely limited to a negligible period, or unless it has been anticipated and provided for in the contract in unambiguous terms.

Alternative Methods of Performance.– The plea of frustration is not open where the contract admits of being performed in alternative ways, and one only of these ways is interfered with. Thus a charter-party is not frustrated if alternative voyages were contemplated, and one is precluded by war or legislation.[1] A contract for the sale of jute remained unaffected by the fact that, by a subsequent order, the purchaser's right to export it was cut off, other means of disposing of jute remaining open, and there being no proof that the sellers knew that export was intended.[2] Where a ship was sent to a port where a strike was in progress, and she was in consequence detained, it was held that the charterers could not plead the exception clause of "strikes of any kind," because there were other ports to which, within the terms of the charter-party, the ship might have been sent.[3] In *Smith, Coney & Barrett* v. *Becker, Grey & Co.*[4] a contract for the sale of sugar, then at Hamburg, could have been fulfilled either by exporting the sugar, or by transferring it to the buyer's name in the Hamburg warehouse. At the time of the contract, though neither of the parties were aware of the fact, the export of sugar from Hamburg had been prohibited. The fact that the contract might still be implemented by transfer in the warehouse books was a sufficient answer to the argument that it had been avoided by impossibility of performance. The principle of these cases must be taken subject to the qualification that the alternative which remains open must be one within the reasonable course of business. A charter-party may be avoided by frustration if the voyage proposed is precluded, although it may be within the power of the charterer, without any actual breach of contract, to lay the ship up and never use her.[5]

[1] *Scottish Navigation Co.* v. *Souter* [1917], 1 K.B. 222; *Anglo-Northern Trading Co.* v. *Emlyn, Jones & Williams* [1918], 1 K.B. 372.

[2] *M'Master & Co.* v. *Cox, M'Euen & Co.*, 1920, S.C. 566; revd. 1921, S.C. (H.L.) 24.

[3] *Brown* v. *Turner, Brightman & Co.* [1912], A.C. 12.

[4] [1916], 2 Ch. 86. See also *Turner* v. *Goldsmith* [1891], 1 Q.B. 544; *Brightman* v. *Bunge, etc., Co.* [1924], 2 K.B. 619.

[5] See opinion of Lord Atkinson, *Tamplin S.S. Co.* v. *Anglo-American, etc.* [1916], 2 A.C. 397, at p. 413.

Contracts to which Frustration Applicable.—The principle of frustration is not applicable to every form of contract. It applies to building and engineering contracts,[1] to contracts of service or mercantile agency;[2] to voyage and also to time charter-parties.[3] It is not generally applicable to leases, which consequently are not determined by events which make it impossible for the lessee to occupy the subjects,[4] or the fact that they are requisitioned by the Government.[5] These, however, were cases of leases of considerable duration; where premises were let for a single day for the purpose of viewing a procession, the contract was avoided when the procession was postponed.[6] Frustration is a doctrine, according to Lord Dunedin, which is not applicable to contracts which are the "concomitants of property,"[7] and there can be little doubt that the incidents of a feu-contract would not be affected by any unexpected developments. The case of a sale of goods which are not specific has been noticed already.[8] While in marine insurance the fact that the insured is deprived of the use of the cargo, without its actual loss, entitles him to claim as on a constructive total loss, to other forms of insurance the doctrine of frustration has no application.[9] Thus where pearls were insured against loss, damage, and misfortune, and were sent, before the war, to Brussels and Antwerp, with the result that, at the date of action, there was no definite information as to their fate, it was pointed out that the policy was a policy on goods, and not on any adventure; that it lay on the insured to prove loss, which he had not done by proving that he had been deprived of possession for an indefinite period; that the principle of abandonment, as a constructive total loss, was one peculiar to marine policies, not to be extended, by analogy, to other forms of insurance.[10]

Contracts with Time Limits.—A contract under which work is done subject to a time limit, and where, owing to unexpected developments, the time limit is exceeded, might seem the strongest case for enforcing the obligation according to its terms, especially when it is considered that the price paid for the work will usually vary according to the time allowed. And in shipping law it is an established rule that if a charter-party fixes a definite number of days (lay-days) for loading or discharging the cargo the charterer will be liable in demurrage if in fact the lay-days are exceeded, although the delay may have been due to causes beyond his control.[11] Defences which have been rejected are that the delay was due to stress of weather;[12] to a strike of the labourers at the port;[13] to the fault of the consignees of the cargo.[14] But legislative interference, introducing regulations which make loading within the lay-days impossible, is probably a sufficient defence.[15] In building

[1] *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1918], A.C. 119.
[2] *Marshall* v. *Glanville* [1917], 2 K.B. 87.
[3] *Scottish Navigation Co.* v. *Souter* [1917], 1 K.B. 222; *Bank Line Co.* v. *Capel* [1919], A.C. 435.
[4] *London and Northern Estate Co.* v. *Schlesinger* [1916], 1 K.B. 20; *Whitehall Court* v. *Ettlinger* [1920], 1 K.B. 680.
[5] *Matthey* v. *Curling* [1922], 2 A.C. 180.
[6] *Krell* v. *Henry* [1903], 2 K.B. 740; *supra*, p. 253.
[7] *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1918], A.C. 119. [8] *Supra*, p. 350.
[9] *British and Foreign Insurance Co.* v. *Sanday* [1916], 1 A.C. 650.
[10] *Moore* v. *Evans* [1918], A.C. 185.
[11] *Hansa* v. *Alexander*, 1919, S.C. 89; affd. 1919 S.C. (H.L.) 122; *U.S. Shipping Board* v. *Strick* [1926], A.C. 545.
[12] *Thüs* v. *Byers*, 1876, 1 Q.B.D. 244; *Holman* v. *Peruvian Nitrate Co.*, 1878; 5 R. 657, per Lord President Inglis, at p. 670, Lord Shand, at p. 662.
[13] *Budgett* v. *Binnington* [1891], 1 Q.B. 35. [14] *Porteus* v. *Watney*, 1878, 3 Q.B.D. 534.
[15] *Ford* v. *Cotesworth*, 1870, L.R. 5 Q.B. 544, as explained by Scrutton, L.J., in *Ralli Brothers* v. *Compania Naviera* [1920], 2 K.B. 287.

contracts the law would appear to be doubtful. The case of contracts allowing the employer to order alterations has been noticed already.[1] A decision of Lord Lee (Ordinary), that a contract to carry out alterations in a house within seven weeks allowed a margin for wet weather would seem hard to defend.[2] In *Duncanson* v. *Scottish County Investment Co.*,[3] a joiner had contracted for work on a building in course of erection, and had undertaken to finish his work by 15th April. There was no penalty clause. He did not finish till the end of June. In answer to a claim for damages in respect of his failure he proved that the joiner work was dependent on the work of the mason and the plasterer, and that the parties who had contracted for these departments of the work had delayed so long as to make it impossible for him to finish in time. The majority of the Court (Lords Dundas and Guthrie) sustained this defence: Lord Salvesen doubted, and rested his concurrence with the majority on a specialty in the case.

Where work is done without a definite time limit the obligation is not to complete it within the normal time, but within a time reasonable in the circumstances of the particular case, and therefore any events which cause delay are elements to be considered in deciding whether a reasonable time has been exceeded or not.[4]

Building Contracts: Payment *quantum meruit*.—Cases of difficulty arise when a builder or contractor, who has completed his work but has met with expense owing to delay or to difficulties which were not anticipated, puts forward the claim that he is entitled to ignore the contract price and demand payment on the basis of *quantum meruit*, *i.e.*, on the basis of payment for the work he has done at the ordinary or market rates. Such cases fall into three main classes. (1) Where additional expense can be attributed to some breach of contract on the part of the employer. (2) Where the contract has been induced by misrepresentation or concealment of material facts, fraudulent or innocent. (3) Where supervening events have brought the contract to an end, on the principle of frustration of the adventure.

Breach by Employer.—(1) Where the employer is in breach of contract, as by failing to give possession of the site, or to furnish necessary plans, within the time agreed upon, expressly or impliedly, the contractor is clearly entitled to damages, and that remedy was sought and obtained in a Scotch case on the subject.[5] On English authority, if the contractor can establish that the result of the breach has been so material as to make the work, as actually done, a different thing from that contracted for—necessarily a question of degree—the contractor can also maintain that the contract is at an end, and that the work he has done must be paid for on the basis of *quantum meruit*. He may thereby elide an arbitration clause, or a provision that no payment is to be made without a certificate from the architect or engineer.[6]

[1] *Supra*, p. 339.

[2] *Robertson* v. *Driver's Trs.*, 1881, 8 R. 555. The point was not considered in the Inner House.

[3] 1915, S.C. 1106.

[4] *Hick* v. *Raymond & Reid* [1893], A.C. 22; *Hulthen* v. *Stewart* [1903], A.C. 389; *Sims* v. *Midland Rly.* [1913], 1 K.B. 103; *Rickinson* v. *Scottish Co-operative Society*, 1918, S.C. 440; *Van Liewen* v. *Hollis* [1920], A.C. 239; all cases of carriers. *Taylor* v. *MacLellan*, 1891, 19 R. 10; *Dowling* v. *Methven*, 1921, S.C. 948 (contracts to supply goods).

[5] *M'Alpine* v. *Lanarkshire and Ayrshire Rly.*, 1889, 17 R. 113. The claim, based on delay in furnishing plans, was held not to fall within the scope of a clause of reference to the employer's engineer.

[6] *Lodder* v. *Slowey* [1904], A.C. 442; *Arterial Drainage Co.* v. *Rathangan Local Board*, 1881, 6 L.R. Ir. 513; *Thorn* v. *Mayor of London*, 1876, 1 App. Cas. 120, per Lord Chancellor Cairns. In *Smellie* v. *Caledonian Rly.*, 1916, 53, S.L.R. 336, a case of this kind was presented, but on averments of breach of contract which were held irrelevant.

Fraud of Employer.—(2) Where there is no breach of contract on the part of the employer, but it can be proved that the contract was induced by his fraud, the contractor is entitled to damages. As the damages will be measured by the difference between the contract price and the expenditure actually incurred plus the normal profit on similar undertakings, it may be immaterial whether the claim is for damages or for payment *quantum meruit*. But in theory the latter form of claim is inadmissible. It involves the recission of the original contract, and that recission is excluded by the fact that after the work is done *restitutio in integrum* cannot be offered.[1] This is of more practical importance when the contract is induced by misrepresentation, but there is no proof of fraud. In one case it was laid down in a charge to a jury that when the contract was induced by a misrepresentation as to the nature of the ground, but it was not averred that the representation had been made fraudulently, the contractor was entitled to claim payment on the basis of *quantum meruit*.[2] In another case a similar decision was given by a Lord Ordinary where the contractor's grievance was that information regarding the difficulties of the work had been withheld.[3] But neither case seems reconcilable with the decision of the House of Lords in *Boyd & Forrest* v. *Glasgow and South-Western Rly.*[4] It was there averred that a journal of bores, which contractors had been allowed to inspect before tendering, did not accurately represent the reports of the borers. Averments of fraud had been disproved, and there was no warranty as to the accuracy of the journal. It was held, on the assumption that the contractor's averments as to the bores were proved, and on the further assumption that he would not have tendered if he had known the true facts, that all that he could found on was an innocent misrepresentation; that for such a misrepresentation the only possible remedy was the reduction of the contract; and that reduction was incompetent where the work had been done and *restitutio in integrum* was impossible. The contractors' claim for payment *quantum meruit* presupposed a new and implied contract to pay on that basis; no such contract could be implied between parties whose relations were regulated by an existing contract which was not, and could not be, reduced.

Frustration.—(3) The contractor's case may be founded on averments that the work has proved so different from that anticipated as to amount to frustration of the adventure. No such case, it is conceived, can be rested on difficulties which existed when the contract was made, though neither party was aware of them. Of these the contractor takes the risk. As has been pointed out, to allow a contractor to hold his contract as abrogated because unsuspected difficulties, however material, were encountered, would involve that an analogous plea might be taken against him should the work prove unexpectedly easy and profitable.[5] But there is some authority for the view that if an employer, under a power to alter the specification, makes alterations so material as to make the work he orders a different thing from that contracted for, the contractor may maintain that the contract is at an

[1] *Boyd & Forrest* v. *Glasgow and South-Western Rly.*, 1914, S.C. 472; revd. 1915, S.C. (H.L.) 20. See, as to the necessity of *restitutio in integrum*, *infra*, Chap. XXXII.

[2] *Smail* v. *Potts*, 1847, 9 D. 1043.

[3] *Mackay* v. *Lord Advocate*, 1914, 1 S.L.T. 33 (Lord Dewar).

[4] *Supra.*

[5] Earl Loreburn, p. 23, Lord Parmoor, p. 43, in *Boyd & Forrest* v. *Glasgow and South-Western Rly.* 1915, S.C. (H.L.), 20; *Bottoms* v. *York Corporation*, 1892; Hudson, *Building Contracts*, 4th ed., ii. 208. If the contractor's obligation is not to produce a particular result, but to work to a particular specification, and both parties are agreed that the work, if done according to specification, would not produce the result the employers aimed at, it may be held that the contract is avoided. *Magistrates of Rutherglen* v. *Cullen*, 1773, 2 Paton 305.

end, and, if he in fact carries it out, that he is entitled to payment *quantum meruit*.[1] The same contention may be put forward if the work is rendered materially more expensive by delay in giving possession of the site, in cases where that delay does not amount to breach of contract on the part of the employer. The argument may then take the form that the original contract is at an end on the principle of frustration of the adventure; that consequently some new contract must be implied between the parties, and that the terms of that new contract must be for payment *quantum meruit*.[2] But it is by no means clear, on the authorities, that this contention is open to the contractor if he has not, at the time when the difficulty became apparent, asserted his right to work on a new basis. It was sustained in *Bush* v. *Whitehaven Trs.*[3] where delay in giving access to the site was material, because it involved that the work must be carried out at a time of year when it was more difficult and expensive. It was also sustained in *Mackay* v. *Lord Advocate*,[4] but there the Lord Ordinary found that the contractors had "made it clear that they would not consent to complete it on contract terms." In *Porter* v. *Tottenham Urban Council*[5] a claim of this nature was rejected, but on the ground that the delay, caused by the unjustifiable proceedings of third parties, was not sufficiently material to involve frustration. In recent cases opinions of weight have been given that if supervening events materially affect the contract the contractor may be entitled to maintain that he is no longer bound by it, but if in full knowledge of these events he elects to proceed with the work he must be held to have waived any claim for anything more than the contract price.[6] The employer should have the opportunity of considering whether, in the circumstances which have arisen, it would be best to stop the work, or to authorise its completion on the basis of payment *quantum meruit*.

(3) *Alteration in Condition of Obligant*

Performance of an obligation may be rendered impossible by a change of the condition of the obligant. He may be disabled by death, by insanity,[7] by serious illness, or, in certain cases, by bankruptcy.

Death.—The death of an obligant may or may not render performance impossible, according as the contract does or does not involve the element of *delectus personæ*. If it does not, the obligation transmits against the representatives of the deceased; if it does, the death terminates the contract,

[1] *Quin* v. *Gardner & Sons*, 1888, 15 R. 776.

[2] See *Hirji Mulji* v. *Cheong S.S. Co.* [1926], A.C. 497. The argument is not conclusive; it would be as easy to imply an agreement that the work was to continue on the original terms.

[3] Hudson, *Building Contracts*, 4th ed., ii. 122, 52 J.P. 392. A clause in the contract provided that no delay in giving possession of the site should vitiate or affect the contract. A jury found that the employer was in breach of contract in failing to give possession at the proper time, and that the conditions of the contract were so completely changed as to render its provisions inapplicable. The Court held that the clause regarding delay could not be read literally, because that would involve freedom to the employers to postpone possession indefinitely, and that when otherwise read it did not protect the employers from a claim for payment *quantum meruit*, based on the latter finding of the jury, which, on the evidence, the Court held to be justified. See observations on this case, which is not reported in any of the regular series of reports, and is not referred to in most of the English works on contract, in *Smellie* v. *Caledonian Rly.*, 1916, 53 S.L.R. 336, per Lord Dewar (Ordinary).

[4] 1914, 1 S.L.T. 33.

[5] 1915, 1 K.B. 776.

[6] Per Earl Loreburn and Lord Atkinson in *Boyd & Forrest* v. *Glasgow and South-Western Rly.*, 1915, S.C. (H.L.) 20; per Lord Skerrington and Lord Dewar (Ordinary) in *Smellie* v. *Caledonian Rly.*, 1916, 53 S.L.R. 336.

[7] As to the effect of insanity, see *supra*, p. 92.

the estate of the deceased is not liable for non-performance, and the other party is relieved of any obligations for the future. Generally, if a man has been chosen for a contract in reliance on his personal qualities, his continuance in life is an implied condition of the contract, and his death annuls it. The application of the rule may be traced in the contracts of service, partnership, agency, and cautionary obligations, merely noting the obvious case of a person engaged to perform work involving literary or artistic skill. The transmissibility of debts has been noticed already.[1]

Contract of Service. In a contract of service the death of either master or servant terminates the contract.[2] In *Hoey* v. *M'Ewan & Auld*, *H.* entered into a five years' engagement with a firm of accountants, consisting of two partners. During the currency of his engagement one of the partners died. The remaining partner declined to continue the engagement, and the action was at the instance of *H.* for damages. It was held that the death of a partner, dissolving the firm, put an end to the engagement of their employees, without giving any right to damages. Death, it was observed, cannot be regarded as a breach of contract, and in such contracts the continued life of each party is an implied condition. But domestic servants are bound to remain in the service of their deceased master until the ensuing term,[3] and the rule would probably be extended to analogous cases.

Death of Partner. A partnership is dissolved by the death of any partner, in the absence of any agreement to the contrary.[4] Such an agreement may be implied from the fact that the partnership is for a long term of years.[5]

Death of Mandant or Mandatary. A mandate necessarily falls by the death of the mandant or mandatary.[6] So where *A.* signed a bond as a guarantor for a company, and gave it to the company's agent with authority to deliver it to the creditor after the signature of other guarantors had been obtained, but died before it was so delivered, it was held that the mandate to deliver it fell by *A.*'s death, and his representatives were not liable.[7] The same rules apply to the contract of agency.[8] But a mandatary or agent is entitled to act until he knows of the death of the party from whom his authority is derived; he binds the estate of the deceased, and is not personally liable.[9]

Cautionary Obligations. A cautionary obligation falls, with regard to future transactions, by the death either of the creditor or of the principal debtor, unless it is for a debt, such as the expenses of an action, of such a

[1] *Supra*, p. 265.

[2] Bell, *Prin.*, sec. 179; Umpherston, *Master and Servant*, p. 90; *Hoey* v. *M'Ewan & Auld*, 1867, 5 M. 814; *Torrance* v. *Traill's Tr.*, 1897, 24 R. 837. But there may be exceptional cases, in which a contract of service involves no *delectus personæ*, and where, therefore, the death of the employer would not put an end to the contract. So where a troupe of music-hall artists entered into an engagement with four persons who carried on a music hall, it was held that the death of one of these persons did not affect the validity of the contract. His existence was unknown to the music-hall artists, who had contracted with a manager (*Phillips* v. *Alhambra Palace Co.* [1901], 1 Q.B. 59).

[3] *Hoey* v. *M'Ewan & Auld*, 1867, 5 M. 814, per Lord Deas, at p. 818.

[4] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 33.

[5] *Warner* v. *Cunningham*, 1815, 3 Dow, 76 (124 years). As to the construction of an agreement to carry on the partnership with the representatives of a deceased partner, see *Hill* v. *Wylie*, 1865, 3 M. 541.

[6] Bell, *Prin.*, sec. 228; *Scot* v. *Stewart*, 1834, 7 W. & S. 211.

[7] *Life Association of Scotland* v. *Douglas*, 1886, 13 R. 910.

[8] Bell, *Com.*, i. 524.

[9] *Campbell* v. *Anderson*, 1826, 5 Sh. 86; affd. 1829, 3 W. & S. 384; *Kennedy* v. *Kennedy*, 1843, 6 D. 40; *Smout* v. *Ilbery*, 1842, 10 M. & W. 11. In English law the liability of the deceased principal's estate seems doubtful (*Drew* v. *Nunn*, 1879, 4 Q.B.D. 661, per Brett, L.J., 668; Pollock, *Contract*, p. 102).

character as to indicate the intention of the cautioner to be bound notwithstanding the death of the party for whom he interponed.[1] The death of the cautioner does not affect his liability for sums already due under the guarantee. And if the undertaking is for a definite period, so that it was not within the power of the cautioner, while in life, to put an end to his liability, the obligation remains as a debt affecting his estate.[2] In cautionary obligations which are revocable by the cautioner, it would seem to be settled that his death does not operate as a revocation, unless express notice is sent to the creditor by his representatives. If no such notice is sent, the obligation subsists even although the representatives were not aware of its existence and the creditor knew of the cautioner's death.[3]

Unfinished Work. The question whether any remuneration can be claimed for work partially done, and interrupted by the death of the worker, seems to depend on whether the contract was divisible or not. It seems clear that no claim can be made for a portrait half-done at the date of the artist's death. Where an author undertook to write a book on Natural Philosophy, and died after having completed one part, the decision that his executors were entitled to partial payment was rested only on the special terms of the contract, which were construed as inferring an agreement to pay for each part on completion.[4] But if the other party has already had the use of the services of the deceased, or chooses to make use of his incomplete work, he must pay for it. So, on the death of a servant, his executors are entitled to payment for the period he has served.[5] And it is conceived that if a sitter chose to take a portrait not completed at the death of the artist, he would be liable for its value.

Illness of Obligant.—Serious illness may determine a contract. It will do so if the contract was for the performance of some service which illness would preclude. So if a musician is engaged for a particular occasion, and is too ill to perform, neither party is under any liability.[6] In contracts involving personal service of a continuing nature, it is a question of degree whether the illness of the person engaged to serve puts an end to the contract or not. Where a singer engaged to take a principal part in a new opera was unable through illness to appear on the opening night, it was held that as she was excused performance, so the manager was entitled to treat the contract as rescinded, and refuse to accept her services when she recovered.[7] In ordinary contracts of service, where the servant is temporarily disabled by illness, it is a question of circumstances, in which the length of the servant's engagement, the nature of the work, and the probable duration of the illness, have to be taken into account, whether the master is entitled to treat the contract as rescinded.[8] It is probably the law that if the illness does not justify the rescission of the contract, the master is not entitled to deduct

[1] *Scot* v. *Stewart*, 1834, 7 W. & S. 211; *Wilson* v. *Ewing*, 1836, 11 Sh. 262.

[2] *Lloyds* v. *Harper*, 1880, 16 Ch. D. 290; *In re Crace* [1902], 1 Ch. 733.

[3] Bell, *Com.*, i. 385; *British Linen Co.* v. *Monteith*, 1858, 20 D. 557 (earlier authorities there cited); *Caledonian Banking Co.* v. *Kennedy's Trs.*, 1870, 8 M. 862.

[4] *Constable* v. *Robinson's Trs.*, 1808, M. App. *voce* Mutual Contract, No. 5, 1st June 1808, F.C.

[5] Ersk. iii. 3, 16; Bell's *Prin.*, sec. 179.

[6] *Robinson* v. *Davison*, 1871, L.R. 6 Ex. 269; *Hall* v. *Wright*, 1859, E. B. & E. 765 (breach of promise), commented on in *Liddell* v. *Easton's Trs.*, 1907, S.C. 154. Where a tenant, who had given notice, remained in possession after the lease had expired, it was held that illness did not save him from liability in damages (*Tod* v. *Fraser*, 1889, 17 R. 226).

[7] *Poussard* v. *Spiers & Pond*, 1876, 1 Q.B.D. 410. It was a case of *rei interitus*; as a singer she had been accidentally destroyed.

[8] *Craig* v. *Graham*, 1844, 6 D. 684; *Manson* v. *Downie*, 1885, 12 R. 1103; and see opinion of Bramwell, B., in *Jackson* v. *Union Marine Insurance Co.*, 1874, L.R. 10 C.P. 125, at p. 145.

anything from the servant's wages for the time he was off work,[1] or demand that he should make up the time lost by illness at the end of his engagement.[2] These statements, however, assume that the illness is accidental, in the ordinary sense of that word. If it can be shewn to be due to fault or gross negligence on the servant's part, he is in breach of contract, is probably liable in damages, and is certainly not entitled to wages.[3]

Bankruptcy of Obligant. The bankruptcy of an obligant does not, as a rule, relieve him of obligations which he has undertaken. It does dissolve partnership, subject to any agreement to the contrary.[4] A trustee in bankruptcy is never bound to carry out contracts entered into by the bankrupt, but if he does not do so, and the contract is not one which the bankrupt can carry out himself, the bankrupt estate is liable in damages.[5] In building contracts, if the builder fails while the work is partially completed, and the trustee does not adopt the contract, the employer's rights are to claim damages for breach of contract, and to have the use of the materials and plant brought on to the premises, allowing a *quantum meruit* for the work done by the builder.[6] A servant is not bound to continue his service with a bankrupt employer, but the contract is not determined in the sense that it is by the employer's death; the bankruptcy is a breach of contract on the employer's part, for which the servant is entitled to damages.[7] As his claim is for damages, not for wages, he is not entitled to any preferential ranking.[8] The bankruptcy of an agent operates as a revocation of the authority given to him, but there is no authority on the question whether, in an agency for a fixed term, any claim of damages accrues to the principal.[9] In sale the contract is not rescinded by the bankruptcy of either party, but the bankruptcy of the buyer confers on the seller the right to withhold delivery, stop the goods *in transitu*, or re-sell, if payment of the price is not made or tendered.[10] In leases the bankruptcy of a tenant does not put an end to the lease, unless there is an express provision to that effect,[11] but to this there is an exception where the lease is held by a partnership. Then as the firm is dissolved there is no longer a tenant, and the lease is avoided.[12] But this does not apply to a case of joint-tenancy where there is no partnership. Then the bankruptcy of one joint-tenant does not abrogate the right of the other, and a clause of irritancy on the bankruptcy of the tenants does not apply where one remains solvent.[13] Where a tenant becomes bankrupt, and the trustee refuses to adopt the lease, the landlord has a claim of damages for which he may rank in the bankruptcy.[14]

[1] Stair, i. 15, 2; Ersk. iii. 1, 16; *White* v. *Baillie*, 1794, M. 10147; *Cuckson* v. *Stones* 1859, 1 E. & E. 248. See Umpherston, *Master and Servant*, p. 63.

[2] *Maclean* v. *Fyfe*, 4th February 1813, F.C.

[3] *M'Ewan* v. *Malcolm*, 1867, 5 S.L.R. 62. So as to seamen, Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 160.

[4] Partnership Act, 1890 (53 & 54 Vict. c. 39), secs. 33, 47.

[5] *Anderson* v. *Hamilton*, 1875, 2 R. 355; *Kirkland* v. *Cadell*, 1838, 16 Sh. 860; Goudy, *Bankruptcy*, 3rd ed., 309.

[6] *Kerr* v. *Dundee Gas Co.*, 1861, 23 D. 343.

[7] *Puncheon* v. *Haig's Tr.*, 1790, M. 13990; *Hoey* v. *M'Ewan & Auld*, 1867, 5 M. 814, per Lord President Inglis, at p. 817; *Day* v. *Tait*, 1900, 8 S.L.T. 40; *Laing* v. *Gowans*, 1902, 10 S.L.T. 461; *Chapman's* case, 1866, L.R. 1 Ep. 346; *M'Dowall's* case, 1886, 32 Ch. D. 366 (liquidation of company). If the business is carried on by trustee or liquidator, and the servant stays, a new contract may be inferred.

[8] *Day* v. *Tait*, *supra*.

[9] Bell, *Com.*, i. 525.

[10] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), secs. 41-48.

[11] Bell, *Com.*, i. 76; *Fraser* v. *Robertson*, 1881, 8 R. 347.

[12] *Walker* v. *M'Knight*, 1886, 13 R. 599.

[13] *Young* v. *Gerard*, 1843, 6 D. 347; *Buttercase & Geddie's Tr.* v. *Geddie*, 1897, 24 R. 1128.

[14] Bell, *Com.*, ii. 343; *Ebbw Vale Steel Co.* v. *Wood's Tr.*, 1898, 25 R. 439 (measure of damages).

CHAPTER XX

EXTRINSIC EVIDENCE IN WRITTEN CONTRACTS

Scope of Chapter.—It is proposed to consider, in the present chapter, the question how far the fact that a contract has been constituted or recorded in writing excludes any other evidence as to the obligations undertaken by the parties. To what extent is the Court, in the task of interpretation, limited to the written record? And this question may be raised in two cases. It may be proposed to determine the scope of the obligations originally undertaken by extrinsic evidence, either explanatory or contradictory of the terms of the written contract, or to shew that these obligations have been modified by a later agreement. The questions raised in these two cases, though clearly analogous, are not identical, and it will conduce to clearness to consider first how far the original import of a written contract may be controlled by extrinsic evidence.

Meaning of Written Contract.—It may be as well to indicate, at the outset, what is meant, in a question as to the admissibility of extrinsic evidence, by a written contract. The obvious case is where parties, having come to an agreement, have recorded the terms of that agreement in a formal writing. But a contract is also in writing where its terms have to be collected from correspondence between the parties.[1] And a written offer or order for goods, though accepted verbally, or merely by sending the goods, places the contract within the rules applicable to contracts in writing.[2] But probably the fact that goods sent on a verbal order are dispatched with a written invoice does not make the contract a written one, so as to exclude parole evidence that the intention of the parties was to enter into a contract different from that appearing by the invoice.[3] Thus where at an auction sale of moveables written conditions of sale were read by the auctioneer, and these, though signed by the exposer, were construed by the Court as merely instructions to the auctioneer, it was held that the contract with the successful bidder was not in writing, and proof was allowed of a verbal undertaking by the auctioneer which was not contained in the conditions of sale.[4] And it has been held by a Lord Ordinary that an account between a banker and customer, on which an overdraft had been allowed, was not a contract in writing so as to offer any bar to proof that the customer was acting as

[1] Dickson, *Evidence*, sec. 1016.

[2] *Pollock* v. *M'Andrew*, 1828, 7 S. 189; *M'Lellan* v. *Peattie's Trs.*, 1903, 5 F. 1031; *Müller & Co.* v. *Weber & Schaer*, 1901, 3 F. 401. So these rules apply to a written offer by a contractor accepted verbally (*Thomson* v. *Garioch*, 1841, 3 D. 625), and a bought and sold note, signed by one party only (*Towill* v. *British Agricultural Association*, 1875, 3 R. 117).

[3] *Buchanan & Co.* v. *Macdonald* (1895, 23 R. 264), where it was held that invoices sent with consignments of beer stating that accounts not paid within three months were not subject to discount, did not preclude proof of a verbal contract that the nominal price was in all cases to be subject to a discount of 35 per cent.; *Woodrow* v. *Patterson*, 1845, 7 D. 385; *Ireland & Son* v. *Rosewell Gas Coal Co.*, 1900, 37 S.L.R. 521.

[4] *Christie* v. *Hunter*, 1880, 7 R. 729.

agent for a disclosed principal, and that the bank did not rely on his credit.[1]

Evidence as to Authenticity of Writing.—Before any question of construction can properly arise, the Court must be satisfied that the writing before it is the authentic writ of the parties by whom it bears to be executed. So there is no limitation of proof if the question is raised whether the signature to a document is authentic,[2] whether it is regularly attested, or whether an agent was acting within his powers in subscribing a contract or memorandum of agreement.[3]

As to Technical Terms.—Questions of construction also presuppose a contract which the Court is able to read. So evidence may be admitted of the meaning of foreign or technical terms, not as indicating the intention of the parties, but as shewing the ordinary meaning of the word or phrase. It seems impossible to lay down any general rule to determine whether a particular phrase is a technical term, or part of the ordinary language which the judge will construe for himself. Illustrative cases are cited below.[4]

On Averments of Error, Fraud, Illegality.—Rules as to the interpretation of written contracts do not apply to cases where the question really is whether the contract is binding on the parties. So parole evidence is admissible to prove that one or other party never gave any assent, or that his assent was obtained by misrepresentation, fraud, or other improper means.[5] And it is competent to prove that a written contract was entered into in circumstances or with objects which make it void or reducible as a *pactum illicitum*.[6]

Exclusion of Extrinsic Evidence.—Assuming, then, a written contract, admitted or proved to be authentic, couched in intelligible terms, and not alleged to be reducible, if one of the parties proposes to lead extrinsic evidence as to their real intention, how far is that evidence admissible? The general rule undoubtedly is that where parties have reduced the terms of their agreement to writing, the obligations they have undertaken must be ascertained from the terms of that writing without the aid of any extrinsic evidence. Parole evidence that their real intention was other than that so expressed is

[1] *Bank of Scotland* v. *Rorie*, 1908, 16 S.L.T. 21. As to proof that an agent is acting for a principal, see *supra*, p. 133.

[2] *Johnston* v. *Scott*, 1860, 22 D. 393.

[3] *Nicholson* v. *Kennedy*, 1850, 12 D. 445; *Maconochie* v. *Stirling*, 1864, 2 M. 1104.

[4] Proof has been allowed as to the meaning of the word "soum" (*Mackenzie* v. *M'Rae*, 1825, 4 S. 146); of "cutting shop" (*Watson* v. *Kidston*, 1838, 1 D. 1254); of "Scotch iron of best quality" (*Fleming* v. *Airdrie Iron Co.*, 1882, 9 R. 473); of "statuary" in a contract of carriage (*Sutton* v. *Ciceri*, 1889, 16 R. 814; affd. 1890, 17 R. (H.L., 40); of "warranted no St Lawrence," in a policy of marine insurance, the question being whether it covered the gulf as well as the river of that name (*Birrell* v. *Dryer*, 1883, 10 R. 585; revd. 1884, 11 R. (H.L.) 41); of "fair market price" in a contract between brewers and the lessee of a tied house (*Charrington* v. *Wooder* [1914], A.C. 71). Proof was refused as to the meaning of the word "effects" in a will (*Griffith's Factor* v. *Griffith's Exrs.*, 1905, 7 F. 470); of the meaning of the expression "payment cash on delivery, less 2½ per cent. in fourteen days, as usual" (*Towill* v. *British Agricultural Association*, 1875, 3 R. 117); of the meaning of the expression "sharp, fresh-water sand," in a building contract (*Greenock Parochial Board* v. *Coghill*, 1878, 5 R. 732). Proof that the word "acre" meant Scotch acre was refused, on the ground that the word had the statutory meaning of "imperial acre" (*Thomson* v. *Garioch*, 1841, 3 D. 625), but allowed that the word "stone" meant "tron stone," a local measure of weight (*Millar* v. *Mair*, 1860, 22 D. 660). Proof was allowed that Whitsunday, in a lease, meant the 26th, instead of the 15th, of May (*Hunter* v. *Barron's Trs.*, 1886, 13 R. 883).

[5] *Napier* v. *Sharp*, 1851, 14 D. 313; *United Guarantee Association* v. *Western Bank*, 1853, 15 D. 834; *Steuart's Trs.* v. *Hart*, 1875, 3 R. 192; *Duran* v. *Duran*, 1904, 7 F. 87.

[6] *Mitchell* v. *Petrie*, 1724, M. 12434; *Gas Light and Coke Co.* v. *Turner*, 1840, 6 Bing. N.C. 324.

inadmissible, either when offered as explanatory of the writing, or with the object of proving that the obligations there undertaken were not those by which they intended to be bound.[1] Averments that one party signed a document in ignorance of its contents, introducing a case of error amounting to want of any true consent, may be admitted to proof, but averments that he did not intend it to be read as the other party proposes to read it are in a very different category.[2]

The primary rule that the terms of a written contract cannot be contradicted by parole evidence has been illustrated in many cases. Thus the lessee on a written lease cannot prove that the landlord's factor had told him that he was to get possession of certain lands not included within the boundaries as described in the lease ;[3] nor may he lead parole evidence to shew the untruth of a statement in the lease that the buildings had been valued at a certain sum at entry ;[4] or that the landlord had undertaken to take a bill for the rent.[5] The same principles preclude parole proof, by a landlord, of obligations alleged to have been undertaken by the tenant, and not appearing in the lease.[6] The debtor in a bond cannot prove a verbal undertaking not to demand payment at the prescribed term.[7] A cautioner cannot prove that his liability was dependent on a condition not expressed.[8] Where, in pursuance of an arbiter's award, lands were conveyed without restriction to a railway company, it was held incompetent to prove that it had been verbally agreed that no fence should be erected within two feet of the boundary.[9] Where in a written minute of the sale of growing timber a certain portion was reserved, it was held incompetent to prove by witnesses that it had been agreed that another portion should also be reserved.[10] Where two railway companies referred to arbitration the question how the receipts from traffic between certain places should be divided, and the arbiter had issued his award without specifying to what kind of traffic he referred, it was held incompetent to prove that the agreement was not intended to include passenger traffic.[11] And where goods were supplied on written bought and sold notes, the Court refused to allow the party to whom they had been supplied to lead parole evidence to shew that the real contract was not sale but agency.[12] The meaning of building restrictions must be arrived at by a construction of the terms of the title, and evidence as to the intentions of the parties is inadmissible.[13]

Formal Deeds. In the cases above mentioned the evidence tendered and

[1] Bell, *Prin.*, sec. 2258 ; *Com.*, i. 457 ; Dickson, *Evidence*, sec. 1015. Cases in following paragraph. The rule, though traceable from the earliest recorded decisions (*Wauchope* v. *Hamilton*, 1574, M. 12298), was hardly settled in the time of Erskine (see *Inst.*, iii. 3, 87 ; English law in Leake, *Contracts*, 119 ; Chitty, *Contracts*, 17th ed., 119 ; Taylor, *Evidence*, 10th ed., 807).

[2] *Steuart's Trs.* v. *Hart*, 1875, 3 R. 192 ; *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25. Where a letter referred to and confirmed a prior verbal contract, proof was allowed where the terms of the letter were ambiguous (*Croudace* v. *Annandale S.S. Co.*, 1925, S.L.T. 449 (O.H., Lord Constable), refused where the averments were directly contradictory of the letter (*Riemann* v. *Young*, 1895, 2 S.L.T., p. 426, O.H., Lord Kincairney).

[3] *Gregson* v. *Alsop*, 1897, 24 R. 1081.

[4] *Lawson* v. *Murray*, 1825, 3 S. 536.

[5] *Henderson* v. *Arthur* [1907], 1 K.B. 10.

[6] *Maxwell* v. *Burgess*, 1773, M. 12351.

[7] *Wallace* v. *Henderson*, 1867, 5 M. 270.

[8] *M'Pherson* v. *Haggarts*, 1881, 9 R. 306.

[9] *Guthrie* v. *Glasgow and South-Western Rly. Co.*, 1858, 20 D. 825. See also *Shaw Stewart* v. *Macaulay* (1864, 3 M. 16), where, however, the question arose with a singular successor.

[10] *Kendal* v. *Campbell*, 1766, M. 12351.

[11] *Highland Rly. Co.* v. *Great North of Scotland Rly. Co.*, 1896, 23 R. (H.L.) 80.

[12] *Müller & Co.* v. *Weber & Schaer*, 1901, 3 F. 401.

[13] *Cowan* v. *Magistrates of Edinburgh*, 1887, 14 R. 682, at p. 686 ; *Bainbridge* v. *Campbell*, 1912, S.C. 92.

rejected was merely that of a verbal agreement. But in cases where a formal deed has been executed, not merely parole evidence of intention is excluded, but also evidence of all prior communings between the parties whether verbal or in writing.[1] In *Inglis* v. *Buttery & Co.*,[2] a leading case on this subject, a written memorandum and specification of a contract for the repairs of a ship contained an undertaking by the repairers that the plating of the hull should be "carefully overhauled and repaired," and "all ironwork" was to be "in accordance with Lloyd's rules for classification." The specification also contained the clause "but if any new plating is required the same to be paid for extra," but these words, though still legible, had been deleted before signature. As the work proceeded it was discovered that in order that the ship might be classified at Lloyd's a large amount of new plating was requisite. In a question whether the repairers were bound to furnish this new plating without any addition to the contract price, it was held that neither the deleted words nor the correspondence passing between the parties with regard to their deletion could be looked at. Lord Gifford, in the Court of Session, stated the law in terms which were approved in the House of Lords: "Where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant a Court must look to the formal deed and to that deed alone. This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is that the formal contract shall supersede all loose or preliminary negotiations, that there shall be no room for misunderstandings such as may often arise and which do constantly arise in the course of long and it may be desultory conversations, or of correspondence and negotiations in the course of which the parties are often widely at issue as to what they will insist in and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings, partly consisting of letters and partly of conversations."[3]

Reference to Prior Writings. It is, of course, competent for parties to frame their contract so that prior documents are incorporated in it, and referred to as forming part of the contract. And if the contract is to be found in letters, without any formal and probative deed, and the final letter recapitulating and stating the terms agreed to refers back to the prior correspondence, that correspondence may be considered in determining the meaning of an ambiguous phrase.[4]

Conveyances. It is a further general rule that when a written contract has been implemented by a disposition or conveyance, and that conveyance has been accepted by the disponee, the contract, with all the negotiations which have preceded it, is superseded, and the rights of the parties must be determined by the terms of the conveyance. And it is immaterial that the prior contract is referred to in the conveyance, if it is not expressly incor-

[1] *Miller* v. *Miller*, 1822, 1 Sh. App. 308; *Inglis* v. *Buttery & Co.*, 1877, 5 R. 58; affd. 1878, 5 R. (H.L.) 87.

[2] *Supra.*

[3] *Inglis* v. *Buttery & Co.*, 1877, 5 R. 58, per Lord Gifford, at p. 69; approved per Lord Blackburn, 5 R. (H.L.), at p. 102. Where a form of charter-party in general use in the trade was employed, and a particular clause was deleted, the majority of the Court were of opinion that it was competent to consider the words that had been deleted, and to draw an inference from them as to the meaning of the words which remained (*Taylor* v. *Lewis*, 1927, S.C. 891, Lord Hunter dissenting on this point).

[4] *Temperance Halls Building Society* v. *Glasgow Pavilion Co.*, 1908, 16 S.L.T. 112, per Lord Low.

porated.[1] A tendency to relax the strictness of this rule [2] was checked by the opinions of the House of Lords in *Lee* v. *Alexander*.[3] There a conveyance of certain superiorities contained a reference to a prior agreement in writing between the parties of which it bore to be in implement. In a question as to the rights conveyed it was held in the Court of Session that this prior agreement might be referred to. In the House of Lords (though the actual judgment was affirmed), it was laid down that no such reference was permissible. "According to the law of Scotland," said Lord Watson, "the execution of a formal conveyance, even where it expressly bears to be in implement of a previous contract, supersedes that contract *in toto*, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the parties."[4]

The rule so broadly stated is subject to certain qualifications. It holds with regard to questions, such as the nature and extent of the subjects conveyed, which fall within the province of the conveyance. So the statutory effect of the phrase "I assign the rents" cannot be controlled by reference to the conditions of sale.[5] It does not, it is submitted, hold with regard to conditions of the contract which would not, in the ordinary course of business, find any place or mention in a conveyance intended merely to transfer or complete the right to property passing under the contract. Thus where, by missive of sale, a house was sold "with fixtures and fittings," and was followed by a conveyance in which the fixtures and fittings were not mentioned, it was held that the purchaser was entitled to found on the missive in an action for the value of the articles alleged to be included in the term "fittings," because these articles, being corporeal moveables, were naturally and appropriately transferable by delivery, and not by a written disposition designed to transfer the title to land.[6] So the conditions under which a sale took place, if in writing, may be proved, although a conveyance of the thing sold may have followed without repeating or incorporating them.[7] In *Young* v. *M'Kellar* [8] heritable property was sold by auction, one of the conditions of the articles of roup being that intending purchasers should "be held to have satisfied themselves with regard to the extent, condition, and description of the subjects." A disposition was duly executed, containing a clause of absolute warrandice. The purchaser having discovered that the seller had no title to part of the subjects conveyed, brought an action based on the obligation of warrandice. In reply to the argument that his claim was excluded by the clause above quoted in the articles of roup, he maintained that the terms of the disposition formed the only record of the contract at which the Court could look. It was held that as the question was not as to the extent of the subjects conveyed but as to the terms on which the sale

[1] *Heriot's Hospital* v. *Gibson*, 1814, 2 Dow, 301; *Hughes* v. *Gordon*, 1819, 1 Bligh 287; *North British Rly. Co.* v. *Tod*, 1846, 7 D. 726; revd. 5 Bell's App. 184; *Lee* v. *Alexander*, 1882, 10 R. 230; affd. 1883, 10 R. (H.L.) 91; *Orr* v. *Mitchell*, 1892, 19 R. 700; revd. 1893, 20 R. (H.L.) 27; *M'Allister* v. *M'Gallagley*, 1911, S.C. 112, per Lord President Dunedin, at p. 117; *Butter* v. *Foster*, 1912, S.C. 1218; *Kinlen* v. *Ennis Urban Council* [1916], 2 Ir. R. 299.

[2] As in *Davidson* v. *Magistrates of Anstruther*, 1845, 7 D. 342, and *Leith Heritages Co.* v. *Edinburgh and Leith Gas Co.*, 1876, 3 R. 789.

[3] *Supra.*

[4] *Lee* v. *Alexander*, 10 R. (H.L.), at p. 96. See also Lord Watson's opinion, *Edinburgh United Breweries* v. *Molleson*, 1894, 21 R. (H.L.) 10, at p. 16.

[5] *Butter* v. *Foster*, 1912, S.C. 1218.

[6] *Jamieson* v. *Welsh*, 1900, 3 F. 176.

[7] *Wood* v. *Magistrates of Edinburgh*, 1886, 13 R. 1006; *Wigan* v. *Cripps*, 1908, S.C. 394; *Young* v. *M'Kellar*, 1909, S.C. 1340.

[8] *Supra.*

took place, the conditions of the articles of roup were not superseded by the disposition. The principle of the decision, as explained by Lord Low,[1] was that the general rule –that a conveyance supersedes all prior writings—is not an absolute rule of law, but an inference from the presumable intention of the parties, and it therefore holds only with reference to points as to which no other intention has been indicated. So it is perfectly competent to prove, by the evidence of prior writings, that a disposition or conveyance, apparently unqualified, was in reality granted in security or in trust.[2] Where a sale of two ships was followed by two separate conveyances, not referring to each other, parole evidence was allowed to prove that it was a term of the contract that if one ship was requisitioned the purchaser should not be bound to take the other.[3] It was explained that it was competent to prove "that the actual contract between the parties was not embodied or intended to be embodied in the formal document, but that the latter was a mere piece of machinery obtained as subsidiary to and for the purpose of the verbal and only real agreement."[4]

It is somewhat doubtful how far the general rule extends to the case where the documents in question are a decree-arbitral and a conveyance following upon it. In *Guthrie* v. *Glasgow and South-Western Rly. Co.*,[5] where the pursuer's contention was that the conveyance ought to have been qualified by a negative servitude, reference was allowed to the arbiter's notes (no formal decree-arbitral had been issued) though a proposal to examine the arbiter as a witness was rejected. In *Duke of Fife* v. *Great North of Scotland Rly. Co.*[6] it was decided that an ambiguous clause in the disposition might be construed by reference to the decree-arbitral, which, it was observed, was the governing right. Some of the opinions may seem to go the length of holding that if the provisions of the decree-arbitral and the conveyance were inconsistent, the former should rule, but in a later case a different construction of the terms used has been adopted, and it is probably the law that reference to the decree-arbitral is permissible only in the event of an ambiguity in the conveyance.[7]

Evidence to exclude Implied Terms. –The rule that the terms of a written contract cannot be varied by extrinsic evidence, and its corollary, that where a contract, though in writing, is followed by a conveyance, the contract is superseded, are applicable not only to terms and conditions actually expressed, but to those conditions which the law would imply in the absence of express stipulation between the parties. If parties to a contract having well-known legal incidents desire that these should not hold in the particular case, they must provide for that by express stipulation, and, if the contract is in writing, by a stipulation appearing in that writing. In a question as to the admissibility of parole evidence a written contract should be read as if the parties had inserted all the terms which the law would imply. Thus in an agricultural lease the obligation of the landlord, if left undefined by the lease, is to put the subjects into tenantable repair at entry, and neither landlord nor tenant can prove a verbal agreement diminishing or increasing

[1] 1909, S.C., at p. 1347.

[2] *Scottish Union Insurance Co.* v. *Marquis of Queensberry's Trs.*, 1839, 1 D. 1203; affd. 1842, 1 Bell's App. 183.

[3] *Claddagh Steamship Co.* v. *Steven*, 1919, S.C. 184; revd. 1919, S.C. (H.L.) 132.

[4] Per Viscount Cave, in *Claddagh*, *supra*, at p. 137. Question whether this could not be said in every case where a contract, verbal or written, is followed by a conveyance?

[5] 1858, 20 D. 825.

[6] 1901, 3 F. (H.L.) 2.

[7] *Forth Bridge Rly. Co.* v. *Guildry of Dunfermline*, 1909, S.C. 493. See opinion of Lord Dundas (Ordinary), at p. 496.

the common-law obligation.[1] A contract of sale, in the absence of any agreement to the contrary, implies payment on delivery, and, if the contract is in writing, proof of a verbal agreement for credit is not admissible.[2] The conveyance of a building stance on which a house has been built infers a right to exact half the cost of the mutual gable from the proprietor of the adjoining stance, if and when he builds upon it, and opinions were expressed in the House of Lords that this right, if not excluded by the terms of the actual conveyance, could not be excluded by the terms of the missives of sale which had preceded it.[3] The implication in a joint minute, by which two defenders settle an action, is that each should pay half the damages, and parole evidence is not admissible to prove an agreement to the contrary.[4] A lessee's undertaking to pay rent involves an obligation to pay in cash, and cannot be qualified by a verbal agreement to take bills.[5]

Collateral Agreements.— It is also a general rule, though subject to qualifications which may make it difficult to decide whether a particular case falls within the rule or the exceptions, that in the case of written contracts the writing, when taken as including the terms or conditions which the law would imply, is the sole measure of the obligations which either party may enforce, and therefore that it is not competent to prove a verbal agreement to add to these obligations, even although the addition proposed may not directly contradict any express or implied term of the written contract.[6] So where by a written lease the landlord agreed to furnish part of the driving power of a steam engine it was held incompetent to prove (except by his writ or oath), that he had also agreed to supply steam for heating purposes.[7] And the same principle has been applied with regard to an alleged verbal promise of repairs.[8] In a written contract to furnish iron pipes it was held to be incompetent to prove a verbal agreement as to the quantity to be supplied.[9] In an early case it was decided that when grain was sold on written conditions it could not be proved by parole that the seller had agreed to carry it to a particular place.[10] When a written contract for the performance of horse haulage on a railway contained no provision as to the number of horses that would be required it was held incompetent to prove a verbal agreement that sufficient work would be given to employ a particular number.[11]

On the other hand, there are cases, difficult to reconcile on any principle with those just cited, in which it has been held that evidence of a verbal agreement on some point collateral to the written contract could be received. This was allowed in a case where the point at issue between the parties (the duration of a lease, admittedly for more than a year, and without any express ish) was otherwise insoluble.[12] In *Renison* v. *Bryce*[13] a business was sold by

[1] *Barclay* v. *Neilson*, 1878, 5 R. 909. See also *Wight* v. *Newton*, 1911, S.C. 762.
[2] *Ford* v. *Yates*, 1841, 2 Man. & G. 549. Cp. *Hall & Sons* v. *Scott*, 1860, 22 D. 413.
[3] *Baird* v. *Alexander*, 1898, 25 R. (H.L.) 35.
[4] *Johnston* v. *Edinburgh and Glasgow Union Canal Co.*, 1835, 1 S. & M'L. 117.
[5] *Henderson* v. *Arthur* [1907], 1 K.B. 10.
[6] Dickson, *Evidence*, sec. 1020; cases in following notes.
[7] *Stewart* v. *Clark*, 1871, 9 M. 616. [8] *M'Gregor* v. *Lord Strathallan*, 1862, 24 D. 1006.
[9] *Pollock* v. *M'Andrew*, 1828, 7 S. 189.
[10] *Brisbane* v. *Two Glasgow Merchants*, 1684, M. 12328. The report puts the point very tersely: "He opponed the contract, in which there was no such thing, which could not be taken away by witnesses." . . . "The Lords found this only proveable *scripto vel juramento*."
[11] *Walker* v. *Caledonian Rly. Co.*, 1858, 20 D. 1102.
[12] *M'Leod* v. *Urquhart*, 1808, Hume 840, as explained by Lord President Dunedin in *M'Allister* v. *M'Gallagley*, 1911, S.C. 112.
[13] 1898, 25 R. 521. See also *Merrow & Fell* v. *Hutchison & Brown*, 1873, 45 Sc. Jur. 334; *British Workmen's, etc., Insurance Co.* v. *Wilkinson*, 1900, 8 S.L.T. 67.

a written contract, the price to be a specified number of shares in a company which the purchaser undertook to form. The company was formed, with a capital of £10,000. The seller refused to carry out the bargain, on the ground that it had been verbally agreed that the capital should be only £5,000. It was held that this averment, as it proposed only to add an unexpressed and collateral term to the contract, and not to contradict any of its provisions, might be allowed. So in England, in cases relating to written leases, it was held that the tenant, in a lease which reserved the sporting rights, might prove a verbal undertaking by the landlord to keep down the rabbits,[1] and, in the lease of a house, a verbal warranty that the drains were in good order.[2] Though from the cases just cited it seems to be possible to prove a collateral agreement even in the case of a formal deed, yet it is a strong argument in favour of the admission of such proof that the writing in question is not formal, but merely a document *in re mercatoria*.[3]

These cases seem to leave very little real content to the rule that it is inadmissible to add by parole an unexpressed term to a written contract. For it is difficult to see what can be the meaning of the term "collateral agreement" in this connection, except that it is an agreement not to be found in the writing, but not directly contradictory of anything to be found there.

Evidence that Contract Executed Conditionally.—From certain English cases it would appear that it is there held competent to prove that a contract, though duly executed and delivered, and, according to its terms, of instant obligation, was not intended to take effect until a certain condition was purified. It is said that in such cases the deed is executed as an "escrow," and not as a fully completed contract.[4] So proof was allowed, in *Wallis* v. *Littel*,[5] of an averment that a lease, concluded by the landlord's factor, was not to be binding unless the landlord approved of it; in *Pym* v. *Campbell*,[6] of an averment that a written contract for the sale of an invention was not to take effect unless a certain party approved of the invention; in *Pattle* v. *Hornibrook*,[7] of an agreement or understanding that a lease, duly executed by both parties, was granted on the unexpressed condition that the tenant must find a cautioner for the rent. There is not much authority for a similar rule in Scotland, and it was rejected in the earliest cases,[8] but it would appear to be competent to prove that a deed has been delivered on the terms that it is not to take effect until a certain condition has been purified. In *Dodds* v. *Walker*[9] a written offer to take a farm was accepted in writing by the factor for the landlord. The landlord refused to grant the lease, and was held entitled to prove, by parole evidence, that the tenant understood that the factor's acceptance of his offer was conditional on the landlord's approval. In *Semple* v. *Kyle*[10] a party, sued upon a dishonoured cheque, averred that he had granted it under reservation of his right to stop payment if he did not receive the cheque of a third party in exchange. It was held that he

[1] *Morgan* v. *Griffith*, 1871, L.R. 6 Ex. 70. See opinion of Mellish, L.J., in *Erskine* v. *Adeane*, 1873, L.R. 8 Ch. 756, at p. 766.

[2] *De Lassalle* v. *Guildford* [1901], 2 K.B. 215; but see *Magistrates of Glasgow* v. *Macfait*, 1755, M. 12341.

[3] Dickson, *Evidence*, sec. 1033.

[4] 1861, 11 C.B. (N.S.) 369.

[5] Leake, *Contracts*, 7th ed., 129.

[6] 1856, 6 E. & B. 370.

[7] [1897], 1 Ch. 25. See also *New London Credit Syndicate* v. *Neale* [1898], 2 Q.B. 487.

[8] *Crawfurd* v. *Vallance's Heirs*, 1625, M. 12304, and two following cases.

[9] 1822, 2 S. 81.

[10] 1902, 4 F. 421.

was entitled to prove this by parole evidence, and opinions were expressed that he was entitled to do so at common law and apart from sec. 100 of the Bills of Exchange Act, 1882. But if a document is delivered unconditionally, it would seem to be incompetent to prove by parole that it is not to exercise its normal obligatory force. So it has been decided that parole evidence is inadmissible to shew an agreement that the sum due under a written contract was only to be exacted subject to conditions not there expressed,[1] or that the liability on a cautionary obligation, undertaken in absolute terms, should determine on the occurrence of a certain event.[2]

Ambiguity.—The mere fact that the terms of a written contract are ambiguous does not let in direct evidence of what the parties intended by the ambiguous phrase. The construction of the writing is for the Court.[3] Evidence of intention offered as explanatory of an ambiguous phrase is inadmissible, because it is really in the same category as evidence offered to contradict a plain one; it is offered to contradict, if necessary, the conclusion which the Court would reach on a construction of the writing.[4] But there is a distinction—not always very satisfactory or easy to apply—between patent ambiguities (expressions in themselves susceptible of more than one meaning) and latent ambiguities (expressions which are apparently clear, but which are seen to be ambiguous from the surrounding circumstances, as disclosed by the contentions of the parties). In the latter case, evidence of intention is admissible.

Latent Ambiguity.—Under the head of latent ambiguities fall any questions as to the identity of the parties or of the subject-matter of the contract. If the defence to an action on a contract is that the defender is not the person who contracted, this question of identity must necessarily be decided by evidence apart from the contract itself. And it may, perhaps, be regarded as an extension of this rule that evidence is admissible as to the capacity in which a party to the contract acted. Thus it has always been held admissible to shew by parole evidence that a party who has signed a contract apparently as a principal is in reality an agent, so as to allow action by or against the real principal,[5] though not to limit the liability of the agent.[6] And when securities were assigned to a bank agent to cover advances, with a relative letter by which the agent was entitled to hold them in security for any obligations "which I may at present or at any future time be under to you," and the question was raised whether the assignation covered advances made by the agent on behalf of the bank, or only advances made by him privately, it was held that as the "you" was, in view of the question raised, ambiguous, a proof of the circumstances of the assignation was admissible.[7]

Evidence of Identity.—So, also, if the subject-matter of the contract is described in terms which necessarily require extrinsic elucidation, proof which may be really of the intentions of the parties will be allowed. Thus,

[1] *Robertson* v. *Pattinson*, 1844, 6 D. 944; affd. 1846, 5 Bell's App. 259; *M'Allister* v. *M'Gallagley*, 1911, S.C. 112.

[2] *Macpherson* v. *Haggarts*, 1881, 9 R. 306.

[3] Bell's *Prin.*, sec. 524; Dickson, *Evidence*, sec. 1080; *Logan* v. *Wright*, 1831, 5 W. & S. 242, per Lord Brougham, at p. 246; *Lee* v. *Alexander*, 1882, 10 R. 230; affd. 1883, 10 R. (H.L.) 91, *supra*, p. 368.

[4] In a very exceptional case, where the question was whether any obligation was imported by the offer of a "suitable maintenance" by members of a congregation to a minister, proof of the understanding of the parties was allowed (*Arneil* v. *Robertson*, 1841, 3 D. 1150).

[5] *Supra*, p. 128. [6] *Supra*, p. 133.

[7] *Robertson's Tr.* v. *Riddell*, 1911, S.C. 14. See also *M'Adam* v. *Scott*, 1912, 50 S.L.R. 264 (1913, 1 S.L.T. 12).

in an action regarding a sale of "the property known as the Royal Hotel," it was observed that extrinsic evidence must be admissible to shew what property *was* known as the Royal Hotel, and that, as evidence of this, it was competent to prove that the subjects pointed out to the purchasers before the sale did not include an adjacent tap-room or stable.[1] Even if the place which is the subject of the sale is described by boundaries, evidence may be necessary to determine their exact limits.[2] In places where a property is sold by a particular name, without boundaries or other means of identification, the parties may differ as to the extent of the property denoted by that name. If the difference is substantial, the sale may be void on the ground that there has been no *consensus in idem*; but if the difference is slight, or if both parties desire to uphold the contract, the Court, in determining the question, will not exclude evidence of intention. Thus when, by missives of sale, "the estate of Dallas" was sold, and the parties differed as to the boundaries of the property thereby conveyed, but neither proposed to avoid the sale, it was held that it was competent to refer to a plan which had been used in the negotiations which had preceded the sale.[3]

Evidence of Surrounding Circumstances.—A principle which may often result in the admission of evidence of the intention of the parties, even in the case of patent ambiguities, is that it is always competent to lead evidence of the circumstances surrounding the parties at the time when the contract was made. "Every Court of Justice has a right to have all the information which was in the possession of the parties contracting, to place itself in the situation of the parties for the purpose of putting a construction upon the instrument to which they have become parties."[4] The proper application of this principle, it has been explained, is that evidence may be led "with regard to the nature of the transaction and the known course of business and the forms in which such matters are carried out, and not to particular facts proved to have occurred at the inception of the transaction or during the negotiations."[5] This clearly covers a decision allowing proof that both parties to a charter-party knew that, owing to a general strike, permits for loading and unloading were required.[6] It is probably reconcilable, though with more difficulty, with *Claddagh Steamship Co.* v. *Steven*.[7] But there are many cases in which evidence of the surrounding circumstances practically amounts to evidence of the intention of the parties. Thus, when *A.* contracted to supply *B.* with all his requirements in rope, a proof was allowed that the words "all your requirements" were not intended by the parties

[1] *Macdonald* v. *Newall*, 1898, 1 F. 68. See also *Morton* v. *Hunter & Co.*, 1830, 4 W. & S. 379 (opinion of Lord Chancellor Brougham, at p. 386); *Macdonald* v. *Longbottom*, 1860, 1 E. & E. 977 ("your wool"), *Bank of New Zealand* v. *Simpson* [1900], A.C. 182 ("total cost of the works"); *Raffles* v. *Wichelhaus*, 1864, 2 H. & C. 906 (two ships with the same name).

[2] *Davidson* v. *Magistrates of Anstruther*, 1845, 7 D. 342 (property bounded by a pier; evidence as to how far the pier extended); *Girdwood* v. *Paterson*, 1873, 11 M. 647; *Brown* v. *North British Rly. Co.*, 1906, 8 F. 534.

[3] *Houldsworth* v. *Gordon-Cumming*, 1909, S.C. 1198; revd. 1910, S.C. (H.L.) 49.

[4] Per Lord Chancellor Cottenham, *Forlong* v. *Taylor's Trs.*, 1838, 3 Sh. & M'L. 177, 210; *Bank of Scotland* v. *Stewart*, 1891, 18 R. 957, per Lord President Inglis, at p. 960; *Gray* v. *Gray's Trs.*, 1878, 5 R. 820; *Caledonian Banking Co.* v. *Kennedy's Trs.*, 1870, 8 M. 862, and *Heffield* v. *Meadows*, 1869, L.R. 4 C.P. 595 (caution); *Welsh's Tr.* v. *Forbes*, 1885, 12 R. 851 (acknowledgment of money received); *Stewart* v. *Shannessy*, 1900, 2 F. 1288 (personal liability of agent); *Macvean* v. *Maclean*, 1873, 11 M. 506 (liability on promissory note—an extreme case); *Claddagh Steamship Co.* v. *Steven*, 1919, S.C. 184; revd. 1919, S.C. (H.L.) 132, narrated *supra*, p. 369.

[5] Per Lord Sumner, *Yorkshire Insurance Co.* v. *Campbell* [1917], A.C. 218, 225.

[6] *Taylor* v. *Lewis*, 1927, S.C. 891.

[7] 1919, S.C. 184; revd. 1919, S.C. (H.L.) 132.

to mean all the rope which *B.* might choose to order, but all the rope required for a particular trade.[1] Where, in a disposition of lands, minerals were reserved, evidence was admitted that both parties were aware that the minerals could not be worked without causing subsidence; and it was inferred that the owner of the surface had renounced his absolute right to interdict workings which would bring down the surface, reserving his right to claim damages for any actual injury done.[2] Where a document used the words "I hand over my insurance policy" the majority of the Court upheld the competency of evidence as to what was said at the time, in determining the question whether the document was to be considered as an assignation.[3] In *Mackenzie* v. *Liddell*,[4] where the question was whether a charter-party whereby a tug was hired "from the 8th September" covered the services of the tug for the whole of that day, opinions were given that telegrams preceding the charter-party might be read as proof of surrounding circumstances, though they could not be considered as proof of what the parties intended. But if a judge, called upon to construe an ambiguous phrase, satisfies himself, by evidence admitted as proof of the surrounding circumstances, of what the real meaning of the parties was, he will usually construe the ambiguous phrase in accordance with that meaning.

Historical Facts. In the construction of writings of ancient date evidence of historical facts is admissible, *e.g.*, that a particular mineral was, at the date of the contract, thought to be of no value;[5] that a particular method of mining was in common use.[6]

Knowledge of Contracting Parties.—In some cases the obligations of the parties depend on the extent of their knowledge at the time of entering into the contract. If so, proof of that knowledge would seem to be always admissible. Thus under sec. 14 of the Sale of Goods Act, 1893, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to shew that he relies on the seller's skill or judgment, there is an implied condition that the goods are reasonably fit for that purpose. In *Jacobs* v. *Scott & Co.*[7] there was a written contract for the sale of "good sound Canadian hay." The hay was bought for the purpose of fulfilling a contract with a tramway company, and was rejected by them. The buyer brought an action of damages, averring that the market for which the hay was bought was known to the sellers, and that it was therefore an implied condition that the hay should satisfy the conditions of that market. In the Court of Session the defenders were assoilzied, on the ground that the contract contained no such condition, and that it could not be imported by extrinsic evidence. The judgment was reversed, on grounds which may be given in an extract from the opinion of the Lord Chancellor (Halsbury), who, after reading from the opinion of Lord Trayner, said: "Now, if the learned judge means that that contract obligation would not exist unless it was to be found within the language of the written contract, I am bound to say that I think that is contrary to the law. That is not the law. The written contract is only intended to codify and state in plain terms the bargain between the parties. You may

[1] *Von Mehren* v. *Edinburgh Roperie and Sailcloth Co.*, 1901, 4 F. 232; *Pillans* v. *Reid*, 1889, 17 R. 259; *Blacklock & Macarthur* v. *Kirk*, 1919, S.C. 57.

[2] *Bank of Scotland* v. *Stewart*, 1891, 18 R. 957; *Anderson* v. *M'Cracken Brothers*, 1900, 2 F. 780.

[3] *Brownlee* v. *Robb*, 1907, S.C. 1302, Lord Ardwall dissenting.

[4] 1883, 10 R. 705.

[5] *Forth and Clyde Navigation Co.* v. *Wilson*, 1848, 11 D. 122.

[6] *Anderson* v. *M'Cracken*, 1900, 2 F. 780.

[7] 1899, 2 F. (H.L.) 70.

by the operation of statements and representations made at the time so clothe the rest of your contract with an additional contract obligation that, whether it is represented as an interpretation of the language of the contract or represented as something collateral to the contract is perhaps immaterial, but undoubtedly you can make a contract obligation of that character part of your contract, although the exact language in which it is expressed is not to be found within the four corners of the written contract itself." [1]

Evidence of Intention in Marine Insurance. The Marine Insurance Act, 1906 (6 Edw. VII. c. 41), provides (sec. 26): "Where the policy designates the subject-matter in general terms, it shall be construed to apply to the interest intended by the assured to be covered." It has yet to be determined how far this section abrogates, in questions of the construction of policies of marine insurance, the general rule that parole evidence of intention is not competent in the construction of written contracts. But opinions have been expressed in the Court of Appeal that it did not entitle a reinsurer, whose policy was in terms applicable to any one of three existing policies, to prove that the intention of the insured was merely to cover his risk on one of the three.[2]

Knowledge Involving Personal Bar.—So again, where the defence to an action founded on an alleged defect in the subject of the contract, is that the pursuer is barred from taking the plea because he was fully aware of the defect at the time of contracting, proof of his knowledge is allowed. Where underwriters, sued upon a policy of insurance, defended on the ground that the vessel was not seaworthy, it was held competent to prove that they had taken the risk in the full knowledge of the fact.[3] Where a purchaser of lands who had obtained a conveyance with a clause of absolute warrandice was evicted from part of the subjects, and sued on the obligation of warrandice, parole evidence that he had bought in the knowledge of the defect in the seller's title was allowed, in support of a plea of personal bar.[4]

Actings under Contract.—Evidence of the actings of parties under the contract during the period when it has been in operation is, as a rule, not admissible. It cannot be regarded as evidence of the circumstances surrounding the parties at the time when the contract was entered into. At the best, it is only indirect evidence of what their real intentions were. Thus where certain shareholders in a theatre had contracted for the right of free admission, and the question was whether that right still existed after the theatre had been destroyed by fire and a new one erected, it was pointed out by Lord Watson that the question was to be decided on a construction of the written contract, and that proof of the exercise of the right in the new theatre was irrelevant.[5] But this rule does not hold in the construction of contracts of ancient date, which, on the principle of *contemporanea expositio*, may be explained by the actings of the parties under them.[6] And the strict rule has

[1] *Jacobs* v. *Scott & Co.*, 1899, 2 F. (H.L.) 70, at p. 76. See also *Gillespie Bros.* v. *Cheney Eggar & Co.* [1896], 2 Q.B. 59.

[2] *Reliance Marine Insurance Co.* v. *Duder*, 1912, 28 T.L.R. 469.

[3] *Burges* v. *Wickham*, 1863, 3 B. & S. 669.

[4] *Leith Heritages Co.* v. *Edinburgh and Leith Glass Co.*, 1876, 3 R. 789. Cp. *Carricks* v. *Saunders*, 1850, 12 D. 812.

[5] *Scott* v. *Howard*, 1880, 7 R. 997; affd. 1881, 8 R. (H.L.) 59, at p. 67. See opinions to the contrary by Lord Young, *Magistrates of Dundee* v. *Duncan*, 1883, 11 R. 145, 148; *Trotter* v. *Torrance*, 1891, 18 R. 848, 854.

[6] *Jopp's Trs.* v. *Edmond*, 1888, 15 R. 271; *Heriot's Hospital* v. *Macdonald*, 1830, 4 W. & S. 98; *Lord Advocate* v. *Sinclair*, 1867, 5 M. (H.L.) 97, per Lord Chancellor (Chelmsford), at p. 102; *Pagan* v. *MacRae*, 1860, 22 D. 806; *North British Rly.* v. *Magistrates of Edinburgh*, 1920, S.C. 409.

been relaxed, for reasons not easy to fathom, in cases where the contract contains provisions of doubtful legal import. So it would seem to be settled that in deciding whether, on a title stated to be bounded by a road, an implied grant of a right of access by that road can be maintained, evidence may be admitted of the state of possession subsequent to the constitution of the right.[1] And where a schoolmaster was engaged on a yearly salary, but the contract contained no provision as to the time of payment, it was held that the question whether the payment due for a broken period was to be calculated by the year or by the school terms was to be decided by the manner in which he had hitherto been paid.[2] If there is a patent ambiguity in the contract, as where the subjects conveyed were described by boundaries and by acreage, and there was a discrepancy, evidence of the actings of the parties is admissible.[3]

Exceptions to General Rule.—Such being the general rules as to the admissibility of extrinsic evidence in the construction of written contracts, we proceed to consider certain cases which may be regarded as exceptions to these rules, or as cases to which they do not apply.

Reference to Oath.—In the first place, when it is said that evidence extrinsic to the written contract is excluded, it is not meant to imply that a reference to the oath of the defender is inadmissible. By the law of Scotland a party is entitled to refer any question of fact to the oath of the party interested in denying it, with the statutory exception of the case where that party has already been examined as a witness.[4] No doubt the construction of a written contract is a question of law, but the intention of the parties to it is a question of fact, and that question may be referred to the oath of the defender, however clear the terms of the written contract may be.[5] So it has been held admissible, in an action of damages based on an obligation of warrandice, to refer to the defender's oath the question whether the subjects from which the pursuer had been evicted were intended to be conveyed.[6] Where a lease contained a clause giving the landlord a right to resume possession, on specified terms, of "such portion of the land as he may be pleased to demand," it was held that the tenant might prove, by reference to the landlord's oath, that it had been agreed that the right of resumption was not to be exercised except in the event of a sale or feu of the lands.[7] And even where the meaning of an obligation to pay interest had been construed by the Court adversely to the pursuer, it was held that he might refer to the oath of the defender whether the parties intended that the words should bear the meaning for which he had unsuccessfully contended.[8]

Proof by Defender's Writ.—An alternative to a reference to oath is proof by writ of the defender, and it would appear that in a question as to the construction of a written contract it is always competent for one party to prove that the intention of the parties was what he avers it to be by the

[1] *Argyllshire Commissioners of Supply* v. *Campbell*, 1885, 12 R. 1255; *Shearer* v. *Peddie*, 1899, 1 F. 1201; *Boyd* v. *Hamilton*, 1907, S.C. 912.

[2] *Macgill* v. *Park*, 1899, 2 F. 272. In *Dowling* v. *Henderson* (1890, 17 R. 921) one party had asserted his reading of the contract, the other had not at once protested, and it was held that the reading thus asserted must rule. But the case was stated to be a very special one, and it is not easy to see on what principle the conclusion was reached.

[3] *Watcham* v. *Att. Gen. of South African Protectorate* [1919], A.C. 533.

[4] Evidence Act, 1853 (16 & 17 Vict. c. 20), sec. 5.

[5] Dickson, *Evidence*, sec. 1100, where the earlier cases are cited.

[6] *Stewart* v. *Ferguson*, 1841, 3 D. 668.

[7] *Sharp* v. *Clark*, 1807, Hume, 577.

[8] *Sinclair* v. *M'Beath*, 1869, 7 M. 934; but see *M'Allister* v. *M'Gallagley*, 1911, S.C. 112.

writ of the opposing party, provided that the writ is subsequent to the date of the contract or conveyance in question.[1]

Admissions allowing Extrinsic Evidence. — The principle upon which proof by writ or oath of the defender is admitted in cases where extrinsic evidence is excluded, is that successful resort to these methods of probation involves an admission by the defender of the justice of the pursuer's case. On similar considerations the rule which excludes extrinsic evidence to contradict the terms of a written contract only holds in a question with a party who is prepared to maintain that the terms of the writing represent the intention of the parties at the date of contracting. If the party interested in upholding the exact terms of the written contract admits that it does not represent the real bargain into which he entered, he leaves it open to the Court to discover, by a proof *prout de jure*, what that real bargain was.[2] In such cases the attitude of the parties to the case proves that the true contract between them was verbal, and that the written deed or record was drawn up for some ulterior purpose, so that the Court, in admitting parole evidence, is allowing it for the construction of a verbal and not of a written contract. Such cases are unusual, and generally somewhat complicated. In an early case a bond bearing to be for borrowed money was admitted by the creditor to be for the price of a mare sold by him. It was held that the debtor could prove by witnesses that it was a condition of the sale that he had the mare on trial, and that he had returned her.[3] In *Grant's Trs.* v. *Morison*,[4] a fairly typical case, *A.* held property upon an absolute disposition in his favour by *B.*, qualified by a back-letter declaring that it was held in security for an advance of £250. On *A.* taking steps to sell the property, *B.* proposed to interdict him, alleging that the sum advanced was only £125, which he was ready to repay. In defence *A.* admitted that he had not advanced £250, but averred that the real bargain was that he should buy the subjects through *B.'s* instrumentality, and that *B.* should have an option to take them over at the price of £250. The Court, finding that both parties admitted that the written documents did not give a true account of the transaction, allowed each party a proof of his averments.

Questions between Third Parties. — Again, the finality of a written contract is a principle which holds only in a question between the parties to that contract, or others deriving right from them, not in questions with or between third parties who may have an interest to prove what the real intention of the contract was. Thus, even where the proof attempted is that an *ex facie* absolute conveyance was really granted as a trust, where the general rule excluding the contradiction of written documents by parole

[1] *Stewart* v. *Clark*, 1871, 9 M. 616. See *Boyle* v. *Morton*, 1903, 5 F. 416, where the competency of reference to subsequent letters was not questioned. There may be a distinction between writ proving the intention of the parties at the time of contracting and writ shewing the understanding of one of the parties as to the legal consequences of what he has done. Writ of the latter kind—proving that the party, though he intended to act as agent, believed that he had bound himself as principal—has been held inadmissible in England, *Lewis* v. *Nicholson*, 1852, 18 Q.B. 503.

[2] *Sim* v. *Inglish*, 1674, M. 12321; *Miller* v. *Oliphant*, 1843, 5 D. 856; *Grant's Trs.* v. *Morison*, 1875, 2 R. 377; *Grant* v. *Mackenzie*, 1899, 1 F. 889; *King* v. *Carrick*, 1896, 4 S.L.T. 36; *Campbell* v. *Inverclyde's Trs.*, 1904, 12 S.L.T. 438; *Miller* v. *Miller*, 1905, 12 S.L.T. 743; *Cairns* v. *Davidson*, 1913, S.C. 1054; *Miller* v. *Wilson*, 1919, 1 S.L.T. 223.

[3] *Sim* v. *Inglish*, 1674, M. 12321.

[4] 1875, 2 R. 377. From the terms of the rubric it might appear that the difficulty in allowing proof lay in the fact that the contract related to heritage (see *supra*, p. 164). But the question dealt with in the opinions given is how far parole evidence was admissible to contradict the terms of the written record of the contract.

is fortified by statute,[1] a third party may prove the true relation constituted by the transaction.[2] And the creditors of one party may be entitled to prove the true intention of his contract by evidence which would not be admissible in a question raised by the party himself. Thus, while in general a written document, indicating one form of contract, cannot, as between the parties, be proved by parole evidence to have been intended as a cloak for a contract of a different character,[3] yet where a security is constituted in the form of a sale it has always been held competent for the creditors of the nominal seller to prove the real character of the transaction, whether the sale was in writing or not.[4] And as now the provisions of the Sale of Goods Act are declared not to apply to a transaction in the form of a sale if intended to operate by way of mortgage, pledge, charge, or other security, it is clear that parole evidence in such a case is admissible.[5]

Evidence of Custom of Trade. The effect given to custom of trade in the interpretation of contracts amounts in many cases to an exception to the rule that extrinsic evidence is not admissible in the construction of written contracts. It has been attempted, somewhat fancifully, to reconcile the admission of proof of custom and the exclusion of other evidence on the ground that the former is to be regarded as a mercantile dictionary, and that proof of it is necessary to enable the Court to read the contract, as a translation might be necessary if the contract were expressed in a foreign language.[6] It may be proved in order to decide the obligations of the parties when circumstances arise for which the contract has made no provision, to add an unexpressed term, or to impose on the words or phrases used a meaning which they could not naturally bear.

Custom as Implied Term.—In questions which arise on contracts of ordinary occurrence, if the particular contract has not provided for the circumstances which are before the Court, and if no statute can be appealed to, the decision may be traced to the recognition of the custom of trade.[7] In the numerous cases where the obligation involved, by express contract or legal implication, is to behave reasonably—to supply, for instance, goods reasonably fit for their purpose, or to do something within a reasonable time—the practice of others engaged in the same vocation must always be an important, often a conclusive, element in determining whether the particular obligant has attained the standard of the reasonable.[8] Evidence of this kind, sometimes spoken of as evidence of custom in the ordinary as opposed to the technical sense,[9] is admitted, not to add an unexpressed term to the contract, but to give a meaning to a term which without it would be insensible.

[1] Act 1696, c. 25.

[2] *Infra*, p. 390.

[3] *Müller & Co.* v. *Weber & Schaer*, 1901, 3 F. 401.

[4] *M'Bain* v. *Wallace*, 1881, 8 R. 360; affd. 1881, 8 R. (H.L.) 106; *Liddell's Tr.* v. *Warr*, 1893, 20 R. 989; *Pattison's Tr.* v. *Liston*, 1893, 20 R. 806. In the case first cited Lord Watson (p. 115) doubted the competency of the evidence which had been led to prove that the written contract of sale was really a security, but did not advert to the fact that the question was not between the original parties, but between the purchaser and the creditors of the seller.

[5] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sec. 61, subsec. (4); *Robertson* v. *Hall's Tr.*, 1896, 24 R. 120; *Jones & Co.'s Tr.* v. *Allan*, 1901, 4 F. 374; *Rennet* v. *Mathieson*, 1903, 5 F. 591; *Gavin's Tr.* v. *Fraser*, 1920, S.C. 674.

[6] See opinion of Cairns, L.C., in *Bowes* v. *Shand*, 1877, 2 App. Cas. 455, 468.

[7] Of course not always; a precedent may be found in foreign law or the question may be decided on general considerations of equity.

[8] *Hillstrom* v. *Gibson*, 1870, 8 M. 463; *Forsyth* v. *Heathery Knowe Coal Co.*, 1880, 7 R. 887; *Anderson* v. *M'Cracken Brothers*, 1900, 2 F. 780.

[9] See opinion of Lord M'Laren, *Glebe Sugar Refining Co.* v. *Paterson*, 1900, 2 F. 615, 621; of Lord President Dunedin, *Gordon* v. *Hogg*, 1912, S.C. 986.

Custom excluding Implied Terms.—A step further is made where evidence of custom of trade is admitted to introduce an unexpressed term to the contract, varying the obligation which the law, in the absence of proof of custom, would infer. In contracts which have established legal incidents parties may be supposed to have intended that these incidents should prevail, if they made no provision to the contrary, and parole evidence that they did not, in fact, so intend is inadmissible.[1] But where both parties have contracted in the knowledge that by the custom of the particular trade incidents other than those which the law would imply are understood to prevail, the ordinary presumption as to their intention is that they presumed their relations would be regulated by the custom.[2] Proof of such custom, therefore, is generally admissible, provided that the condition it imports is not at variance with any express condition of the contract, and that the custom is known to both parties. This rule, applicable to all contracts, may be expressed in the language of the Sale of Goods Act, 1893,[3] in reference to sale. "Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied . . . by usage, if the usage be such as to bind both parties to the contract." But there may be cases where the contract enters so fully into detail that it is a fair presumption that the particular custom alleged was intended to be excluded, and, if so, evidence of the custom in question is not admissible. Thus where certain express powers were conferred on the manager of a business, it was held that the contract intended to enumerate all the powers he was to have, and proof of a custom of trade that he should exercise a power not mentioned was excluded.[4] And if parties provide for a particular incident in one contract and enter into similar contracts without any such provision, it will generally be assumed that they do not intend that the incident in question should be implied by custom of trade. Thus where a tenant took over the sheep stock on a minute of reference which provided for six months' credit, or, alternatively, 2½ per cent. discount, and the landlord undertook to take over the stock at the end of the lease, it was held that he was not entitled to prove that by the custom of the district a right to discount was implied, as the inference from the express provision for it in the bargain between the parties was that it was not to hold where it was not expressly mentioned.[5]

Custom of Trade must be Lawful.—The condition which it is proposed to import into a contract by proof of custom of trade must be lawful. No custom of trade can make binding a condition which, if expressed, would be a *pactum illicitum*.[6] Yet it would appear that the custom of a particular exchange to disregard the provisions of a particular statute may be binding on parties who are proved to have contracted in full knowledge of it.[7] And no custom of trade can alter the general law of the country, and therefore no effect could be given to a custom to regard the transfer of certain delivery orders as equivalent to the transfer of the goods,[8] or to hold things to be moveable which had become heritable by being affixed to heritage.[9]

[1] *Supra*, p. 369. [2] Bell, *Com.*, i. 457. [3] 56 & 57 Vict. c. 71, sec. 55.

[4] *Gye* v. *Hallam*, 1832, 10 S. 512; *Alexander* v. *Gillon*, 1847, 9 D. 524. Cp. *Stewart* v. *Maclaine*, 1898, 36 S.L.R. 233; affd. 1900, 37 S.L.R. 623, where the actings of the parties were construed as evincing an intention to exclude an alleged local custom.

[5] *Buchanan* v. *Riddell*, 1900, 2 F. 544. [6] *Ronaldson* v. *Drummond & Reid*, 1881, 8 R. 956.

[7] *Neilson* v. *James*, 1882, 9 Q.B.D. 546; *Perry* v. *Barnett*, 1885, 15 Q.B.D. 388. Cp. *Seymour* v. *Bridge*, 1885, 14 Q.B.D. 460.

[8] *Anderson* v. *M'Call*, 1866, 4 M. 765; *Dobell, Beckett & Co.* v. *Neilson*, 1904, 7 F. 281.

[9] *Nisbet* v. *Mitchell Innes*, 1880, 7 R. 575. See, however, *Learmonth* v. *Sinclair's Trs.*, 1878, 5 R. 548, where it was found that a local custom could alter the law of fixtures.

Subject to the preceding remarks, the cases noted below supply illustrations of conditions which have been imported into contracts by proof of custom of trade,[1] though it must be borne in mind that a custom of trade may exist in England and not in Scotland, and in one part of the country and not in another.

Custom Expressly Referred to.—If the contract expressly refers to and incorporates a custom of trade, as in a case where a charter-party refers to the custom of the port, it is immaterial that one or both parties may not be aware of the actual nature of the custom. The contract is then to be read as if the terms of the custom, as it may ultimately be proved to exist, were written out as an express term or condition.[2] And if a man authorises another to deal for him on a particular exchange, he will in general be assumed to have intended that his contract should be regulated by the customs of that exchange.[3] In other cases, if the usage is that of a particular place, it is not binding unless it is proved that the party against whom it is pleaded was aware of it.[4] So where it was provided that a ship was to be discharged at a particular port at a certain rate per working day, but there was no express reference to the custom of the port, the Court refused to give effect to a local custom under which certain days were not accounted working days.[5] Where the custom is not merely that of a particular place, but of a trade or a district, it may have attained such universality, and have been so often before the Courts, that it has become one of the terms or incidents implied by law in all contracts of the particular class, of which judicial notice will be taken, and of which evidence is unnecessary. It is then binding on the parties, unless expressly excluded, whether they were aware of it or not.[6] There is some authority for holding that it may be a matter of such notoriety that a particular trade is controlled by usage that anyone dealing in that trade is barred from asserting that he was not aware of the fact, and will be

[1] *M'Leod* v. *Bruce*, 1816, Hume, 842, note (that a tenant, in a particular district, was entitled to the use of barns after the term of ish); *Learmonth* v. *Sinclair's Trs.*, 1875, 5 R. 548 (that, in Caithness, where a tenant built a house, the woodwork remained his property, and did not pass to the landlord as a fixture); that a landlord was bound to take over the tenant's stock at a valuation (*Stewart* v. *Maclaine*, 1900, 37 S.L.R. 623, per Lord Shand); that rent under a lease of shootings was payable at entry (*Fraser* v. *Patrick*, 1879, 6 R. 581); that where horses were sent to farmers by hotel-keepers for winter keep, their return could not be demanded till April (*Brown* v. *M'Connell*, 1876, 3 R. 788); that where a lace manufacturer was employed to produce a design, and for that purpose prepared perforated cards, he was not entitled to use the cards in his own business, though they belonged to him (*Morton & Co.* v. *Muir Brothers*, 1907, S.C. 1211); that a tenant is entitled to the waygoing crop (*Wigglesworth* v. *Dallison*, 1778, 1 Smith, *L.C.*, 12th ed., 613 (English cases collected there in notes)); that a sale f.o.b. (in the iron trade) implied an obligation to pay on receipt of bill of lading (*Jack* v. *Roberts & Gibson*, 1865, 3 M. 554); that a tenant was entitled to sell flints turned up by the plough (*Tucker* v. *Linger*, 1883, 8 App. Cas. 508); that an agent for the sale of goods, in making advances, relied solely on the goods, to the exclusion of any personal liability of the principal (*Dinesmann* v. *Mair*, 1912, 1 S.L.T. 217); that in a contract whereby parties who were not manufacturers undertook to supply certain goods "as required" reasonable notice must be given when delivery of any quantity was demanded. *Ross* v. *Shaw* [1917], 2 Ir. R. 367.

[2] *Strathlorne S.S. Co.* v. *Baird*, 1915, S.C. 956; revd. (on ground that the custom was not proved) 1916, S.C. (H.L.) 134.

[3] *Sutton* v. *Tatham*, 1839, 10 A. & E. 27; *Forget* v. *Baxter* [1900], A.C. 467; *Scott* v. *Godfrey* [1901], 2 K.B. 726. But certain customs may be applicable only between members of the exchange, not between members and outsiders, even if the latter have contracted subject to the rules of the exchange, *e.g.*, the custom of the Stock Exchange that when a broker fails his stock is sold at a "hammer" price. See *Beckhuson* v. *Hamblet* [1901], 2 K.B. 73; *Levitt* v. *Hamblet* [1901], 2 K.B. 53; *Anderson* v. *Beard* [1900], 2 Q.B. 260.

[4] *Kirchner* v. *Venus*, 1859, 12 Moore P.C. 361; *Holman* v. *Peruvian Nitrate Co.*, 1875, 5 R. 657.

[5] *Holman* v. *Peruvian Nitrate Co.*, *supra*.

[6] *Learmonth* v. *Sinclair's Trs.*, 1878, 5 R. 548. As to the recognition of a custom which will transform it into a rule of law, see 1 Smith, *L.C.*, notes to *Wigglesworth* v. *Dallison*.

bound by the usage provided that it appear to the Court to be reasonable.[1] But such cases, if they exist, are exceptional, and as a general rule a contract is not controlled by a usage of which the party against whom it is pleaded is not aware. So the usage of a particular exchange, under which debts due to a party known to be acting as a broker or agent may be set off against a balance due by the broker, is not binding on the employer of the broker or agent if he was not aware of it, and the usage of the exchange was not referred to in his contract.[2]

Custom of Trade in Construction.—There remain cases in which proof of custom of trade is offered on a point for which the written contract expressly provides. It may then either be proposed to contradict the express terms of the contract, or to translate it, by shewing that a particular term has a trade meaning other than that which it would normally bear.

Unambiguous Provisions.—It may be said to be firmly settled, at least in Scotland, that if a contract contains a direct provision, expressed in unambiguous language, it is not relevant to offer proof that by the custom of trade conditions are annexed to contracts of the kind which are inconsistent with that provision. Thus in *Gordon* v. *Robertson* [3] a tenant agreed to a condition that "the whole fodder to be used on the ground, and none sold or carried away at any time, hay only excepted." It was attempted to qualify this condition by a custom (which was admitted) that a tenant was entitled to remove the straw of the waygoing crop. This was allowed in the Court of Session, but the judgment was reversed in the House of Lords, where it was held that the custom was in conflict with the express terms of the lease, and therefore could not receive effect. Where a building contract was entered into at specified rates it was incompetent to prove a usage in the building trade that higher rates were chargeable for a particular kind of work.[4] Where a printed form of charter-party, which referred to the custom of the port, was altered in writing by a provision for a fixed number of lay-days, it was held that the clause referring to custom, though not deleted, could not be invoked in order to admit of proof that at the port of discharge the custom was that wet days were not to be counted.[5] In *Haldane* v. *Gray* [6] the contract contained an obligation to deliver one puncheon of whisky per week, and it was held incompetent to prove an alleged custom that regular orders for each quantity required must be sent. In *Hogarth* v. *Leith Cotton-Seed Oil Co.*[7] bills of lading contained an obligation to deliver the goods "from the ship's tackles." The shipowners averred a custom at the port of discharge entitling them to land the cargo into sheds, and charge the consignees with the expense this involved. It was held that this custom, being inconsistent with the terms of the bills of lading, could not be binding on the consignees. In *M'Lellan* v. *Peattie's Trs.*,[8] iron merchants undertook to deliver steel rails "in about two weeks." They failed to do so, and, in defence to a claim of damages, averred a custom of the trade that where rails were ordered from parties who were not manufacturers, the time fixed was subject to extension if delay arose in obtaining them from the manufacturers.

[1] See conflicting opinions in *Robinson* v. *Mollett*, 1875, L.R. 7 (H.L.) 802; decided on the ground that the custom was not reasonable.

[2] *Sweeting* v. *Pearce*, 1861, 9 C.B. N.S. 534; *Pearson* v. *Scott*, 1878, 9 Ch. D. 198.

[3] 1826, 2 W. & S. 115. Clauses very similarly expressed have since been construed differently (*Lord Elibank* v. *Scott*, 1884, 11 R. 494), but no question of usage was involved.

[4] *Scott & Morris* v. *Hatton*, 1827, 6 S. 233.

[5] *Rowtor S.S. Co.* v. *Love & Stewart*, 1916, S.C. 223; affd. on this point, 1916, S.C. (H.L.) 199.

[6] 1842, 4 D. 1307.

[7] 1909, S.C. 955.

[8] 1903, 5 F. 1031.

It was held that this averment was irrelevant, in respect that it was inconsistent with the express terms of the contract. In a leading case, a company agreed to supply to the contractors for the Forth Bridge "the whole of the steel required for the bridge" at certain prices, "the estimated quantity of steel to be 30,000 tons, more or less." It was proposed by the company to prove that by the usage of the steel trade this was to be read as a contract for the supply of 30,000 tons of steel, and not for the supply of steel in excess of that quantity which the contractors might require for the bridge. It was held that the terms of the contract were definite and unambiguous, and could not be qualified by proof of the usage of the trade.[1]

In cases where it is arguable whether the alleged custom of trade is in conflict with the express terms of the contract or not, it is recognised that proof will more easily be admitted where the contract is contained in brief and elliptical mercantile documents than where it is recorded in a formal deed.[2]

It has been stated that the English Courts have gone further, in the admission of proof of custom of trade, than the Scotch Courts would be prepared to go.[3]

Words having Trade Meaning. To prove a custom of trade that the words used in a contract bear a special trade meaning may or may not amount to a contradiction of the express terms of that contract. It is really a question as to what terms can be regarded as unambiguous. Words or phrases which have a definite legal meaning exclude proof that in a particular trade that meaning does not hold.[4] And there may be other phrases with an ordinary meaning so well understood that the Court will not admit the possibility that they have been used in an exceptional sense.[5] But in cases where any ambiguity is reasonably possible, proof will be allowed that particular words have, by custom of trade known to both parties, a special meaning. Thus proof has been allowed that by custom of trade an obligation to deliver iron meant iron of a particular kind ;[6] that "a thousand rabbits," in the lease of a rabbit warren, meant twelve hundred ;[7] that a year, in theatrical parlance, meant the portion of the year during which the theatre was open ;[8] that a chronometer was not included in the sale of a ship "with

[1] *Tancred, Arrol & Co.* v. *Steel Co. of Scotland*, 1887, 15 R. 215 ; 1889, 16 R. 440 ; affd. 1890, 17 R. (H.L.) 31.

[2] *Sinclair* v. *M'Beath*, 1868, 7 M. 273 ; per Lord President Inglis in *Tancred, Arrol & Co.*, 1887, 15 R. 215, at p. 222.

[3] Per Lord President Inglis in *Tancred, Arrol & Co.*, 1887, 15 R. 215, at p. 222 ; and see Dickson, *Evidence*, sec. 1096. On the most recent authorities, however, it may be doubted if there is any real distinction. Thus evidence was rejected that, in the rubber trade, a purchaser must accept rubber of inferior quality, subject to a rebate in the price, although the alleged usage was not inconsistent with any express term of the contract, but merely with the general rule that a purchaser is entitled to reject goods which are not of the quality provided for in the contract ; *North-Western Rubber Co. and Huttenbach, in re* [1908], 2 K.B. 907. In *Palgrave* v. *Owners of the "Turid"* [1922], 1 A.C. 397, it was attempted unsuccessfully to control a provision under which cargo was to be discharged "at charterer's risk and expense as customary," by proof of a local custom that when staging was required the expense must be borne by the shipowner. See also *Westacott* v. *Hahn* [1918], 1 K.B. 495 ; *Affréteurs Réunis* v. *Walford* [1919], A.C. 801.

[4] *Calder* v. *Aitchison*, 1831, 9 S. 777 ; affd. 1831, 5 W. & S. 410 ("to guarantee an agent for 4 per cent. for commission and guarantee") ; *M'Dowall & Neilson's Tr.* v. *Snowball Co.*, 1904, 7 F. 35 ("approved bill") ; *Athya* v. *Rowell*, 1856, 18 D. 1299 ("settlement, 2½ dis. fourteen days").

[5] See *Tancred, Arrol & Co.* v. *Steel Co. of Scotland*, 1887, 15 R. 215 ; 1889, 16 R. 440 ; affd. 1890, 17 R. (H.L.) 31.

[6] *Mackenzie* v. *Dunlop*, 1853, 16 D. 129 ; affd. (on ground that proof of usage failed) 1856, 3 Macq. 22.

[7] *Smith* v. *Wilson*, 1832, 3 B. & Ad. 728.

[8] *Grant* v. *Maddox*, 1846, 15 M. & W. 737.

all belonging to her on board and on shore " ;[1] that an obligation to guarantee bills drawn " at the expiry of three months," included bills drawn at ninety-five days, not bills drawn at one hundred.[2]

Limits of Proof of Custom. Within limits impossible to define, a custom of trade, unless it is definitely incorporated in the contract, must be reasonably fair. It must be calculated to facilitate fair business relations between the parties, not to give an undue advantage to monopolists. The Court will not lend its assistance to a class representing one side of a business in their efforts to establish, under the plea of custom, one-sided conditions which would look ill if inserted in plain language in their contracts. And the mere fact that those representing the other side of the business were well aware of the custom will not be conclusive, if it appears that they were practically concussed into submitting to it. The mercantile Hampden, when he arises, is not to be prejudiced by the tame submission of his predecessors.[3]

Proof of Custom. The party relying on custom of trade must aver on record the nature and limits of the custom he proposes to prove,[4] and must support it by proof that, though not necessarily universal, it was known to and followed by the bulk of those engaged in the trade.[5] While it is recognised that where the custom of the trade is incorporated in the contract, the proof need not be so conclusive as where it is not referred to,[6] yet where a particular trade was practically in the hands of the defender, it was held that he could not put forward his own usage as the " custom of the port " by which the contract was to be regulated.[7] Proof that the custom alleged is judicially noticed as part of the common law in England will support evidence of usage in Scotland which might otherwise be deemed scant.[8] The evidence must be that of parties engaged in the particular trade. So it was pointed out that the proof of the meaning of the word " statuary " in a contract of carriage was not at all advanced by the evidence of sculptors as to the meaning which they attached to the word.[9] And it is a strong objection to the proof that the evidence represents only one side of the trade.[10] The usage need not be universal throughout the country; it is sufficient that it is recognised and acted upon in a particular district.[11] Proof of the usage of a barony has been allowed to introduce an unexpressed term into a lease,[12] and there seems no good reason to doubt that the usage

[1] *Armstrong & Co.* v. *Macgregor & Co.*, 1875, 2 R. 339.

[2] *M'Lagan* v. *M'Farlane*, 1813, Hume, 101.

[3] See *Bruce* v. *Smith*, 1890, 17 R. 1000, and Lord Young's illustration of the " custom " of levying blackmail; *Ross* v. *Glassford*, 1771, M. 9177, where the Court determined, as to an alleged custom in Glasgow, that it was " fraught with inhumanity, destructive to trade, and high time that it should be corrected " ; *Moult* v. *Halliday* [1898], 1 Q.B. 125; opinion of Brett, J., in *Robinson* v. *Mollett*, 1875, L.R. 7 H.L., at p. 818; *Gibson* v. *Crick*, 1862, 1 H. & C. 142; *Perry* v. *Barnett*, 1885, 15 Q.B.D. 388; *Clydesdale Shipowners Co.* v. *Gallaher* [1907], 2 Ir. R. 578; affd. in H.L. [1908], 2 Ir. R. 482; *Devonald* v. *Rosser* [1906], 2 K.B. 728.

[4] *Milne* v. *Samson*, 1843, 6 D. 355.

[5] *Mackenzie* v. *Dunlop*, 1856, 3 Macq. 22; *Hogarth* v. *Leith Cotton-Seed Oil Co.*, 1909, S.C. 955; *Morrison* v. *Allardyce*, 1823, 2 S. 434 (domestic service—local custom).

[6] *Douglas & Co.* v. *Stiven*, 1900, 2 F. 575.

[7] *Clacevich* v. *Hutcheson*, 1887, 15 R. 11; *Cazalet* v. *Morris*, 1916, S.C. 952; opinion of Lord President Strathclyde, *Strathlorne S.S. Co.* v. *Baird*, 1915, S.C. 956; revd. 1916, S.C. (H.L.) 134.

[8] *Strong* v. *Philipps*, 1878, 5 R. 770 (lien).

[9] *Sutton* v. *Ciceri*, 1890, 17 R. (H.L.) 40, per Lord Watson. But proof of the usage of a particular trade may be supported by proof of a similar usage in an analogous trade (*Fleet* v. *Murton*, 1871, L.R. 7 Q.B. 126).

[10] *Hogarth* v. *Leith Cotton-Seed Oil Co.*, 1909, S.C. 955, 968.

[11] *Morton & Co.* v. *Muir Brothers*, 1907, S.C. 1211.

[12] *M'Intosh* v. *Ogilvy*, 1806, Hume, 822; *Officer* v. *Nicolson*, 1807, Hume, 827; *Simson* v. *Fordyce's Trs.*, 1824, 3 S. 225.

of a large estate might be binding, provided that both parties were aware of it.[1] The admission of usage as binding is not limited to cases strictly mercantile; many of the cases relate to leases, though, as has been already explained, it is more difficult to admit proof of usage where the contract is regulated by a formal deed.[2]

It has been remarked that proof of what usually happens is not necessarily proof of usage; there must be the additional element that what has been done has been regarded as the legal import of the contract in question.[3] Lord Shaw has pointed out that no number of contracts to do a thing which is expressly specified can establish a custom of trade to do it when it is not specified; and that "you cannot build up a custom of trade at a port out of a series of protests against it."[4]

There are two cases requiring special consideration, because the general rules as to the admissibility of parole evidence are complicated by statutory enactments—bills of exchange, and proof of trust.

Bills of Exchange Act, Section 100. The rule of the common law was that bills of exchange were to be regarded as written contracts, into which the obligations inferred by law were to be read, and therefore that an agreement inconsistent with the obligations which the law would infer from the position of the parties on the bill could be proved only by the writ or oath of the party proposing to enforce these obligations.[5] This rule has been altered by sec. 100 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). The section provides: "In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence." The very general terms in which this section is expressed has given rise to much difficulty. The following points seem to be established. Parole proof is competent that the bill was for the accommodation of the drawer, in a question between him and the acceptor:[6] or for the accommodation of the indorsee suing on it;[7] that the bill was delivered to the party suing on it, or to someone whose title he represents, subject to a collateral condition which has not been purified;[8] that the bill has been endorsed to a bank for collection only;[9] that the party suing had agreed to renew the bill as it fell due, until the occurrence of a certain event,[10] subject to the qualification that the agreement must not amount to an understanding that the debtor need not pay the bill unless he pleased,[11] or that payment is

[1] See *M'Tavish* v. *Fraser's Trs.*, 1790, Hume, 546, and the two cases following, recognising a qualified right of property in lessees, founded on the custom of an estate; *Macintyre* v. *Orde*, 1881, 18 S.L.R. 604.

[2] *Supra*, p. 382.

[3] *Brown* v. *M'Connell*, 1876, 3 R. 788.

[4] *Strathlorne S.S. Co.* v. *Baird*, 1916, S.C. (H.L.) 134, 140.

[5] Ersk. iii. 2, 31; *Little* v. *Smith*, 1845, 8 D. 265; *Wilson* v. *Scott*, 1874, 1 R. 1003; *Law* v. *Humphrey*, 1876, 3 R. 1192. As to the qualification of this rule at common law, see *Ferguson, Davidson & Co.* v. *Jolly's Tr.*, 1880, 7 R. 500.

[6] *Stagg & Robson* v. *Stirling*, 1908, S.C. 675, per Lord President, at p. 679; Lord Kinnear, at p. 680.

[7] *Viani* v. *Gunn & Co.*, 1904, 6 F. 989.

[8] *Semple* v. *Kyle*, 1902, 4 F. 421.

[9] *Clydesdale Bank* v. *Liquidator of Allan & Son*, 1926, S.C. 235, per Lord Justice-Clerk Alness, at p. 241, and Lord Hunter, at p. 243.

[10] *Drybrough* v. *Roy*, 1903, 5 F. 665; *Harker* v. *Pottage*, 1909, 1 S.L.T. 155. On these cases it may be remarked that a verbal agreement to renew a bill cannot qualify the bill in England (*New London Credit Syndicate* v. *Neale* [1898], 2 Q.B. 487); and that such an agreement hardly falls within the words of sec. 100. It is not "relevant to any question of liability" on the bill, only to the question when the liability may be enforced.

[11] *Gibson's Trs.* v. *Galloway*, 1896, 23 R. 414; *Drybrough* v. *Roy*, *supra* (opinion of Lord Moncreiff).

postponed until the occurrence of an event for which no date can be predicated.[1] On the other hand, it remains incompetent to prove by parole that the bill has been paid ;[2] or that by an arrangement to which the holder of the bill was a party, it had been agreed that the drawer should incur no liability, and that the holder should look solely to the drawee for payment.[3] And if the bill is granted in pursuance of a written contract, sec. 100 does not make it competent to lead evidence which will practically amount to a contradiction of that contract's terms. So where it was provided in writing that certain payments were to be made by bills, and these were to be guaranteed by *A.*, and in pursuance of this arrangement *A.* signed a guarantee, it was held that he could not prove a verbal agreement with the party in whose favour the bills were drawn that they were to be renewed at maturity, in respect that the alleged agreement was relevant, not to a question of liability on the bill, but to a question of liability on the contracts which preceded it.[4] Where in the sale of a pawnbroking business it was provided (in writing) that promissory notes should be given for the price and that the seller should take over the lease of the premises, and promissory notes payable on demand were accordingly granted, it was held that an offer to prove a verbal agreement that they were not to be put in force till the expiry of the lease was not a relevant defence to a charge upon the notes.[5] The admission of parole evidence under sec. 100 can " only apply to cases where the alleged liability is rested exclusively upon a bill and not upon a bill as the mere method of carrying into effect a written contract." [6]

Proof of Trust.—The law of proof of trust is here considered only in so far as it appertains to the subject of the admissibility of extrinsic evidence in the construction of written contracts. For other aspects of the law, and for the meaning given to the words " declaration or back-bond of trust " as used in the statute, the under-noted works may be consulted.[7]

Trusts Act, 1696.—The Act 1696, c. 25 (Trusts (Scotland) Act, 1696), enacts : " No action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be trustee, and against whom or his heirs or assignees the declarator shall be intended, or unless the same be referred to the oath of party *simpliciter*."

Taking the common law as it has now been developed, it would appear that this Act adds little to it. A deed of trust is a written contract, and, as has been explained in the preceding pages, it is incompetent to contradict the terms of a written contract by parole evidence. But at the time the Act was passed this was by no means so clear, and it has been judicially explained that its object was to check a laxity which had crept into practice and had led to the admission of extrinsic evidence when the circumstances appeared

[1] *Manchester and Liverpool District Banking Co.* v. *Ferguson*, 1905, 7 F. 865.
[2] *Robertson* v. *Thomson*, 1900, 3 F. 5.
[3] *National Bank of Australasia* v. *Turnbull*, 1891, 18 R. 629.
[4] *Stagg & Robson* v. *Stirling*, 1908, S.C. 675.
[5] *M'Allister* v. *M'Gallagley*, 1911, S.C. 112. It is difficult to understand why, in this case, proof of the averment in question by the writ or oath of the defender was refused. The Court held that the contract was express on the point, but still, on the authorities mentioned already (p. 376), proof by writ or oath of a different intention would seem admissible. See also *Winton* v. *Thomson* (1862, 24 D. 1094), where a reference to oath was allowed in circumstances somewhat similar.
[6] Per Lord Kinnear in *Stagg & Robson* v. *Stirling*, 1908, S.C. 675, at p. 680.
[7] Dickson, *Evidence*, sec. 575 ; M'Laren, *Wills*, 3rd ed., ii. 1056 ; Menzies, *Trusts*, i. 31. Gloag and Irvine, *Rights in Security*, 143.

strongly indicative of a trust.[1] And in cases where the pursuer's averments amount to a statement that the defender is wilfully denying the fiduciary character of a title to property which he holds, the Court, but for the Act, would probably have arrived at the conclusion that such a statement, amounting to a charge of fraud, would make parole evidence of the real bargain between the parties admissible.[2] But under the Act it is settled that averments of fraud against the defender, if the fraud alleged merely consists in denying the existence of the trust, do not affect the question, though averments that the property alleged to be held in trust was obtained by fraud will let in parole evidence.[3]

Application of Act to Securities.—From the terms of the Act it may be conjectured that it was originally intended to apply only to cases of trust in the stricter sense—cases where one party holds property for the benefit of another, without having any patrimonial interest in it himself. But the construction has been wider, and it is settled that it also covers cases where a security has been constituted by an *ex facie* absolute title in the person of the creditor.[4] But a party who has undertaken to sell property at some future time is not in any sense a trustee for the intending purchaser, and therefore where certain members of a club purchased a plot of ground and undertook, on being repaid the price, to convey it to the club, it was held that the Trust Act, 1696, had no application to the case.[5]

The Act has been applied to two different classes of transactions.

Conveyance *ex facie* Absolute.—The case to which it applies most clearly is where one party has granted a conveyance or assignation to another in unqualified terms, and avers that the real intention was that it was to be held in trust or in security. In cases of this kind there has never been any difficulty, in the absence of any admission by the defender, in holding that the proof is limited to his writ or oath.[6]

Trust or Agency.—More difficult cases arise in another form of the transaction, where it is alleged that property obtained from a third party, to which the defender has been granted an unqualified title, is really held by him in trust for the pursuer. The difficulty, then, is to distinguish between averments of trust and averments of failure, on the part of the defender, to implement his obligations under a contract of agency. In the latter case the Act does not apply. It is clearly established that if the pursuer avers that he instructed the defender to act as his agent in the purchase of property, and that the agent, without instructions, has taken the title in his own favour, there is no limitation as to the method by which these allegations may be proved.[7] Thus, in *Horne* v. *Morrison*,[8] *H.* averred that he and *M.*

[1] See *Leckie* v. *Leckie*, 1854, 17 D. 77, and *Marshall* v. *Lyell*, 1859, 21 D. 514. The cases before the Act are collected in Morison's *Dictionary*, 12749 *et seq.*

[2] It is admitted in England, in spite of the terms of the Statute of Frauds (29 Car. II. c. 3) (*Rochefoucauld* v. *Boustead* [1897], 1 Ch. 196). And see Stair, iv. 6, and iv. 45, 21; *Bruce, Petitioner*, 1646, M. 12329.

[3] *Marshall* v. *Lyell*, 1859, 21 D. 514, per Lord Justice-Clerk Inglis, at p. 521; *Anstruther* v. *Mitchell*, 1857, 19 D. 674; *Wink* v. *Speirs*, 1867, 6 M. 77; *Tennent* v. *Tennent's Trs.*, 1868, 6 M. 840; *Dunn* v. *Pratt*, 1898, 25 R. 461, per Lord Kinnear, p. 472.

[4] *Leckie* v. *Leckie*, 1854, 17 D. 77; *Seth* v. *Hain*, 1855, 17 D. 1117; *Walker* v. *Buchanan, Kennedy & Co.*, 1857, 20 D. 259; *Duff, Ross & Co.* v. *Kippen*, 1866, 2 S.L.R. 3; *Purnell* v. *Shannon*, 1894, 22 R. 74.

[5] *Govan New Bowling Club* v. *Geddes*, 1898, 25 R. 485.

[6] *Leckie* v. *Leckie* and *Purnell* v. *Shannon, supra.*

[7] *Corbet* v. *Douglas*, 1808, Hume, 346; *Boswell* v. *Selkrig*, 1811, Hume, 350; *Horne* v. *Morrison*, 1877, 4 R. 977; *Mackay* v. *Ambrose*, 1829, 7 S. 699, per Lord Glenlee, at p. 702; *Galloway* v. *Galloway*, 1929, S.L.T. 131.

[8] *Supra.*

had been engaged in a joint adventure in building land, that *M.* had purchased land on behalf of the joint adventure, and had, without the authority or consent of *H.*, taken the title in his own favour. *H.* sued for a share of the profit made on a resale of the land in question. The action was met by a plea based on the Act 1696, which was repelled, on the ground that as it was averred that the defender had taken the title in his own name without the pursuer's consent, the Act did not apply. And the Act is also excluded if the pursuer's averments are that the arrangement was that the property should be taken in the defender's name, and he should execute a back-letter or other document recording the transaction, and that he had refused or failed to do so. Proof by parole is then competent.[1] The same rule applies in cases of *negotiorum gestio*. If *A.*, in the course of managing the affairs of *B.*, without instructions from *B.*, takes property in his own name, *B.* can prove *prout de jure* that the property is held for him, because he never consented to the title which *A.* obtained.[2] "It is indispensable that the true owner of the property should have consented to an absolute title being taken in the trustee's name in order to exclude proof except by writ or oath."[3]

At the other end of the scale are cases, to which the Act clearly applies, where there has been an agreement that the title to property should be taken in the name of the defender without any record of a trust, and the attempt is made to prove that it is held for the pursuer. Here there is no doubt that proof is limited to the writ or oath of the defender.[4] In an early and leading case the allegation was that the defender, who was the pursuer's law agent, had been authorised to purchase land and take the title in his own name, because the pursuer, who was a Roman Catholic, was, as the law then stood, unable to hold heritable property. The proof of these averments was limited to the writ or oath of the defender.[5]

The intermediate and difficult case is where it is averred that the defender was instructed to purchase property in his own name, and to have the ultimate title completed in favour of the pursuer. From *Dunn* v. *Pratt*[6] it would appear that if the defender acted as the pursuer's law agent, so that the ultimate completion of the title was part of his mandate, proof may be by parole, on the ground that the pursuer's case is not a declarator of trust, but an allegation that the defender has failed to fulfil a contract of mandate or agency; if not, so that the completion of the title is a matter for separate agency, proof is limited to the writ or oath of the defender, on the ground that, as the defender has fulfilled his mandate, any further obligation on his part must be fiduciary. In *Dunn* v. *Pratt* the defender had bought a property, and appeared as the purchaser in the missives of sale. No conveyance had been executed. The pursuer brought a declarator that the property was held for him, and averred that he had instructed the defender to purchase, as he had in fact done, on the agreement and understanding that the disposition from the seller was to be taken in his (the pursuer's) favour. The Court, holding that the defender (who was not a law agent) had fulfilled his mandate when

[1] *Pant Mawr Quarry Co.* v. *Fleming*, 1883, 10 R. 457.

[2] *Spreul* v. *Crawford*, 1641, M. 16201, as explained in *Marshall* v. *Lyell*, 1859, 21 D. 514, at p. 521.

[3] Per Lord President Inglis in *Pant Mawr Quarry Co.*, 1883, 10 R. 457, at p. 459.

[4] *Duggan* v. *Wight*, 1797, M. 12761; affd. 1797, 3 Paton, 610; *Mackay* v. *Ambrose*, 1829, 7 S. 699; *Seth* v. *Hain*, 1855, 17 D. 1117; *Laird* v. *Laird & Rutherfurd*, 1884, 12 R. 294; *Anderson* v. *Yorston*, 1906, 14 S.L.T. 54.

[5] *Duggan* v. *Wight*, *supra*.

[6] *Dunn* v. *Pratt*, 1898, 25 R. 461 (dissenting, Lord Kinnear).

he purchased the property, held that the proof of any further obligation on his part must be regulated by the law of trust, and must therefore be limited to his writ or oath. The distinction is very thin, for it was surely part of the defender's duty, under his mandate, to do all that lay with him to secure that the disposition from the seller should be in the pursuer's favour. In two subsequent cases the decision in *Dunn* v. *Pratt* has been questioned by Lord Salvesen. The former—*Cairns* v. *Davidson* [1]—was decided on the ground that a deposit receipt is not a "deed of trust." In *M'Connachie* v. *Geddes*,[2] *A.* had bought certain shares in a ship, and had been registered as their proprietor. The sale had been carried out by written offer and acceptance, in which *A.* appeared as purchaser. *B.* brought an action concluding that the shares should be transferred to her, and averred that she had instructed *A.* to purchase them and arrange for their registration in her name. Parole proof was allowed, on the ground that *B.'s* averments disclosed a case of mandate and not of trust. *Dunn* v. *Pratt* was distinguished on the ground that written missives were necessary in a sale of heritage, unnecessary in a sale of shares in a ship—a distinction sufficiently narrow.

Trust or Partnership.—Two remarkable decisions may be quoted for the proposition that if the alleged trustee is a partner of a firm, and is averred to hold in trust for the firm, the question raised is one of partnership and not of trust, and therefore that the proof is not limited by the Act 1696.[3] In the former it was averred that a sum of money standing in a bank account to the credit of a party deceased was really held by him for behoof of a partnership of which he was alleged to have been a member. The Court treated the case as a question of the method of proving the fact of partnership, and allowed a proof *prout de jure*, whereas it is obvious that the real question was whether, assuming the alleged partnership to have existed, the money was held in trust for it.[4] In the next case it was held that where a policy of insurance was taken on the life of a partner in a firm and expressed to be payable to his representatives, it was competent to prove, *prout de jure*, on his death, that the policy was held in trust for the firm.[5] The case, it was held, depended on principles of partnership or mandate, not on principles of trust. But every case of the kind, where property is taken in the name of a party alleged to be a trustee, involves a mandate in his favour. And a trust does not cease to be a trust because the beneficiary is a firm and the trustee a partner. The question was raised again in *Laird* v. *Laird & Rutherfurd*.[6] There it was averred that letters patent, held by *A.* and *B.*, were held by them in trust for a firm of which *A.* was a partner though *B.* was not. In a question with *B.* it was not seriously disputed that the Trusts Act applied, but it was argued, on the authority of the cases above referred to, that the question with *A.* was one of partnership and not of

[1] *Cairns* v. *Davidson*, 1913, S.C. 1054. *National Bank* v. *Mackie* (1905, 43 S.L.R. 13) was apparently not cited.

[2] 1918, S.C. 391.

[3] *Baptist Churches* v. *Taylor*, 1841, 3 D. 1030; *Forrester* v. *Robson's Trs.*, 1875, 2 R. 755. *Kilpatrick* v. *Kilpatrick* (1841, 4 D. 109) has also been cited in this connection. It was there held that, in a question between joint lessees of a farm, it was competent to prove by parole that the farm stocking belonged to one of them. But no question of trust was involved; it was a question of the mode of proving ownership of moveable property not held by any written title. Where the averment was that one of two joint-tenants (father and son) had the sole interest in the farm proof was limited to writ or oath; *M'Vean* v. *M'Vean*, 18 4, 2 M 1150.

[4] *Baptist Churches* v. *Taylor*, *supra*.

[5] *Forrester* v. *Robson's Trs.*, 1875, 2 R. 755.

[6] 1884, 12 R. 294.

trust, and therefore that the bargain with him might be proved by parole. The contention was rejected, and the proof was limited to writ or oath. The earlier cases were distinguished, on the ground that they were cases in which there was no "deed of trust." But this distinction cannot be supported without ignoring the facts of *Forrester* v. *Robson's Trs.*,[1] because if letters patent are held to be a "deed of trust," there can be no reason for holding that a policy of insurance is not.

Meaning of "Deed of Trust."—Most of the cases under the Trusts Act have related to conveyances of heritable property, but its application is not limited to them. It applies also to moveable property held on written title, such as shares of a company,[2] a policy of insurance,[3] or the assignation of a debt,[4] though for reasons not easy to fathom, it is inapplicable to a deposit receipt taken payable to a third party,[5] or to War Loan inscribed in the books of the Bank of England.[6] And the statutory expression "deed of trust" has been construed so widely as to include any written title, such as missives of sale.[7] But the Act does not apply to cases where a trust or similar bargain is constituted without writing and merely by delivery of corporeal moveables. The fact that goods have been pledged or deposited may be proved by parole evidence.[8]

Admission of Trust Allows Proof.—The Act applies only to cases where the party alleged to be a trustee takes his stand upon the possession of a title apparently unqualified. So if *ex facie* of the written conveyance or title the fact that it is held in trust appears, the operation of the Act is excluded, and proof of the nature of the trust purposes may be by parole evidence. The conveyance or title is the writ of the trustee proving trust.[9] And where the fact of trust or other qualification of the absolute title is either admitted on record or proved by the writ of the defender, the case falls within the rule that where a defender admits that a written contract does not represent the real bargain between the parties parole evidence is admissible as to the true nature of that bargain.[10] The defender, however, may aver donation, which does not imply any qualification of his absolute title, without opening the door to parole evidence.[11] An admission by one of two parties by whom property is held jointly does not bind the other.[12]

Rights of Truster.—If a party who has granted an *ex facie* absolute conveyance can obtain an admission from the grantee that it is really in security for debt, he can insist on a reconveyance on tendering payment.[13]

[1] *Supra.*
[2] *Anderson* v. *Yorston*, 1906, 14 S.L.T. 54.
[3] *Lindsay* v. *Barmcotte*, 1851, 13 D. 718.
[4] *Purnell* v. *Shannon*, 1894, 22 R. 74.
[5] *Cairns* v. *Davidson*, 1913, S.C. 1054.
[6] *Beveridge* v. *Beveridge*, 1925, S.L.T. 234 (O.H., Lord Morison).
[7] *Dunn* v. *Pratt*, 1898, 25 R. 461, but see *supra*, pp. 387-8.
[8] Bell, *Prin.*, sec. 204; Dickson, *Evidence*, sec. 579; *Lord Strathnaver* v. *M'Beath*, 1731, M. 12757; *Taylor* v. *Nisbet*, 1901, 4 F. 79. "If *A.* hands *B.* a bearer-bond *A.* may prove *prout de jure* that *B.* holds the bond or its proceeds in trust for *A.* But if the bond happens not to be a bearer one, and a transfer or some form of assignation be necessary to put *B.* in possession, then proof that *B.* holds the bond or its proceeds in trust for *A.* must be limited to writ or oath." Per Lord Sands, *Newton* v. *Newton*, 1923, S.C. 15, 25.
[9] *Livingstone* v. *Allan*, 1900, 3 F. 233; *National Bank* v. *Mackie*, 1905, 43 S.L.R. 13.
[10] *Livingstone* v. *Allan, supra*; *Walker* v. *Buchanan, Kennedy & Co.*, 1857, 20 D. 259; *Murray* v. *Wright*, 1870, 8 M. 722; *Lindsay* v. *Barmcotte*, 1851, 13 D. 718; and see *supra*, p. 377.
[11] *Newton* v. *Newton*, 1923, S.C. 15.
[12] *Seth* v. *Hain*, 1855, 17 D. 1117. In *Cairns* v. *Davidson* (1913, S.C. 1054) Lord Salvesen (p. 1058) states that it is an undecided question whether the fact that the property is held by two parties excludes the operation of the Act, and indicates an opinion that it does. But his Lordship's attention cannot have been called to *Seth* v. *Hain.*
[13] *Walker* v. *Buchanan, Kennedy & Co., supra.*

He is not, however, entitled, without tendering payment, to a declarator that the conveyance is really in security, because, as he has agreed to give the creditor the benefit of a security in the form of an absolute title, he has no right to a decree which would have the effect of limiting it.[1]

Qualified Admission.—An admission, either on record or on reference to oath, must be taken with all intrinsic qualifications, and it would appear that if the defender in a case where it is alleged that an *ex facie* absolute disposition was really a security, while admitting that he holds no absolute right of property, avers that the disposition was granted for a particular debt, he is not bound to prove the existence of that debt. The pursuer's case rests on the admission, which must be taken by him subject to the qualification under which it was given.[2] If, however, admitting the fact that his right is really in trust or in security, the defender claims to maintain it, on the plea of retention, until debts incurred to him after the date of the conveyance are paid, he is then admitting the pursuer's case and stating an extrinsic and independent defence to it, and that defence he must establish by evidence other than his own oath.[3]

Questions with Third Parties.—Where the question is not between the truster and the alleged trustee, or their respective representatives, the Act 1696, c. 25, is not applicable and proof may be by parole evidence. So a third party, having an interest, may prove the fact that property held by *A.* is really held in trust for *B.*, in a question either with *A.* or with another third party.[4] This was held where the jurisdiction of the Scotch Courts depended on the ownership of heritable property.[5] And where a bill which had been protested for non-acceptance was assigned to *A.*, and he charged the acceptor for payment, the latter was held entitled to prove by parole evidence that *A.* held the bill in trust for *B.*, with whom the acceptor had agreed that it should be held to be discharged.[6] Creditors of the truster may certainly prove, in a question with the alleged trustee, that the title given to him was given in pursuance of a scheme to evade their rights,[7] and, from the analogy of the rights of third parties, and of cases of sales intended to be securities,[8] it would seem that they would have the same right even in cases where the trustee's title was given for some other purpose. In a question between the creditors of the truster and the creditors of the alleged trustee, parole proof is admitted.[9]

Questions between Spouses.—It was decided by Lord Low that the Act did not apply to the case where the pursuer was a wife and the alleged trustee her husband.[10] In *Galloway* v. *Galloway*[11] the majority of the Court approved of the decision, considered it still to be applicable in spite of intervening legislation, and to rule the case where the pursuer was a husband and the alleged trustee his wife.

[1] *Leckie* v. *Leckie*, 1854, 17 D. 77.

[2] *Burnet* v. *Morrow*, 1864, 2 M. 929; *Murray* v. *Wright*, 1870, 8 M. 722, per Lord Benholm, at p. 725; *Chalmers* v. *Chalmers*, 1845, 7 D. 865.

[3] *Fortune* v. *Luke*, 1831, 10 S. 115; *Murray* v. *Wright*, *supra*. See also *Smith's Tr.* v. *Smith*, 1911, S.C. 653.

[4] *Lord Elibank* v. *Hamilton*, 1827, 6 S. 69; *Scott* v. *Miller*, 1832, 11 S. 21; *Middleton* v. *Rutherglen*, 1861, 23 D. 526; *Hastie* v. *Steel*, 1886, 13 R. 843; *Lord Advocate* v. *M'Neill*, 1864, 2 M. 626, per Lord Deas, at p. 634; 4 M. (H.L.) 20.

[5] *Hastie* v. *Steel*, *supra*.

[6] *Middleton* v. *Rutherglen*, *supra*.

[7] *Wink* v. *Speirs*, 1867, 6 M. 77.

[8] See *ante*, p. 378.

[9] *Wallace* v. *Sharp*, 1885, 12 R. 687.

[10] *Anderson* v. *Anderson's Tr.*, 1898, 6 S.L.T. 204.

[11] 1929, S.L.T. 131.

CHAPTER XXI

PROOF OF ALTERATION OF WRITTEN CONTRACT

Exclusion of Parole Evidence.—It may be laid down with more confidence than is usually possible in making general statements, that where the relations of parties are regulated by a formal written contract, the averment that the contractual provisions have been altered by a subsequent verbal agreement cannot be proved by parole evidence. Where one party takes his stand on the terms of the written contract, and the other, either in order to insist on obligations due to him, or in answer to a claim for damages for breach of contract, avers that the terms of the contract were verbally altered, his case is irrelevant if he merely avers a verbal agreement, and does not add averments of actings following upon it, or offer to prove it by the writ or oath of his opponent.[1] Thus a tenant, on a written lease which specifies the rent, cannot prove by parole an agreement to reduce it.[2] Where the landlord had used sequestration for the full rent, as fixed by the lease, and the tenant, averring that it had been reduced by mutual agreement, brought an action of damages, it was held that his action was irrelevant if he did not indicate on record some proof in writing of the alleged agreement to reduce the rent.[3] So where stockbrokers purchased stock in pursuance of written instructions and, suing for their account, were met by the defence that these instructions had been altered verbally, it was held that parole proof of the alleged alteration was incompetent.[4] Where decree had been obtained for a certain sum the ordinary import of the decree—that diligence might proceed at once—could not be altered by proof of a verbal agreement for payment by instalments.[5] Where parties settled an action by joint minute, signed by counsel, this was held to be a written contract between them, and not to admit of proof of a subsequent verbal agreement to alter its terms.[6] Where by private Act of Parliament a succession was settled on the survivor of *A.* and *B.*, proof was refused of an alleged agreement between them to share it equally.[7] And if a written executory contract provides for the execution of work in a particular way, or for the delivery of an article at a particular date, it is no defence to the party who has failed in these particulars to allege that the other party

[1] Dickson, *Evidence*, sec. 1025. Cases cited *infra*, and *Dumbarton Glass Co.* v. *Coatsworth*, 1847, 9 D. 732; *Wallace* v. *Henderson*, 1867, 5 M. 270; *Skinner* v. *Lord Saltoun*, 1886, 13 R. 823; *Barr's Trs.* v. *Barr & Shearer*, 1886, 13 R. 1055. In England a verbal agreement to alter a written contract may be proved, unless the contract was one which, by statute, must be constituted in writing (*Goss* v. *Lord Nugent*, 1833, 5 B. & Ad. 58; *Morris* v. *Baron* [1918], A.C. 1; *British & Beningtons Ltd.* v. *Cachar Tea Co.* [1923], A.C. 48.

[2] *Riddick* v. *Wightman*, 1790, Hume, 776; *Gibb* v. *Winning*, 1829, 7 S. 677; *Kirkpatrick* v. *Allanshaw Coal Co.*, 1880, 8 R. 327; *Rattray* v. *Leslie's Tr.*, 1892, 19 R. 853.

[3] *Law* v. *Gibsone*, 1835, 13 S. 396; *Turnbull* v. *Oliver*, 1891, 19 R. 154.

[4] *Stevenson* v. *Manson*, 1840, 2 D. 1204.

[5] *Lavan* v. *Aird & Co.*, 1919, S.C. 345.

[6] *Hamilton & Baird* v. *Lewis*, 1893, 21 R. 120.

[7] *M'Murrich's Trs.* v. *M'Murrich's Trs.*, 1903, 6 F. 121.

had verbally agreed to an alteration in the method of execution,[1] or to an extension of the time. "By the law of Scotland," said Lord Chancellor Chelmsford, "a written agreement cannot be waived or varied by words only; and if the permitted waiver or variation rests entirely on parole, there remains a *locus pœnitentiæ* to the person who has consented to the waiver or variation. It cannot be enforced against him." [2]

Agreement to Rescind.—In English law a distinction is drawn between an agreement to alter a written contract and an agreement to rescind or cancel it, parole evidence being admissible in the latter event in cases where it would be excluded in the former.[3] There would seem to be sufficient authority for the statement that the law of Scotland differs in this respect, and that an agreement to cancel, rescind, or abandon a written contract, if standing alone, and not followed by actings referable to it, cannot be proved by parole evidence. It is so laid down by writers on the law of evidence,[4] founding, however, on a dictum of Erskine,[5] which seems to refer only to payment of a debt. The extinction and the alteration of a written contract have been judicially referred to as presenting the same question;[6] and in *Macpherson* v. *Haggarts*,[7] eminent counsel, with the approval of the Court, declined to contend that parole evidence was admissible to prove that a bank had agreed to cancel a guarantee. The renunciation of a written contract which is still pending may be inferred where the parties have entered into a new contract relating to the same matter.[8] So where an heir of entail granted a new lease to tenants whose existing lease had still two years to run, it was held that the arrangement was not open to the objection that, if construed as an extension of the old lease, it would have exceeded the period for which an heir of entail is entitled to grant leases. The old lease, without any express renunciation or discharge, was extinguished when the new lease was granted.[9]

Nature and Extent of Rule.—In spite of two very special cases[10] it is believed that the general rule may be stated as well established. But its exact nature and limits are not so easy to determine. Is it a rule of evidence, limiting the methods of proof of the fact that a verbal agreement to alter the terms of the written contract has been arrived at? Or is it a principle of contract that the terms of a written agreement cannot be derogated from except by an agreement in writing (*i.e.*, by an agreement recorded in writing

[1] *Sutherland* v. *Montrose Shipbuilding Co.*, 1860, 22 D. 665; *Spencer* v. *Dobie*, 1879, 7 R. 396; *Burrell* v. *Russell*, 1900, 2 F. (H.L.) 80 (narrated *infra*, p. 397); *Paterson* v. *Inglis*, 1902, 10 S.L.T. 449. There would seem to be no definite authority in Scotland for or against the English rule that where a contract provides for the doing of a particular act (*e.g.*, the supply of goods) at a specified time parole evidence is admissible of an agreement to extend the time, but as the tendency of modern decisions is rather to relax than to tighten the restrictions on evidence it is probable that the English decisions would be followed. See *Ogle* v. *Earl Vane*, 1868, L.R. 3 Q.B. 272; *Hickman* v. *Haynes*, 1875, L.R. 10 C.P. 598; *Morris* v. *Baron* [1918], A.C. 1 (Lord Atkinson); *Levey* v. *Goldberg* [1922], 1 K.B. 689. The question was considered in *Glasgow Steam Shipping Co.* v. *Watson*, 1873, 1 R. 189.

[2] *Bargaddie Coal Co.* v. *Wark*, 1859, 3 Macq. 467, at p. 477.

[3] *Morris* v. *Baron* [1918], A.C. 1, where the distinction is drawn by Lord Dunedin, at p. 25; *British & Beningtons Ltd.* v. *Cachar Tea Co.* [1923], A.C. 48.

[4] Tait, *Evidence*, pp. 335, 341; Dickson, *Evidence*, sec. 627.

[5] *Inst.*, iii. 4, 8.

[6] *Law* v. *Gibsone*, 1835, 13 S. 396; *Lavan* v. *Aird & Co.*, 1919, S.C. 345, per Lord Justice-Clerk (Scott-Dickson).

[7] 1881, 9 R. 306.

[8] Ersk. ii. 6, 44; *Campbeltown Coal Co.* v. *Duke of Argyll*, 1926, S.C. 126; *Edinburgh Entertainments Co.* v. *Stevenson*, 1926, S.C. 363, opinion of L.J.C. Alness, p. 378.

[9] *Campbeltown Coal Co.* v. *Duke of Argyll*, *supra*.

[10] *Craig* v. *Budge*, 1823, 3 Murray, 320; *Thomson* v. *Monkland Steel Co.*, 1836, 14 S. 393.

at the time when it was made), so that any alteration not so made, and not followed by actings upon it, is not binding, and leaves to each party the opportunity to resile?

A fairly plausible case may be made for the former hypothesis, that a verbal alteration of the terms of a written contract is binding, but that proof of it is limited by a rule of evidence. It would seem to be sufficiently established that proof by writ or oath of the party interested in denying such a verbal alteration is competent, even in cases where it was not alleged that any actings had followed.[1] Yet if a verbal agreement, even if proved, allows *locus pœnitentiæ*, how could the proof of it by writ or oath advance the case of the party relying upon it? Were his proof absolutely conclusive, he would only succeed in establishing an agreement from which his adversary was entitled to resile. Again, in *Baillie* v. *Fraser*, a written lease provided for the payment of rent calculated by the price of corn. The tenant averred that the provision had been verbally altered, and a fixed rent substituted. He produced receipts for rents for several years paid on that basis. The case was treated as one where the question was whether there was sufficient evidence to instruct a verbal agreement to alter the rent permanently; it was held that there was, and that it was an agreement from which neither party could resile.[2] The same principle was given effect to, with greater clearness, in *Dickson* v. *Bell*,[3] where it was held that a verbal arrangement for a permanent reduction of rent was binding on the landlord when proved by letters written with his authority by his agent, and merely referring to the reduction as a fact in the prior relations between the parties.

Certain cases, in which it has been held that a particular writing adduced was not sufficient to support a plea based on a verbal agreement to alter the terms of a contract, do not present any serious difficulty to this view of the law. In *Rattray* v. *Leslie's Trs.*[4] the only evidence to support an alleged reduction of rent was a return by the landlord, under the Valuation Acts, stating the rent at the lower figure. All that was held was that this was not conclusive, and, at least in the opinion of Lord M'Laren, the case is treated as one of evidence. The decision in *Tharsis Sulphur and Copper Co.* v. *M'Elroy* probably establishes that an engineer's or architect's certificate to the effect that the work has reached a certain stage does not set up a verbal agreement to alter the terms of the contract, even although it states that work has been done which is outside these terms; but that is on the ground that such certificates ("progress" certificates) are intended to certify a matter of fact—the point which the work or building has reached—and have nothing to do with the question whether the contract under which the work is done has been altered or not.[5]

[1] *Scot* v. *Cairns*, 1830, 9 S. 246; *Law* v. *Gibsone*, 1835, 13 S. 396; *M'Murrich's Trs.* v. *M'Murrich's Trs.*, 1903, 6 F. 121.

[2] *Baillie* v. *Fraser*, 1853, 15 D. 747. This case has been described as one where an imperfect agreement was validated by *rei interventus* (per Lord Mure, *Kirkpatrick* v. *Allanshaw Coal Co.*, 1880, 8 R. 327, 337), but it is difficult to justify this view of it from the opinions given.

[3] 1899, 36 S.L.R. 343 (Second Division).

[4] 1892, 19 R. 853.

[5] *Tharsis Sulphur and Copper Co.* v. *M'Elroy*, 1877, 5 R. 161; revd. 1878, 5 R. (H.L.) 171. It was attempted (unsuccessfully) to infer, from the certificates of the employer's engineer, not merely an agreement to allow the contractor to deviate from the contract provisions, but an obligation to pay him for the extra work involved in doing so, though that extra work did not make the article produced more valuable. The difficulties in the contractor's case were increased by the fact that, as is usual in engineering contracts, there was a clause providing that no extra work was to be done unless authorised in writing. See also *Spencer* v. *Dobie*, 1879, 7 R. 396.

Locus Pœnitentiæ.—But while these considerations may avail to prevent any dogmatic statement as to the law, it is submitted that the preponderating weight of authority is in favour of the view that a verbal alteration of a written contract is, taken merely by itself, not binding. There is *locus pœnitentiæ*, until some actings have followed on the contract as altered. This is distinctly laid down in the opinions of the judges in the House of Lords in dealing with the legal effect of acquiescence in a breach of the provisions of the written contract following on an alleged agreement to alter it.[1] It is clearly implied in the passage already cited from the opinion of the Lord Chancellor (Chelmsford), and the opinion of Lord Cranworth is to the same effect. The same principle is laid down by Lord President Inglis in a later case, again dealing with a verbal alteration, fortified by averments of actings following upon it. "It must be observed that this is not the constitution of an original and independent agreement by parole, but it is an alteration of a written contract by a parole agreement. These two things stand upon a somewhat different footing in regard to their legal aspect and effect. The rule in regard to parole agreements respecting heritage is that they are not of any effect unless they can be proved either by the writ or oath of the parties. But with regard to the variation of a formal written contract by words only, the rule is that that cannot be done—that a formal written contract cannot be varied or altered by words merely."[2]

The party who avers that the terms of a contract have been departed from without any written proof of an agreement to alter them may found his case either upon acquiescence by the other party, or on a verbal agreement followed by acts amounting to *rei interventus*. These pleas may raise different considerations.

Effect of Acquiescence.—In certain cases, especially where the contract has no term of future endurance, a party has been held barred from insisting on the exact terms of his contract on the ground that his conduct amounted to acquiescence in the other's non-observance of them, even when there are no averments of any actual agreement to alter them. Thus where a landlord, in the knowledge that his tenant is departing from the system of cultivation enjoined by the lease, receives payment of rent without reservation or objection, he will be held to have sanctioned the tenant's system of cultivation, and is not entitled to insist afterwards that the system of the lease should be resorted to if that be impossible without serious loss to the tenant.[3] Insurance companies have, somewhat easily, been held to have waived exact compliance with the conditions of the policy with regard to notice of a claim.[4] If a party, when the obligations under the contract are in dispute, acquiesces, by words or acts, in actings by the other only justifiable on his own version of the contract, the former, if ultimately found to be in the right, will be barred from all claim in respect of the actings to which his acquiescence extended.[5] In *Thomson* v. *Thomson & Co.*[6] a father had made over his business to his son, stipulating for an annuity, and for a right, in default of punctual payment thereof, to resume the business. A dispute having arisen as to the liability

[1] *Bargaddie Coal Co.* v. *Wark*, 1856, 18 D. 772; revd. 1859, 3 Macq. 467.
[2] *Kirkpatrick* v. *Allanshaw Coal Co.*, 1880, 8 R. 327, at p. 332.
[3] *Taylor* v. *Duff's Trs.*, 1869, 7 M. 351; *Lamb* v. *Mitchell's Trs.*, 1883, 10 R. 640.
[4] *Shiells* v. *Scottish Assurance Corporation*, 1889, 16 R. 1014; *Donnison* v. *Employers' Accident, etc., Insurance Co.*, 1897, 24 R. 681.
[5] *Steel Co. of Scotland* v. *Tancred, Arrol & Co.*, 1892, 19 R. 1062.
[6] 1900, 2 F. 912. See also cases of waiver of the obligation to present a bill for payment—*Allhusen* v. *Mitchell*, 1870, 8 M. 600; *Shepherd* v. *Reddie*, 1870, 8 M. 619.

for one instalment, payment was refused, and a litigation ensued, in which the father was ultimately successful. Meanwhile he had accepted payments of later instalments of the annuity. He gave notice that he proposed to resume the business in respect of the failure in punctual payment of the instalment which had been the subject of the litigation. It was held that by accepting payments of later instalments he had waived his right to do so.

In cases where the contract is one with a prolonged term of endurance, it has been laid down,[1] in spite of two apparently adverse decisions of the House of Lords,[2] that acquiescence in an act involving a departure from the contractual conditions merely bars a claim for damages, and does not infer any licence to similar departures in the future, and therefore does not support a plea that the terms of the contract have been impliedly altered. The contract still rules, though prior breaches of it may have been condoned. To displace it, the other party must aver something more than acquiescence in, or condonation of, his breach of contract in the past; he must aver that what he has done was not really a breach of contract, because the terms of the original contract had been altered by subsequent agreement. And the question is, How can such averments be proved?

Verbal Alteration with *rei interventus*.—The leading case is *Bargaddie Coal Co.* v. *Wark*.[3] There a mineral lease prohibited the tenants from breaking through a barrier of fifteen feet of coal separating the subjects let from neighbouring fields. Contravention of this provision was admitted. In defence to an action concluding that the tenants should be ordained to restore the barrier and interdicted from breaking through the part of it which still remained, the defenders averred that the landlord had verbally agreed to waive the prohibition in the lease, in order to enable their workings to be carried on in connection with a neighbouring pit, and had also acquiesced in the operations which they had carried out in reliance on this alleged waiver. The Court of Session, in a judgment too logical to be good law, held that two separate questions were involved. First, could the alleged agreement be proved by parole evidence? Secondly, had the defenders relevantly averred acts of acquiescence sufficient to bar the landlord's right to insist on his contract on the assumption that no express verbal waiver by him could be or had been proved? Answering both these questions in the negative, decree substantially in the terms concluded for was pronounced. The judgment was reversed in the House of Lords, except in so far as it interdicted the tenants from removing part of the barrier which still remained (a point on which, it would appear, the tenants did not appeal); and the case was remitted with a finding that the Court of Session ought to have directed an issue whether the barrier coal removed by the tenants was removed with the consent of the landlord. It was laid down by the Lord Chancellor (Chelmsford) that the Court of Session, in separating the case into two questions, had proceeded in the wrong way; that acts of acquiescence, though not sufficient in themselves to bar the exercise of a right, might be sufficient "to give validity and force to a parole agreement"; that when there were averments of acquiescence parole evidence was admissible to prove both the fact of a verbal agreement and the acts from which acquiescence was to be inferred; and that, in these circumstances, it was possible to prove, by the combined

[1] *Carron Co.* v. *Henderson's Trs.*, 1896, 23 R. 1042; *Pirie* v. *Earl of Kintore*, 1903, 5 F. 818, at p. 849; affd. 1906, 8 F. (H.L.) 16.

[2] *Geddes* v. *Wallace*, 1820, 2 Bligh 270 (partnership); *Young* v. *Ramsay*, 1825, 1 W. & S. 560 (lease).

[3] 1856, 18 D. 772; revd. 1859, 3 Macq. 467.

effect of the verbal agreement and the acts of acquiescence, not only an indemnity for acts done in the past, but an alteration of the contractual provisions, so as to make a continuance of similar acts justifiable. The result of this judgment has been explained to be "that where there are averments of acquiescence in operations inconsistent with the terms of the written contract, they may be admitted to proof; and if it appears that the acquiescence was the consequence of a previous arrangement, that it is then competent to prove that arrangement." [1]

Facts Amounting to *rei interventus*.—The chief difficulty in applying this rule has been to determine what kind of acts are sufficient to infer the acquiescence which may let in a general proof. After several cases not directly deciding it, but containing comments on Lord Chelmsford's opinion,[2] the question came up for decision in *Kirkpatrick* v. *Allanshaw Coal Co.*[3] There mineral tenants, under a lease with a fixed rent of £3,000, averred that, in order to enable them to resist the demands of their workmen for higher wages, the landlord had agreed to reduce the fixed rent to £2,000, with the object of limiting the financial loss which would fall upon the tenants in the event of a strike. This agreement, they averred, was for a permanent reduction in the fixed rent during the years which the lease had to run, and they proposed to prove that in reliance on it they had resisted the demands of the workmen, and incurred loss by a strike. The action was for payment of the full amount of the fixed rent. The Court refused to allow a proof of the tenant's averments, holding that in order to let in proof of a verbal agreement to alter a written contract followed by acts acquiesced in, the acts in question must be acts amounting to a contravention of the provisions of the written contract; not merely acts averred to have been done in reliance on the verbal alteration but which could have been lawfully done without it. The decision amounts to holding that where, as in the case in question, the verbal alteration effects a reduction of the rent under a lease, it is not enough to aver acts amounting to *rei interventus*, *i.e.*, an alteration in the tenant's position, with the knowledge of the landlord, and in reliance on the alleged agreement; it must also be shewn that the tenant's acts, acquiesced in by the landlord, amount to a contravention of the terms of the lease.[4] So where the question at issue was the competency of proof that a party holding a decree had agreed to accept payment by instalments it was held that averments that certain instalments had been tendered and accepted, being quite consistent with a continued right to enforce instant payment, were insufficient to let in parole evidence.[5]

As to what, in cases of this kind, will amount to acquiescence, it would appear, from *Bargaddie Coal Co.* v. *Wark*,[6] that mere non-interference for a considerable period may be sufficient.

Verbal Alteration of Building Plans.—In contracts for building according

[1] Per Lord Justice-Clerk Inglis, *Sutherland* v. *Montrose Shipbuilding Co.*, 1860, 22 D. 665, at p. 673.

[2] *Sutherland* v. *Montrose Shipbuilding Co.*, 1860, 22 D. 665; *Walker* v. *Flint*, 1863, 1 M. 417; *Cowan* v. *Lord Kinnaird*, 1865, 4 M. 236.

[3] 1880, 8 R. 327.

[4] *Kirkpatrick* v. *Allanshaw Coal Co.*, 1880, 8 R. 327. Lord Shand dissented, and pointed out the injustice that might result in cases where a party had incurred expenditure in reliance on a verbal agreement to vary the conditions of a contract. But all rules limiting the method of proof must find justification in their general convenience, and must necessarily produce injustice to those who, ignoring them, prefer to trust in the honour of those with whom they deal, and find their confidence misplaced.

[5] *Lavan* v. *Aird & Co.*, 1919, S.C. 345.

[6] 1856, 18 D. 772; revd. 3 Macq. 467.

to particular plans it is somewhat doubtful whether any divergence from the terms of the written contract under which the work is undertaken can be justified by averments of verbal consent, and non-interference in the knowledge of what was being done. In *Burrell* v. *Russell*,[1] a contract for building a ship incorporated plans under which she was to be built with a straight keel. As built, the keel was cambered. The shipbuilders were sued for damages. Their defence was that the pursuers, through their overlooker, had verbally consented to the camber (which might, in certain circumstances, be an advantage) and were cognisant of the way in which the ship was being built. Proof of these averments was allowed in the Court of Session, but in the House of Lords the Lord Chancellor (Halsbury) and Lord Davey expressed the opinion that the evidence was incompetent. But it is not quite clear whether the ground of their judgment was that parole evidence of an agreement to alter the specification of a contract of this kind was always incompetent, or on the ground that there were no relevant averments that the overlooker had any power to alter it, nor ground for holding that his knowledge could be attributed to his employer.[2] Where, in a building contract, power is given to the architect to increase, lessen, or omit any part of the work, the inference is that he may exercise this power verbally, and the question whether any particular alteration is within his power of sanction is not complicated by the objection that it involves a verbal alteration of a written contract.[3]

Questions with Singular Successors.—Even where, on the principles considered in the preceding pages, proof of a verbal alteration of a written contract would be competent and effectual as between the original parties, it will not effect an alteration when the question is raised with a singular successor. Thus where a lease contained provisions for the rotation of crops, and damages for failure to observe these were claimed by a purchaser from the landlord, it was decided that allegations of acquiescence on the part of the landlord, whether or not they amounted to averments of an agreement to alter the terms of the lease, were irrelevant in a question with the purchaser.[4] This does not hold where the lease provides that the rotation may be altered with the consent of the landlord, and that consent has actually been given.[5] In *Thom* v. *Chalmers* [6] the Lord Ordinary (Kinnear) thought it too clear for argument that a verbal agreement to alter the terms of a feu-contract could not be founded on in a question with a singular successor of the superior.

[1] 1900, 2 F. (H.L.) 80.

[2] *Burrell* v. *Russell*, 1900, 2 F. (H.L.) 80. The probable intention of parties was an element in the case, as various other alterations of the original terms, of less importance, had been the subject of another communication.

[3] *Forrest* v. *Scottish County Investment Co.*, 1915, S.C. 115; affd. 1916, S.C. (H.L.) 28.

[4] *Hall* v. *M'Gill*, 1847, 9 D. 1557.

[5] *Carnegie* v. *Guthrie*, 1866, 5 M. 253.

[6] 1886, 13 R. 1026.

CHAPTER XXII

RULES OF INTERPRETATION

Any attempt to determine the principles upon which the Courts proceed in the construction of contracts must relate mainly, if not exclusively, to contracts reduced to writing. In verbal contracts, where the parties can be examined as witnesses as to the meaning which they respectively put on the expressions used, questions of credibility enter so largely as to leave little room for canons of construction. And even in written contracts the tendency of modern decisions is to regard interpretation as a question of impression: to treat rules of construction merely as indications, not as guides.

Problem of Construction.—In a question of construction, a contract presents a problem somewhat more complex than a will or a statute. In these, the intention of the testator, or the intention of the Legislature, is the sole object of inquiry. But in the majority of cases of disputed contracts it would be idle to aim at the discovery of the intention of the parties; the case is presented for decision because the parties entertain different views as to the meaning of the obligations which they have undertaken. Nor is the meaning of a contract, or of a particular obligation therein, to be determined by considering what the party who is in the position of the offerer meant to offer, or what the party who is in the position of the acceptor considered himself entitled to receive. A party who has made an offer in terms calculated to convey a particular impression cannot refuse performance on the easy plea that he did not mean what he said. And it would paralyse all business relations if the law allowed the party to whom an offer was made to interpret that offer as he pleased.

A dictum of Lord Blackburn has been cited as a formula: "In all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other."[1] But there are cases in which this is hardly sufficient without the qualification that the party must be supposed to be conversant with the law on the subject. There are contracts—notably policies of marine insurance, charter-parties, and bills of lading—which are always entered into in stereotyped forms, and these forms have, by a long course of decisions, developed a phraseology of their own, and the man who uses language which in this way has really become technical is entitled to assume that it will be understood in the sense which has been ascribed to it by prior decisions, however remote that sense may be from the reading which would be given to the words by a reasonable man unacquainted with the law on the subject.[2] The matter seems really to come to this—that the Court is to endeavour to place itself in the position of a

[1] *Fowkes* v. *Manchester and London Assurance Association*, 1863, 3 B. & S. 917, at p. 929.

[2] *Thames and Mersey Marine Insurance Co.* v. *Hamilton*, 1887, 12 App. Cas. 484; *Salvesen* v. *Guy & Co.*, 1885, 13 R. 85, per Lord Kinnear, p. 86; *M'Cowan* v. *Baine & Johnston*, 1890, 17 R. 1016; affd. 1891, 18 R. (H.L.) 57; *Lamont, Nisbett & Co.* v. *Hamilton*, 1907, S.C. 628.

reasonable and disinterested third party, duly instructed, if necessary, as to the law.

Whole Contract to be Considered.—The rules which determine how far extrinsic evidence is inadmissible in the construction of written contracts have been already considered.[1] As a general rule the whole contract, and any writings which may legitimately be given in evidence, may be looked at in order to determine the meaning of a word or phrase. The meaning of any expression is to be arrived at on a consideration of the context and of its relation to the whole deed. So where *A.* agreed to supply *B.* with "as much coal as he should require," the meaning of the word "require" as used in other passages in the contract was considered, and it was held that it meant "need for the purpose of his business," and not "ask for."[2] Even if words are used which are not, in any ordinary sense, ambiguous, yet if it is clear that the party used them throughout the contract with an exceptional meaning, they will be read with that meaning wherever they occur.[3] It is an argument not without weight, though far from conclusive, that the construction is to be preferred which gives a meaning to every word and clause of the contract: although, especially in formal deeds, the possibility that unmeaning and redundant words of style may have been used is not to be lost sight of.[4]

The construction of dispositions of land forms an exception to the general rule that the whole of the contract may be considered in order to decide on the meaning of any word or clause. In the question of what is conveyed the dispositive clause, if unambiguous, rules, even although the other clauses of the deed may shew that its terms do not represent the real intention of the party granting the conveyance. It is only if the terms of the dispositive clause are ambiguous that the other clauses may be considered.[5] Probably the one exception to this is that a dispositive clause in absolute terms may be qualified by a reservation in the *tenendas* clause.[6]

Contract Partly Printed, Partly Written.—It is a general rule that if the record of the contract consists of a printed form with alterations or additions in writing, the written portion is to rule in the event of any discrepancy.[7]

Words Read in Ordinary Sense.—The most general rule of construction—without which, indeed, all interpretation would be impossible—is that ordinary words are to be taken as used in their ordinary meaning, if there is nothing in the context or in the rest of the contract to imply the contrary.[8] But this rule, though it has been applied by the House of Lords to check decisions pronounced on vague grounds of equity or conjectural intention,[9]

[1] *Supra*, Chap. XX. [2] *North British Oil and Candle Co.* v. *Swann*, 1868, 6 M. 835.

[3] *Martin* v. *Kelso*, 1853, 15 D. 950.

[4] *Florence Land, etc., Co., in re*, 1878, 10 Ch. D. 530; Jessel, M.R., p. 538: "I am never very much embarrassed by the suggestion that when a man used ten words where two would do I am bound to affix a separate meaning to every one of the ten."

[5] *Orr* v. *Mitchell*, 1892, 19 R. 700; revd. 1893, 20 R. (H.L.) 27.

[6] *Bain* v. *Duke of Hamilton*, 1865, 3 M. 821 (reservation of minerals). Cf. *Smith* v. *Ballingall*, 1895, 2 S.L.T. 503.

[7] *Glynn* v. *Margetson* [1893], A.C. 351; *Rowtor Steamship Co.* v. *Love & Stewart*, 1916, S.C. 223; 1916, S.C. (H.L.) 199; *Taylor* v. *Lewis*, 1927, S.C. 891, per Lord Justice-Clerk Alness, at p. 898.

[8] See opinion of Lord Wensleydale in *Grey* v. *Pearson* (1857, 6 H.L.C. 61, 106). Quoted by editors of Bell's *Prin.*, sec. 524; and by Lord Blackburn, *Caledonian Rly. Co.* v. *North British Rly. Co.*, 1881, 8 R. (H.L.) 23, 30.

[9] *E.g.*, *Crosse* v. *Banks*, 1886, 13 R. (H.L.) 40; *Burnett* v. *Great North of Scotland Rly. Co.*, 1884, 12 R. (H.L.) 25; *Gatty* v. *Maclaine*, 1920, S.C. 441; affd. 1921, S.C. (H.L.) 1. *Buchanan* v. *Andrew*, 1871, 9 M. 554; revd. 1873, 11 M. (H.L.) 13, is a very strong instance of the construction of a contract (a feu reserving minerals) according to its literal meaning, in spite

is too wide to be of much use in practice. Very few terms are unambiguous, and disputes commonly arise because expressions have been made use of which may legitimately be construed in more than one way. Perhaps as a general rule it is more useful to say that "a business sense will be given to business documents." [1]

Technical Terms.—The converse of the rule that ascribes to ordinary words their ordinary meaning is that technical terms are to be interpreted in their technical sense, with the aid, if necessary, of extrinsic evidence.[2]

Assumption of Honesty.—It is a general rule that contracts are to be construed on the assumption of honest dealing. No merely general clause of exemption, however widely expressed, is to be taken as enabling the party using it to escape the normal consequences of his fraud. So a strike clause will not cover a strike engineered by the employer in order to get rid of his obligations under the contract.[3] And where, in the specification under which tenders for the construction of a railway were asked, the company stated that bores had been put down at various parts of the line, and that a copy of the journals of these bores could be seen, with the addition that "contractors must therefore satisfy themselves as to the nature of the strata, as the company will not hold themselves liable for any claim that may be made against them on account of any inaccuracy in the journals of the bores," it was laid down by Lord Shaw that such a saving clause, however widely expressed, would not cover a case of fraud.[4]

Construction *contra proferentem*.—In cases where parties have differed as to the meaning of an ambiguous expression there is a general presumption in favour of its construction *contra proferentem*—in the sense opposed to the interest of the party who made use of it.[5] This, as is noted by Lord Stair, affords a presumption especially strong when the contract is framed by one party under skilled advice, and accepted by the other without it. But it applies generally when the terms of the contract are dictated in detail by one party and met with a general acceptance by the other. If the former desires exceptional terms he should make his meaning plain: *sibi imputet*, if he fail to do so. So as the terms of fire, life, and accident insurance policies are invariably framed by the company, the meaning of a doubtful phrase will be held to be that most favourable to the insured.[6] "The true meaning of the policy is according to the way in which a layman (or unlearned

of the argument that, so construed, it would lay an impossible burden on one of the parties. See also, in regard to the argument that a literal construction of the contract would involve hardship (*Chalmers' Tr.* v. *Dick's Tr.*, 1909, S.C. 761), opinion by Lord Dundas; (*Auld* v. *Glasgow Working Men's, etc., Building Society*, 1887, 14 R. (H.L.) 27)—a sermon on the text, "Hold to your bargain." Contrast opinions in *Cadzow* v. *Lockhart*, 1876, 3 R. 666.

[1] Per Lord Halsbury, *Glynn* v. *Margetson* [1893], A.C. 351, 359. See also opinion of Atkin, J., *Groom* v. *Barber* [1915], 1 K.B. 316, 325.

[2] *Supra*, p. 365.

[3] *Forrester's Tr.* v. *M'Kelvie*, 1895, 22 R. 437. There were no express averments of fraud.

[4] *Boyd & Forrest* v. *Glasgow and South-Western Rly. Co.*, 1915, S.C. (H.L.) 20, 35.

[5] Stair, iv. 42, 21; Ersk. iii. 3, 87.

[6] *Hutchison* v. *National Loan Assurance Society*, 1845, 7 D. 467; *Sangster's Trs.* v. *General Accident, etc., Corporation*, 1896, 24 R. 56; *Life Association of Scotland* v. *Foster*, 1873, 11 M. 351; *Reid* v. *Employers' Accident Insurance Co.*, 1899, 1 F. 1031; *Hunter* v. *General Accident, etc., Assurance Corporation*, 1909, S.C. 344; affd. 1909, S.C. (H.L.) 30; *Bradley* v. *Essex, etc., Indemnity Society* [1912], 1 K.B. 415; *Dawsons Ltd.* v. *Bonnin*, 1921, S.C. 511; affd. 1922, S.C. (H.L.) 156. In *Scott* v. *Scottish Accident Insurance Co.* (1889, 16 R. 630) the Court laid on the company the burden of shewing that it was impossible to read the policy in any way except that they proposed, but no other case supports this extreme doctrine. English and American authorities are collected in Porter, *Insurance*, 7th ed., 30.

person) would read the words." [1] Thus where a party proposing to insure agreed to a general condition that if any of the statements made by him were untrue the policy should be null and void, it was held that the word "untrue" must be read as meaning "untrue to the declarant's knowledge and belief," and not "untrue in fact," and therefore that the policy was not voided by the assured's statement that she was not suffering from rupture, while in fact she was, though she was not aware of it.[2] The same principle has been applied to the construction of a prospectus, in a question with the promoters; [3] to clauses exempting a carrier or other custodier from liability; [4] and to formal bonds of caution. These are construed in the sense most unfavourable to the creditor, on the ground that the framing of their terms is in his hands; [5] a principle which does not extend to informal guarantees *in re mercatoria*.[6] The rule of construction *contra proferentem* applies with much force to private Acts of Parliament, when these are, in effect, contracts with legislative sanction. Their language is read, not as the language of the Legislature, but as language which the promoters of the Act have used and which the Legislature has sanctioned, and therefore, *in dubio*, they are to be construed against the promoters, with whom it rested to make their meaning plain.[7] But in order to admit of construction *contra proferentem*, there must be a *proferens*, and in ordinary contracts where parties are contracting on an equal footing it may fairly be assumed that the ultimate terms are arrived at by mutual adjustment, and do not represent the language of one more than of the other. So the Court refused to apply this rule of construction in the case of a warranty in a policy of marine insurance, there being no reason to suppose that its terms were dictated either by the underwriter or by the shipowner.[8] If, however, one party alleges a leonine bargain—*e.g.*, payment for goods according to the amount stated in the bill of lading whether that amount was actually shipped or not—the rule of construction *contra proferentem* may be invoked to defeat him.[9]

Rule against Restrictions on Property.—It is a general presumption that words limiting the exercise of the ordinary rights of property are to be construed in a sense as narrow as the words will fairly bear. *In dubio, pro libertate respondendum.*[10] This rule has been always applied in the construction of building restrictions in feu-charters.[11] Thus, to take a recent example, a feu-contract provided "that no houses or buildings of any kind shall be erected on the said ground other than villas or dwelling-houses with offices."

[1] Per Cockburn, C.J., in *Fowkes* v. *Manchester, etc., Association*, 1863, 3 B. & S. 917, adopted by Lord President Inglis and Lord Ardmillan in *Life Association of Scotland* v. *Foster*, 1873, 11 M. 351, at pp. 358, 371.

[2] *Life Association of Scotland* v. *Foster*, 1873, 11 M. 351.

[3] *Gluckstein* v. *Barnes* [1900], A.C. 240.

[4] *Ballingall* v. *Dundee Ice, etc., Co.*, 1924, S.C. 238; *Elderslie S.S. Co.* v. *Borthwick* [1905], A.C. 93; *Rutter* v. *Palmer* [1922], 2 K.B. 87; *London and North-Western Rly.* v. *Neilson* [1922], 2 A.C. 263.

[5] Bell, *Prin.*, sec. 251; *Com.*, i. 390; *Napier* v. *Bruce*, 1840, 2 D. 556; affd. 1842, 1 Bell's App. 78; *Bayne* v. *Russell*, 1869, 7 S.L.R. 101; *Veitch* v. *National Bank*, 1907, S.C. 554; *Harmer* v. *Gibb*, 1911, S.C. 1341, per Lord Mackenzie.

[6] *Caledonian Banking Co.* v. *Kennedy's Trs.*, 1870, 8 M. 862, per Lord Justice-Clerk Moncreiff, at p. 867; *Wood* v. *Priestner*, 1867, L.R. 2 Ex. 66, 282.

[7] *Scottish Drainage and Improvement Co.* v. *Campbell*, 1889, 16 R. (H.L.) 16; *Colquhoun* v. *Glasgow Procurators' Widows' Fund*, 1904, 7 F. 345; revd. 1908, S.C. (H.L.) 10.

[8] *Birrell* v. *Dryer*, 1883, 10 R. 585; revd. 1884, 11 R. (H.L.) 41.

[9] *Harrower, Welsh & Co.* v. *M'William*, 1928, S.C. 326.

[10] *Dig.*, l. 17, 20; Stair, iv. 42, 21.

[11] *Heriot's Hospital* v. *Ferguson*, 1774, 3 Paton, 674; *Hood* v. *Traill*, 1884, 12 R. 362; *Anderson* v. *Dickie*, 1914, S.C. 706; affd. 1915, S.C. (H.L.) 79. A number of cases illustrating this rule are collected in Rankine, *Land-Ownership*, 4th ed., 482.

The feuar proposed to build tenement houses. Applying the principle that the presumption is in favour of freedom in the use of property, it was held that the restriction quoted above did not prevent him.[1] Again, servitudes, being a burden on the right of property, are construed strictly and in favour of the servient tenement.[2] So in the construction of entails if there are two possible readings, "both equally technical, grammatical, and intelligible, that construction must be adopted which destroys the entail rather than that which supports it."[3]

Ut res magis valeat.—Again, if one of two constructions will make the contract valid, the other deprive it of any operative effect, the former is generally to be preferred. The construction should *ut res magis valeat quam pereat.*[4] There are indeed certain cases where parties have contracted in terms so loose and vague that the Courts have been compelled to decide that their agreement cannot be enforced,[5] but this is a conclusion which, if possible, will be avoided. To avoid it the Court "would be justified in doing some violence to the language of the contract."[6] Thus 2,500 tons of coal were sold "in equal monthly instalments in lots of 300 tons maximum." Founding on the absence of any minimum, the buyer maintained that he might take any amount he pleased, however small. The Court refused to adopt a construction of the contract which would practically render it inoperative (and which, it may be added, was clearly contrary to the business meaning) and held that it imposed upon the seller an obligation to take about 300 tons per month.[7] A similar decision was pronounced in a case where a bill of lading for perishable goods contained a deviation clause which, construed literally, would have entitled the ship to call at any ports she pleased before arriving at the port of delivery. It was held that the shipowner, having deviated from a reasonably direct course, was liable in damages for injury to the goods.[8] So again where there is a question whether the signature on a bill of exchange is that of the principal or of the agent by whose hand it is written, the construction most favourable to the validity of the bill is to be adopted.[9] And where a party agrees to forgo his right to exercise a particular trade, in terms which may or may not be read as imposing a restriction so wide as to be void as a *pactum illicitum*, it is at least an argument in favour of the narrower construction that its adoption will give validity to an undoubted agreement.[10]

It is a rule in many respects analogous to the principle that effect must if possible be given to the contract, that if it is clear that the intention of both parties was to secure some particular result, the terms of their contract should be construed so as to secure this result. So where a contract between coalmasters and a railway company was designed to secure equality of

[1] *Bainbridge* v. *Campbell*, 1912, S.C. 92.

[2] Ersk. ii. 9, 33; Rankine, *Land-Ownership*, 4th ed., 417.

[3] Per Lord Campbell, *Lumsden* v. *Lumsden*, 1843, 2 Bell's App. 104, 114; Stair, ii. 3, 58; Ersk. iii. 8, 29; Montgomerie Bell, *Conveyancing*, 3rd ed., ii. 1025; M'Laren, *Wills and Succession*, 3rd ed., i. 506, where the cases are collected.

[4] *Muir* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 21, Earl Cairns, L.C., at p. 23, Lord Penzance, at p. 33. This does not apply to entails, in so far as the prohibitory, irritant, and resolutive clauses are concerned. They are construed so as to destroy the entail, as an entail, if possible. See authorities referred to in last note.

[5] *Supra*, p. 11.

[6] Per Lord Rutherfurd Clark in *Barr* v. *Waldie*, 1893, 21 R. 224, at p. 228.

[7] *Barr* v. *Waldie*, *supra*.

[8] *Glynn* v. *Margetson* [1893], A.C. 351.

[9] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), sec. 26 (2); *Brown* v. *Sutherland*, 1875, 2 R. 615.

[10] *Watson* v. *Neuffert*, 1863, 1 M. 1110; *Mills* v. *Dunham* [1891], 1 Ch. 576.

conditions at two ports it was held that the general word "charges" fell to be construed in a sense which would secure equality, not in a sense which would defeat it.[1]

Construction *ejusdem generis*.—An important principle, generally spoken of as the rule of construction *ejusdem generis*, may be stated as follows. Where a list of things is given, to which some provision of the contract applies, and that list concludes with wide general words, the meaning of these general words is so far controlled by the context that they apply only to things of the same class (*ejusdem generis*) as those in the preceding list.[2] So a policy of insurance on a ship, enumerating various causes of injury, which were held all to fall within the *genus* or description of perils of the sea, and ending with the words "all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of insurance or any part thereof," was held not to cover damage to the donkey engine by the action of sea water.[3] Such a clause only covers "all cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes."[4] And where delivery of cargo was excused if caused by "war, disturbance, or any other cause," it was held that these last words only covered an obstacle to delivery similar to those mentioned, not temporary ice at the port of delivery.[5] Again, where the demurrage clause in a charter-party provided for delay in loading caused, *inter alia*, by "holidays, strikes, stoppage at the colliery at which the ship is booked to load first, . . . detention by railway or cranes, stoppage of trains, accidents to machinery, or any other unavoidable cause," and delay was caused by failure to get a berth owing to the congestion of shipping at the port, it was held that as all the causes of delay enumerated were those arising from some breakdown of the normal arrangements of the port, delay arising from the ordinary rule that only a limited number of ships could get berths was not *ejusdem generis* to the enumerated causes, and was therefore not covered by the general words, "any other unavoidable cause."[6]

This rule of construction is to be taken subject to two qualifications. (*a*) In order that it may be applicable the things enumerated must be all of one *genus* or description. Thus a lease reserved to the landlord power to resume part of the subjects let for the purposes of "planting, feuing, or letting on building leases, or for making, altering, or widening roads, or for making railroads or canals, or for any other purpose." Part of the lands were sold to the Admiralty for the purpose of constructing a naval base. In a question whether the tenant was entitled to compensation (beyond that provided for in the lease) he maintained that the purpose for which the land was taken was not directly included in the clause of resumption, and was not covered by the words "for any other purpose," because it was not

[1] *Lochgelly Iron and Coal Co.* v. *North British Rly. Co.*, 1913 (H.L.), 1 S.L.T. 405.

[2] Ersk. iii. 4, 9. The same principle is applied to the construction of statutes (*Henretty* v. *Hart*, 1885, 13 R. (J.C.) 9; *Walker* v. *Lamb*, 1892, 19 R. (J.C.) 50; *Powell* v. *Kempton Park Racecourse Co.* [1899], A.C. 143; Craies on *Statutes*, 3rd ed., 163; *Baird* v. *Lees*, 1924, S.C. 83).

[3] *Thames and Mersey Insurance Co.* v. *Hamilton*, 1887, 12 App. Cas. 484. See Marine Insurance Act, 1906 (6 Edw. VII. c. 41) Sched. I., Rule 12. "The term 'all other perils' includes only perils similar in kind to the perils specifically mentioned in the policy."

[4] *Thames and Mersey Insurance Co.* v. *Hamilton*, 1887, 12 App. Cas. 484, per Lord Bramwell, at p. 492.

[5] *Knutsford Steamship Co.* v. *Tillmans* [1908], A.C. 406.

[6] *Abchurch Steamship Co.* v. *Stinnes*, 1911, S.C. 1010; *Richardson and Samuel, In re* [1898], 1 Q.B. 261; *Thorman* v. *Dowgate Steamship Co.* [1910], 1 K.B. 410; *Northfield Steamship Co.* v. *Compagnie l'Union des Gaz* [1912], 1 K.B. 434; *Arden Steamship Co.* v. *Mathwin*, 1912, S.C. 211.

ejusdem generis with the cases enumerated. On behalf of the Admiralty it was argued that the general rule of construction did not apply, because there was no *genus* to which all the enumerated particulars could be ascribed. It was not necessary to rest the decision on this argument, as it was held that the construction of works for a naval base was *ejusdem generis* to "feuing or letting on building lease," but the opinions were that it was sound.[1] (*b*) Words may be so general as to preclude the argument that they do not fairly bear their literal construction, in spite of the context. It is a conceivable view that particular cases are introduced only by way of emphasis or illustration. Thus the Corporation of Glasgow let to a tramway company the right to use tramways within their area on condition that the company should pay to the corporation "the expense of borrowing, management, etc., and this provision shall be so construed as to keep the corporation free from all expenses whatever in connection with the said tramways." The question was raised as to the liability of the company to relieve the corporation of owner's assessments. It was held that to construe the agreement on the principle that the last clause was limited to expenses *ejusdem generis* with expenses of borrowing and management would amount to striking out the words "all" and "whatever," and therefore that the clause must be read in its normal meaning, and as wide enough to cover any expense to which the formation of the tramways had given occasion.[2] And so where a clause in a charter-party covered "frosts, floods, strikes, and any other unavoidable accidents or hindrances of what kind soever," it was held that the last words were so wide as to cover delay in loading owing to the congestion of shipping at the port, though this was not *ejusdem generis* to the particular cases enumerated.[3] The case for construction *ejusdem generis* is weakest where the general words precede the particular.[4]

Expressio unius est exclusio alterius.—The maxim *expressio* (*vel enumeratio*) *unius est exclusio alterius* applies where particular cases are provided for by a contract, without any general or inclusive words. There is then a presumption that similar cases not expressly provided for are excluded. "If authority is given expressly, though by affirmative words, upon a defined condition, the expressing of the condition excludes the doing of the act authorised under other circumstances than those so defined."[5] So where by a *mortis causa* disposition the liferenters who should take under it were laid under a general prohibition against "selling, mortgaging, or otherwise disposing of" their interests, and an irritant clause was provided, declaring that "such sales and mortgages" should be null, it was held that as the words "or otherwise disposing of" were not repeated in the irritant clause, dispositions which were not sales or mortgages were not covered by it, and therefore that a trust disposition for behoof of creditors was

[1] *The Admiralty* v. *Burns*, 1910, S.C. 531. See also *Crichton Stuart* v. *Ogilvie*, 1914, S.C. 888; a case on the construction of a statute. The meaning of the word "*genus*" in this connection has been considered in a very learned opinion by M'Cardie, J. His conclusion is: "The only test seems to be whether the specified things which precede the general words can be placed under some common category. By this I understand that the specified things must possess some common and dominant feature." *Magnhild* v. *M'Intyre Brothers* [1920], 3 K.B. 321 (revd. on a separate ground [1921], 2 K.B. 97).

[2] *Glasgow Corporation* v. *Glasgow Tramways, etc., Co.*, 1897, 24 R. 628; revd. 1898, 25 R. (H.L.) 77.

[3] *Larsen* v. *Sylvester* [1908], A.C. 295. Cp. *Arden Steamship Co.* v. *Mathwin & Son*, 1912, S.C. 211; *Northfield Steamship Co.* v. *Compagnie l'Union des Gaz* [1912], 1 K.B. 434; *Ballingall* v. *Dundee Ice, etc., Co.*, 1924, S.C. 238, at p. 241.

[4] *Ambatielos* v. *Anton Jurgens* [1923], A.C. 175.

[5] Per Willes, J., in *North Stafford Steel Co.* v. *Ward*, 1868, L.R. 3 Ex. 172, at p. 177.

valid.[1] And where a contract by several parishes combining for the erection of a poorhouse provided that the board of managers should have the power to appoint certain officers, and (*inter alia*) might appoint the same person to the offices of governor and secretary, it was decided that the expression of the power to combine certain offices implied a prohibition to combine any others, and therefore that a resolution to appoint the same person as house governor and medical officer was *ultra vires*.[2]

Ambiguous Expressions Construed as Obligatory. —The Court will not readily accept, in any contract, a construction of ambiguous language which in effect leaves it open to a party who has incurred an obligation to refuse to implement it. So in insurance policies a clause providing that the insured must furnish proof of loss satisfactory to the directors of the insurance company does not entitle them to reject proof which would in ordinary circumstances establish the fact in question.[3] A charter-party which fixes no day for the arrival of the ship at the port of loading leaves the shipowner under an obligation to arrive within a reasonable time, and a cancelling clause is not construed as exempting him from a claim of damages for failure to fulfil that obligation.[4] Where the obligation of a charterer to furnish a cargo was qualified by an exception in case of delay owing to strikes, the onus lay upon him to prove that he had done all he could to furnish the cargo, and had failed owing to the strikes. That onus was not discharged when it was proved that a strike had caused a colliery to lessen its output; but it was also shewn that the charterer, by making a contract with the colliery in more stringent terms, might have secured delivery in spite of the strike.[5] In *Kilmarnock District Committee* v. *Somerrell*,[6] an agreement between a local authority which proposed to construct waterworks and the proprietor of the lands on which the works were to be constructed provided that the plans should be "submitted to and approved by" the proprietor. He maintained that he was entitled to an absolute veto. The Court, taking into consideration the position of the parties, and the other provisions of the contract, refused to accept this interpretation, and ordained him to lodge objections to the plans, to be submitted to arbitration under a general clause of reference. In *Seitz* v. *Brown & Co.*,[7] *A.* agreed with the directors of a company to communicate to them, and to fit up in their works, a method or process of using their products, of which he was the inventor. He was to receive a fixed payment. The method was not patented, and anybody was entitled to use it. The contract was declared to be conditional on the directors being satisfied with the method, which could be inspected in another mill. The directors made the inspection, but did not intimate whether they were satisfied or not. Subsequently they employed another expert, who was acquainted with *A.'s* method, to make alterations in their mill, which were held to amount, in all

[1] *Chaplin's Trs.* v. *Hoile*, 1891, 19 R. 237. As to similar discrepancies between the prohibitory and irritant clauses in entails, see *Rennie* v. *Horne*, 1838, 3 Sh. & M'L. 142; *Earl of Kintore* v. *Lord Inverury*, 1863, 4 Macq. 520.

[2] *Kilwinning Parish Council* v. *Cunninghame Combination Board*, 1909, S.C. 829.

[3] *Braunstein* v. *Accidental Death Insurance Co.*, 1861, 1 B. & S. 782; *Ballantine* v. *Employers' Insurance Co.*, 1893, 21 R. 305. As to the construction of a provision that a purchaser must furnish a "sufficient" cautioner, see *Menzies* v. *Barstow*, 1840, 2 D. 1317. And see, as to the construction of discretionary powers, *supra*. p. 302.

[4] *Nelson & Sons* v. *Dundee East Coast Shipping Co.*, 1907, S.C. 927.

[5] *Dampskibselskabet Danmark* v. *Poulsen*, 1913, S.C. 1043. See also *Schele* v. *Lumsden*, 1916, S.C. 709, opinion of Lord Guthrie.

[6] 1906, 14 S.L.T. 567. See also *Calder* v. *Police Commissioners of North Berwick*, 1899, 1 F. 491.

[7] 1872, 10 M. 681.

essentials, to an adoption of that method. It was held that they were liable in damages to *A.* for breach of contract. They were bound, if they approved the method, and desired to use it, to employ *A.* on the terms agreed upon.

No Advantages from Default.—Terms at all ambiguous will not be interpreted in a sense which would enable one party to gain an advantage from his own default or wrong. This has been illustrated chiefly in cases where it is provided that on the occurrence of a certain event the contract shall be void. Such provisions are to be construed subject to the implied condition "that the conduct or situation of the party treating the contract as void shall not have been the means whereby the event which gives rise to the condition has been brought about."[1] So if there is a provision that in a certain event, involving default by one party, the contract shall be void, the word "void" is read as equivalent to "voidable in the option of the other party."[2] In *Bidoulac* v. *Sinclair's Tr.*,[3] an agricultural lease contained a clause declaring that in the event of the tenant's bankruptcy the lease should "*ipso facto* become null and void, as if the same had never been entered into." The tenant became bankrupt, and the trustee renounced the lease. The landlord lodged a claim for damages. The trustee rejected the claim, on the ground that, by the terms of the writing, the lease became *ipso facto* void on the tenant's bankruptcy, and therefore that the renunciation merely recognised the fact of avoidance, and did not constitute a breach of contract. It was held that the fair construction of the writing was to give the landlord the right to declare the lease void if he chose to do so; not to import a nullity of which the tenant could take advantage. On similar principles a provision in articles of roup that goods unpaid for "shall" be resold gives a right to the auctioneer, none to the defaulting purchaser.[4] So again, if the articles of a company provide that on non-payment of calls the shares shall be forfeited, the provision will as a rule be read as giving the directors the option to forfeit the shares, not as entitling the shareholder to maintain that he has automatically ceased to be a member of the company,[5] though in an exceptional case, where the regulations of a building society allowed no direct action for payment of instalments, but provided for the imposition of fines for non-payment, with the further provision that when the fines imposed equalled the amount standing at the member's credit that amount should be forfeited and the member should cease to have any interest in the society, it was held that the ordinary rule did not apply, that the forfeiture was to be regarded as automatic, and consequently that the member to whose account the rule applied had ceased to be a member of the society, and was not liable as a contributory when, after an interval of twenty years, the society was in liquidation.[6]

[1] Per Lord Shaw, *New Zealand Shipping Co.* v. *Société des Ataliers de France* [1919], A.C. 1, at p. 12.

[2] *Kinloch* v. *Mansfield*, 1836, 14 S. 905; *Burns* v. *Martin*, 1885, 12 R. 1343; revd. 1887, 14 R. (H.L.) 20; *Bidoulac* v. *Sinclair's Tr.*, 1889, 17 R. 144; *Quesnel Forks Gold Mining Co.* v. *Ward* [1920], A.C. 222. So, in the construction of a statute, the term "null and void" may be read as "voidable"—*Malins* v. *Freeman*, 1838, 4 Bing. N.C. 395.

[3] 17 R. 144.

[4] *Robinson, Fisher & Harding* v. *Behar* [1927], 1 K.B. 513.

[5] *Moore* v. *Rawlins*, 1859, 6 C.B. N.S. 289; Wilton, *Company Law*, p. 635. Under the Companies (Consolidation) Act, 1908, Table A., secs. 24-30, the power of forfeiture is expressly declared to be optional.

[6] *Irvine, Fullarton, etc., Building Society* v. *Cuthbertson*, 1905, 8 F. 1.

CHAPTER XXIII

MUTUALITY OF CONTRACTUAL OBLIGATIONS

Interdependence of Contractual Provisions.—It is a general, though by no means a universal, principle in the construction of mutual contracts, that as the obligations on the one side are the counterparts of the obligations on the other, the undertakings by each party are really conditional; each binds himself to do his part provided that the other does his; neither is absolutely bound to fulfil his obligation irrespective of whether the rights he has contracted for are implemented or not. The application of this rule (which for convenience may be called the principle of mutuality) and the qualifications and exceptions to it, may be considered in reference to two general concepts. The one is, that a party to a mutual contract cannot demand fulfilment of the obligations in which he is a creditor, unless he has performed, or is prepared to perform, the obligations which he has himself undertaken, and in which he is a debtor. The other, briefly stated, is that if it appear that the intention of the parties was to constitute a mutual contract, and not merely a series of independent obligations, both parties must be bound, or neither. The application of the first of these rules may be reserved for consideration in the part of this work dealing with breach of contract; the application of the second, as a question of construction, it is proposed to attempt here.

Principles of Equity.—On this subject the institutional writers are exceedingly vague. Bell states that if the obligations are strictly reciprocal, and not "with a difference of time or place," the consequence is that "both are bound, or neither."[1] Erskine says: "The equality essential to mutual contracts requires that the mutual contractors be bound effectually to one another. If either of the parties can by any defect in the contract shake himself loose of the obligation, equity will not suffer the other party to be fettered."[2] Erskine's conception of equity—and the same conception has coloured much judicial reasoning—is surely a false one. Equity is not an external force, it is a principle of construction. The law of Scotland does not compel parties to frame their contracts upon equitable principles; it may assume, in a question of interpretation, that they have done so.

Option to Avoid Contract.—The general doctrine that both parties must be bound, or neither, has no application to cases where it is expressly provided that one of the parties may, in certain contingencies, have the option of rescinding the contract. Thus a break in a lease in favour of landlord or tenant only is a lawful form of contract. The fact that payment of a bond is not exigible till after the expiry of a certain period does not impliedly deprive the debtor of the right to tender payment at once.[3] The general construction of a conventional irritancy, applicable to a breach of contract

[1] Bell, *Prin.*, sec. 71.
[2] Ersk. iii. 3, 86.
[3] *Fraser* v. *Globe Insurance Co.*, 1830, 9 S. 207.

by one or other party, is that it confers a right to rescind exercisable at the option of the party aggrieved, even if its terms are that on the occurrence of the breach in question the contract shall, *ipso facto*, become null and void.[1] And a party contracting as an agent may stipulate for the right to enforce the contract while protecting himself from any liability to be sued upon it.[2]

Voidable Contracts.—The application of the principle of mutuality is more difficult when the right of one of the parties to rescind a contract, or to resile from his obligations, arises from implication of law and not from any express stipulation. Even then it is not a legal impossibility that the right to rescind should be vested in one party only. It depends on the nature of the defect in the contract from which the opportunity to rescind or resile arises.

The defect in the contract may be that it is voidable on the ground of misrepresentation or fraud. Then the party deceived has the option to rescind or affirm the contract. But though he has the right, in Erskine's words, to "shake himself loose of the obligation," no such right belongs to the party responsible for the fraud. Fraud may involve penalties, never advantages.

***Ultra vires* Contracts.** The defect in the contract may consist in the fact that it is beyond the contractual power of one of the parties. If, as in the case of a minor who has no curators, or, having curators, acts with their consent, the disability is merely of the nature of a personal privilege, and does not amount to a nullity, no one but the party possessing the privilege can found upon it; and a contract by a minor, though reducible on the ground of minority and lesion, is binding on the other party if the minor chooses to enforce it. A more doubtful case is a contract which is not merely voidable at the instance of one party but absolutely beyond his contractual powers. A pupil, it would seem, may maintain a contract,[3] or a minor who has acted without the consent of his curator.[4] Lord Fraser states that although a personal obligation by a married woman is null, yet she can, if she chooses, enforce the obligation undertaken as its counterpart, if the other party was aware that he was dealing with a married woman.[5] But a different conclusion has been reached in England in cases of contracts *ultra vires* of corporate bodies. When *A.* took shares in a company, on condition that he should have the company's custom for his goods, and that the price should be set against the calls on the shares, it was held, in the liquidation of the company, that as the contract was *ultra vires*, it was not binding upon either party, and therefore that *A.* was not liable as a contributory.[6] And where a contract by a corporation, which required, according to English law, to be entered into under the corporate seal, was concluded without it, it was decided that as the corporation was not bound by the contract it had no right to enforce it.[7]

Mutuality in Improbative Agreements.—In contracts relating to heritage, and in certain other contracts, it is a general rule that a probative writing by each party is necessary to constitute a completed and binding agreement. From merely verbal agreements either party may resile.[8] Also, if there is a

[1] *Bidoulac* v. *Sinclair's Tr.*, 1889, 17 R. 144. And see *supra*, p. 406.
[2] *Levy* v. *Thomson*, 1883, 10 R. 1134.
[3] Bankton, iv. 45, 15; Ersk. i. 7, 33; Fraser, *Parent and Child*, 3rd ed., 206.
[4] Fraser, *Parent and Child*, 3rd ed., 495.
[5] Fraser, *Husband and Wife*, 2nd ed., i. 533.
[6] *Pellatt's* case, 1867, L.R. 2 Ch. 527; *National House Property Investment Co.* v. *Watson*, 1908, S.C. 888.
[7] *Mayor of Kidderminster* v. *Hardwick*, 1873, L.R. 9 Ex. 13.
[8] See *supra*, p. 164.

probative writing by one party only, as in the case of a written offer accepted verbally, the contract is still incomplete, and either the party who has made the written offer or the party who has given the verbal acceptance may still withdraw. But this does not depend upon the principle of mutuality, but on the rule of law that in such cases a probative writing on each side is necessary to constitute a completed contract. But where a verbal contract relating to heritage is followed by *rei interventus*, or actings by one party on the faith of it, the other party is bound; and it is probably the law that the party who has acted is also bound, on the theory that both parties to a mutual contract must be bound, or neither.[1]

***Thomson* v. *James*.**—In *Thomson* v. *James*,[2] where it was decided that a contract was complete when an acceptance was posted by the offeree, the difficulty was suggested that as the offeree had, according to a prior decision,[3] the power to withdraw his acceptance if he could bring the withdrawal to the notice of the offerer before the acceptance arrived, there was a period during which the offerer was conclusively bound while the offeree could, in Erskine's phrase, shake himself loose, contrary to the principle of mutuality in contract. If that principle is regarded merely as a canon of construction, the difficulty is more apparent than real. The offerer, according to the reasoning in *Thomson* v. *James*, is to be taken as impliedly agreeing to be bound when the offeree posts his acceptance; he may surely also be taken as impliedly agreeing to submit to the consequence that he is conclusively and the offeree merely provisionally bound.

Option to Terminate Contract without Notice.—In the question whether an employer can dismiss a servant without notice, it is a valid argument in the negative that in the circumstances it cannot be supposed that the servant (*e.g.*, the captain of a ship) can be entitled to give up his employment without warning. The obligation to give notice and the right to receive it must be reciprocal.[4] Thus, dealing with the case of a teacher who was appointed by a school board without any express arrangement as to the duration of his employment or as to notice of dismissal, and who, on being dismissed, claimed damages in default of reasonable notice, it was held that as it could not be supposed that the teacher could leave without notice, it must be inferred that a correlative obligation to give notice was imposed on the school board.[5]

Mutuality in Cases of Statutory Intervention.—In cases where the incidence of contractual obligation is altered by statute, the principle of mutuality is so far recognised that it will be inferred that if a statute declares that the party to one side of a contract is bound, or is free to resile, a corresponding obligation, or a corresponding right to resile, will be inferred in the party on the other side. Thus the right of a lessee, which at common law was a merely personal right against the lessor, was protected by statute against the lessor's singular successors,[6] and the Court inferred that the lessee was bound to the singular successor in the obligations he had undertaken in the lease.[7] The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), enacts (sec. 58): "A sale by

[1] *Bathie* v. *Lord Wharncliffe*, 1873, 11 M. 490, per Lord Deas, at p. 498. And see *supra*, p. 174.

[2] 1855, 18 D. 1. And see *supra*, p. 33.

[3] *Countess of Dunmore* v. *Alexander*, 1830, 9 S. 190, narrated *supra*, p. 38.

[4] *Creen* v. *Wright*, 1876, 1 C.P.D. 591.

[5] *Morrison* v. *Abernethy School Board*, 1876, 3 R. 945; see also *Devonald* v. *Rosser* [1906], 2 K.B. 728. But a person holding an office involving a *munus publicum* is free to resign, though he cannot be dismissed. *Somers* v. *Teviothead School Board*, 1879, 7 R. 121.

[6] Act 1449, c. 17.

[7] *Hall* v. *M'Gill*, 1847, 9 D. 1557.

auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid." The Second Division arrived at the conclusion that it necessarily followed from this rule that the exposer might withdraw any article until the fall of the hammer.[1] The result was arrived at on the theory of the mutuality of contractual rights. "If it is in the power of any competitor at an auction sale to retract his bid before the fall of the hammer, it follows that the exposer is equally entitled to withdraw his subject, because if the competitor is not bound, the exposer is not bound either."[2]

Divisibility of Contracts.—In the question whether a contract is divisible, so that some of its provisions may be enforced, though the contract as a whole may be unenforceable, one test is to consider whether the bargain so divided could have been enforced on either side. In *Allan* v. *Gilchrist*[3] the action, as originally framed, concluded for implement of a verbal bargain for the sale of a house, with the stock in trade and fittings therein contained, and the goodwill of a business. There was an alternative conclusion for damages. It was held that the contract as a whole, being a verbal bargain relating to heritage, was not enforceable. The pursuer then proposed to restrict his conclusions to a claim for damages for failure to carry out the contract in so far as it consisted of a sale of moveables, *i.e.*, of the fittings, stock in trade, and goodwill. This claim was submitted to the test whether implement could have been demanded of this part of the contract by each party. To answer that affirmatively would have involved that the defender would have been entitled to tender the goodwill and stock of a business without giving the pursuer any right to the premises in which the business was carried on. Such a tender, it was held, the pursuer would not have been bound to accept; it followed that he could not have demanded implement so restricted, and, if he could not have demanded implement, he could assert no right to damages for failure to implement.

Contracts Enforceable in Part.—But it is not an absolute rule that, because a contract is as a whole unenforceable, one party may not be entitled to enforce it in part, though, if the situation were reversed, he would not be bound to accept partial performance. If the contract is that *A.* is to give something in return for something to be given by *B.*, *A.*, if prepared to implement his side of the contract, may be entitled to demand from *B.* something less than a full return, and thereby to get over the difficulty that *B.*'s offer exceeds his contractual powers, though *A.* would not have been bound to perform his side of the contract in return for merely partial performance by *B.* As an English judge has observed, "a vendor cannot make a purchaser take an estate with a bad title, but the purchaser may compel the vendor to give him the estate with such title as he has."[4] In *Bain* v. *Lady Seafield*,[5] the minister of a parish, with the consent of the Presbytery, made an excambion of the site of the church, churchyard, and glebe for other lands in the vicinity belonging to a neighbouring proprietor. It was found to be incompetent to alienate the site of the church and churchyard without the consent of the heritors, but held that it did not follow that the minister was entitled to succeed in an action for the reduction of the contract. The proprietor, if he chose to give the lands he had agreed

[1] *Fenwick* v. *Macdonald, Fraser & Co.*, 1904, 6 F. 850.
[2] *Fenwick, supra*, per Lord Trayner, 6 F., at p. 854.
[3] 1875, 2 R. 587.
[4] Per Wigram, V.C., *Sutherland* v. *Briggs*, 1841, 1 Hare 26.
[5] 1887, 14 R. 939.

to give and to accept only the glebe in return, was entitled to maintain the contract to that extent, although he would have had the right to reduce the contract on the ground that the whole subjects for which he had stipulated could not be given. So it was held by the Lord Ordinary, and affirmed by the Court, that the proprietor (in the actual case his widow and successor) had the right to retain the glebe, which the minister, with the consent of the Presbytery, and without the consent of the heritors, was entitled to excamb. In *Cleland* v. *Morrison*,[1] again, it was held that a contract might be maintained by one who would have been entitled, had he pleased, to reduce it. An heir of entail, who had power to feu part of the estate, feued eleven acres, and also conferred upon the feuar the right to take stones from a quarry. In a question with a succeeding heir, who was insisting on a reduction of the feu-contract, the Lord Ordinary found that the heir of entail in possession had no power to grant the right to take stones from a quarry forming part of the entailed estate, but that the contract was divisible, and therefore that it might be reduced *quoad* the right to take stones but sustained as a valid feu-right. In the Inner House the contract was held to be reducible on other grounds, but opinions were expressed in favour of the principle to which the Lord Ordinary had given effect. It is somewhat difficult to understand, in view of these authorities, the opinions given in *Earl of Galloway* v. *Duke of Bedford*.[2] An heir of entail had granted a lease comprising the salmon and trout fishings in a river. In a question whether the lease was binding on a succeeding heir of entail the Lord Ordinary (Kyllachy) held that a lease of salmon fishings was *intra vires*, but that a lease of the trout fishings was not. On a minute being lodged by the lessees, to the effect that they were prepared to pay the whole rent for the subjects without the trout fishings, the Lord Ordinary held that they were entitled to maintain the lease as a lease of the salmon fishings, on the ground that their offer did not involve a reforming of the contract, but merely a qualified and partial reduction. In the Inner House it was decided, on the special terms of the lease, that it had not been fortified by possession, and on that ground was not binding on a succeeding heir. Apart from this, however, opinions were expressed that the lessees were not entitled, by offering to give up the lease *quoad* the trout fishing, to save the rest of the lease from reduction, on the ground that they were trying to force on the heir a contract which his predecessor had not made. But it is hard to see any distinction between the proposal involved in the lessees' minute—to give the whole consideration, but not to demand the whole return—and the contentions that were held to be admissible in *Bain* v. *Lady Seafield* [3] and *Cleland* v. *Morrison*.[4] The latter case, so far as appears from the report, was not referred to.

Mutuality in Questions of Assignability. The principle of mutuality has been invoked in cases relating to the assignability of rights arising under mutual contracts, but it is submitted that in such cases it is not entitled to any weight. It is argued that if *A.* contracts with *B.*, and then assigns his rights under the contract to *C.*, *B.* is not bound to accept performance from *C.*, because, in a question with him, *C.* is not bound to perform, and both parties must be bound, or neither.[5] But to this argument there seem to be two sufficient answers—(1) If the contract is assignable it must be so in

[1] 1878, 6 R. 156.
[2] 1902, 4 F. 851.
[3] 1887, 14 R. 939.
[4] 1878, 6 R. 156.
[5] *Grierson, Oldham & Co.* v. *Forbes, Maxwell & Co.*, 1895, 22 R. 812; see opinion of Lord Kincairney (Ordinary) at p. 814.

virtue of agreement to that effect, express or implied, by the original parties to it, and the man who agrees to his contract being assignable impliedly agrees to accept performance from an assignee who is not bound to give it. He waives the objection founded on the theory that both parties must be bound, or neither. (2) Though, in the case supposed, *C.* is not directly bound to *B.*, yet as he takes the contract on the terms on which his cedent (*A.*) held it, he cannot enforce it against *B.* unless he is prepared to perform the obligations which were incumbent on *A.*

Questions of Agency.—Another case where the principle of mutuality may be of importance is where an agent makes an offer which is beyond the powers committed to him, and that offer is accepted. Then the principal, by ratifying the unauthorised act of the agent, may complete the contract, making it binding on himself as well as on the party with whom the agent contracted. It is still an undecided point whether that party has the right to resile before the principal has ratified the contract. Against him it may be argued that the effect of ratification of a contract is to make it binding from its date, for him, that if he is not entitled to resile, he is bound by a contract to which the other party is not bound, having still the power to disclaim the unauthorised act of the agent.[1]

[1] See opinion of Lord Salvesen in *Goodall* v. *Bilsland*, 1909, S.C. 1152; and *supra*, p. 145.

CHAPTER XXIV

ASSIGNABILITY OF CONTRACTUAL RIGHTS

It has already been noticed that the assignee of the rights of a contracting party has a right to sue on the contract, reserving the question, now to be considered, in what cases the rights under a contract are assignable.

Assignability of Debts.—In the earlier law of Scotland, as the history of the forms of assignation indicates, the creditor in an obligation to pay money had not generally the power to assign the right to exact payment.[1] But it has long been settled that a claim for payment of money is assignable, whether arising from an express contract to pay, from a breach of contract involving liability in damages,[2] or from an obligation of relief.[3] The assignee may sue in his own name, or sist himself as pursuer in an action commenced by the cedent.[4]

Alimentary Rights.—An obligation to pay money in the nature of a liferent or annuity may be declared to be alimentary, and, if so, is not assignable by the party in whose favour it is incurred.[5] To exclude the diligence of creditors, or the claim of an assignee for onerous causes, the funds from which the payment is derived must be vested in trustees.[6] The law, moreover, does not admit of the imposition of an alimentary or non-assignable character upon a capital sum.[7] It has never been decided that an assignation of so much of an alimentary fund as may exceed a reasonable maintenance for the holder thereof is not competent, but the Court has refused to declare **ab ante** that he had power to assign either a specified proportion of the fund, or the excess over a sum fixed by himself as a reasonable maintenance.[8] A provision that a particular sum shall be unassignable, though it may be unavailing in a question with creditors, is sufficient to preclude a gratuitous assignation. "It may safely be affirmed that a gratuitous assignee would be affected by such a condition in the same manner as his cedent; indeed it is elementary that a mere donee can have no right to the subject of gift except such as his cedent had power to give."[9]

Debt Declared Unassignable.—The effect of an express provision by a party incurring a pecuniary obligation that the debt shall not be assignable

[1] Stair, iii. 1, 2; Ersk. iii. 5, 2; Bell, *Prin.*, sec. 1459; Menzies, *Conveyancing*, 2nd ed., 268.

[2] Stair, iii. 1, 3; Erskine and Bell, *ut supra*; *International Fibre Syndicate* v. *Dawson*, 1901, 3 F. (H.L.) 32, per Lord Robertson. The assignability of a claim for damages arising *ex contractu* is assumed as clear law in cases dealing with claims arising *ex delicto* (*Constant* v. *Kincaid & Co.*, 1902, 4 F. 901; *Traill & Sons* v. *Aktieselskabat Dalbeattie*, 1904, 6 F. 798; *Riley* v. *Ellis*, 1910, S.C. 934).

[3] *Reid* v. *Lamond*, 1857, 19 D. 265; *Wylie & Lochhead* v. *Hornsby*, 1889, 16 R. 907.

[4] *Fraser* v. *Duguid*, 1838, 16 S. 1130.

[5] *Rennie* v. *Ritchie*, 1845, 4 Bell's App. 221; *Lord Ruthven* v. *Drummond*, 1908, S.C. 1154, and see M'Laren, *Wills and Succession*, 3rd ed., i. 618.

[6] *Forbes' Trs.* v. *Tennant*, 1926, S.C. 294, where the prior cases are reviewed.

[7] *Watson's Trs.* v. *Watson*, 1913, S.C. 1133.

[8] *Cuthbert* v. *Cuthbert's Trs.*, 1908, S.C. 967.

[9] *Murray* v. *Macfarlane's Trs.*, 1895, 22 R. 927, per Lord M'Laren, at p. 936.

by the creditor is a point on which there is little authority. Such a provision in a deed by which a party conveys his own property to trustees is not effectual in a question with an onerous assignee.[1] "No one is entitled so to protect his own income against his own onerous obligations and the claims of his lawful creditors."[2] But a provision that a debt is not to be assigned would probably be sufficient to bar a claim by a gratuitous assignee of the creditor. In *Boswall* v. *Arnott*[3] an acknowledgment of trust bore that a bond was held for two sisters, expressly excluding their assignees. It was held on the death of one of the sisters that the survivor had a right to her share preferable to that of a gratuitous assignee from her.

Assignability of Right to Conveyance.—As the right to a payment due under a contract is assignable so is the right to the conveyance or transfer of a particular thing. Where a contract is so far executed that nothing remains to be done except to convey or transfer property on the one hand, and to pay the price on the other, the benefit of the contract may be transferred by either party, in the absence of any agreement to the contrary. So where a security over heritable property was constituted by an *ex facie* absolute disposition it was regarded as indisputable that the debtor's right to a reconveyance was assignable.[4] In *Aurdal* v. *Estrella*[5] there was an agreement to sell a Spanish ship. The seller was a Spanish, the purchaser a British, subject. After the agreement, but before the property in the ship had passed to the purchaser, the Spanish Government prohibited the transfer of ships to foreigners. To meet the difficulty arising from this change in the law the British purchaser sold his interest in the ship to a Spaniard. It was held that he was within his rights, and that the original seller was bound to execute a bill of sale in favour of the subpurchaser. In *Whitely* v. *Hilt*,[6] *A.* had obtained a piano on hire-purchase terms from *B.* While some instalments remained to be paid, *A.* sold the piano, with the rest of her furniture, to *C.* In an action between *B.* and *C.*, in which the Court proceeded on a finding in fact that *A.'s* conduct was not fraudulent, it was held that the right acquired by a contract of hire-purchase was assignable; that the sale, carrying to *C.* all *A.'s* right, title, and interest in the articles she sold, was equivalent to an assignation: and that *C.* was entitled to tender payment of the remaining instalments and thereby to acquire the property in the piano. It was questioned, but not decided, whether a fraudulent sale by a party possessing on hire-purchase would involve such a repudiation of the contract as to deprive him of any right to the article, and consequently leave him with nothing to assign.[7]

Effect of Formation of Company.—No distinction has ever been drawn,

[1] *Ker's Tr.* v. *Justice*, 1866, 5 M. 4.

[2] *Ker's Tr.* v. *Justice*, *supra*, per Lord Deas, at p. 10.

[3] 1759, M. 12578. See Montgomerie Bell, *Conveyancing*, 3rd ed., i. 330; *Strachan* v. *Barclay*, 1683, M. 4310.

[4] *National Bank* v. *Union Bank*, 1885, 13 R. 380; revd. 1886, 14 R. (H.L.) 1.

[5] 1916, S.C. 882.

[6] [1918], 2 K.B. 808.

[7] *Cooper* v. *Micklefield Coal Co.* (1912, 107 L.T. 457) does not seem in accord with the principle that the benefit under a contract may be assigned, and seems to carry the principle of *delectus personæ* further than is warranted by any Scotch case. A colliery company contracted with *A.*, who was a retail merchant selling his coal by carts sent through the streets, to supply him with a certain amount of coal yearly at a fixed price. The contract had some years to run. *A.* assigned his business, and the contract, to *B.* Hamilton, J., held that the colliery company was not bound to supply the coal to *B.* The element of *delectus personæ* he found in the consideration that *B.*, who had no experience in the business, was less likely to carry it on successfully, and so be able to pay the price. But as *A.* admittedly remained liable for all coal supplied, the element of *delectus personæ* seems very unsubstantial, and it is difficult to see how *A.* did any more than assign the benefit of his contracts.

in a question of assignability, between an assignation to a total stranger and one to a company formed to carry on the business of the cedent, as an individual or as a firm. The company, if it proposes to enforce the contract, must shew that it was assignable, not necessarily to anyone, but to anyone capable of satisfying the obligations which the contract involved.[1]

Change in Partnership.—A change in the constitution of a partnership may raise questions of difficulty. There is no general rule that such a change, whether by withdrawing or adding a partner, necessarily affects continuing contracts,[2] apart from the statutory provision that a cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the obligation was given.[3] In other cases it has been laid down that "wherever the motive or consideration of the contract is founded in any material degree upon the confidence of the one party in the integrity, ability, and judgment of the other it must be assumed that the obligation was intended to be limited to the firm as actually constituted."[4] This rule would seem to leave contracts unaffected by the introduction of a new partner; and it has been decided that where the original contracting party, then trading alone, assumed three partners, the firm could enforce a contract with a servant.[5] Again, if a party contracting with a firm is not aware who the partners are, a change in the personnel will not affect the contract.[6] At the opposite extreme is the case where the acting partner, who was the only one known, retired, and it was found that a sleeping-partner, who proposed to carry on the business, could not enforce a contract.[7] Where three partners in a tea-room contracted to give board and lodging for a year, and the firm was dissolved by the retirement of the partner with whom references had been given and exchanged, it was decided that the lodger was no longer bound.[8] A narrower case was *Jaeger's Sanitary Clothing Co.* v. *Walker*.[9] There a firm of three partners had undertaken to supply *A.* with a particular kind of cloth of which they were the manufacturers, and had also bound themselves not to supply the same cloth to other parties. One of the partners retired. It was decided, mainly on the ground that the observance of the negative covenant involved individual care and attention, that the result was to give *A.* the right to terminate the contract if he pleased. In the case of contracts with a servant or agent, whether, according to the Scotch practice, entered into with the firm, or, according to the English, with all the individual partners, the death of one partner avoids the contract, on the principle that the continued survivance of all parties was an implied term.[10] Where two out of four partners voluntarily

[1] *Grierson, Oldham & Co.* v. *Forbes, Maxwell & Co.*, 1895, 22 R. 812; *Berlitz School of Languages* v. *Duchene*, 1903, 6 F. 181.

[2] Bell, *Com.*, ii. 526. See the distinction, in its effect on contracts, of a change in the constitution of a firm and of the conversion of a business into a company, drawn by Lord M'Laren in *Berlitz School*, *supra* (6 F., at p. 186). It is conceived that there are many cases, for instance, the appointment of a firm of accountants as auditors, where the contract would be in no way assignable, but would not be affected by a change in the constitution of the firm.

[3] Partnership Act, 1890, sec. 18.

[4] Per Lord Kinnear (Lord Ordinary), *Alexander* v. *Lowson's Trs.*, 1890, 17 R. 571.

[5] *Harkins* v. *Smith*, 1841, 13 Sc. Jur. 381.

[6] *Phillips* v. *Alhambra Palace Co.* [1901], 1 Q.B. 59.

[7] *Robson* v. *Drummond*, 1831, 2 Barn. & Ad. 303.

[8] *Yorke* v. *Campbell*, 1904, 12 S.L.T. 413.

[9] 1897, 77 L.T. 180.

[10] *Hoey* v. *M'Ewan & Auld*, 1867, 5 M. 814; *Tasker* v. *Shepherd*, 1861, 6 H. & N. 575; *Friend* v. *Young* [1897], 2 Ch. 421.

retired, it was decided that a servant, who had been engaged for a period of years by all four, might treat this retirement as a breach of contract, for which he might claim damages.[1]

Delectus personæ.—The question whether a contract involving obligations other than the payment of money is assignable depends generally upon whether these obligations indicate an element of *delectus personæ*. It might be argued, though with no support from the authorities, that there is *delectus personæ* in almost every contract. *A.*, contracting with *B.*, must have had some reason for preferring *B.* to others, even although the service he requires from *B.* may be one that anybody could furnish. *Delectus personæ* means more than this, it is at least confined to cases where the Court finds evidence of deliberate choice as opposed to mere caprice. To define it exactly would be a very difficult task; a general description, frequently cited, was given by Bramwell, B., in *Boulton* v. *Jones*.[2] "Where a contract is made in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose and adopt the contract."

Degrees of Assignability.—A contract may be assignable in three senses, or, as it might otherwise be put, there are three degrees of assignability. (1) The contract may be so completely assignable that the original party may not only transfer his contractual rights to the assignee, but also free himself from his contractual liabilities. (2) It may be assignable in the sense that an assignee acquires the right to tender performance and sue for its counterpart, the cedent nevertheless remaining liable if the contract be not implemented. (3) It may be assignable only in the sense that one or other party may fulfil the obligations he has undertaken through the agency of a third party, without giving that third party any right to enforce the contract on introducing him into the contractual relationship.

Effect of Assignation on Liability.—Subject to any express provision, and to the possibility, in what is after all a question of interpretation of intention, that the Court may hold in any particular case that the parties intended that one or other should cease to be liable if he assigned his position under the contract, there is no general principle of law by which a party who has entered into a contract can get rid of the liabilities it may involve by assigning it to a third party. He may be entitled to assign the right to perform the contract, so that the other party may be bound to accept performance by the assignee and must submit to be sued by him, but the liabilities remain. *Prima facie*, there is always *delectus personæ* in the choice of a debtor.[3] So while an agreement to buy entitles the purchaser to assign the right to demand the article, he remains liable for the price.[4] A party sending goods remains liable for freight though the obligation may be to deliver to the

[1] *Brace* v. *Calder* [1895], 2 Q.B. 253. As the two remaining partners continued the business and offered to keep the plaintiff on the existing terms, the damages were nominal.

[2] 1857, 2 H. & N. 564. Adopted by Lord Kincairney (Ordinary) in *Grierson, Oldham & Co.* v. *Forbes, Maxwell & Co.*, 1895, 22 R. 812, 814; by Lord Mackenzie (Ordinary) in *Cole* v. *Handasyde & Co.*, 1910, S.C. 68, 70. The statement should be amplified by adding to "personality" business reputation. Thus the *delectus personæ* may consist in the reputation of a company, to which personality can hardly be attributed. *Griffith* v. *Tower Publishing Co.* [1897], 1 Ch. 21.

[3] See opinions in *Stevenson* v. *Maule & Son*, 1920, S.C. 335. The rule is well put by Atkin, J.: "Under ordinary circumstances it is quite clear that a contracting party cannot assign a contract so as to relieve himself of its burdens. He cannot, against the consent of the other party, substitute for himself a person who is put under the sole obligation to perform the contract." *Fratelli Sorrentino* v. *Buerger* [1915], 1 K.B. 307; (in C.A. [1915], 3 K.B. 367).

[4] *Aurdal* v. *Estrella*, 1916, S.C. 882.

consignee, and though the consignee, by taking the goods, also incurs liability, and may have a title to enforce the original contract.[1] The law considered in a preceding chapter,[2] under which the liability of a vassal or of a lessee may terminate on the transfer of their respective interests, is, it is conceived, exceptional, resting rather upon established practice than upon any definite principle.[3] Other contracts may be assignable without involving the consequence that the original party to the contract can by an assignation relieve himself of the liabilities he has undertaken.

Contracts for Lengthened Period.—But the question whether the liability on a contract is to remain after an assignation of it is one of the presumed intention of the parties. There may be sufficient indication that their intention was that both the rights and liabilities should pass to an assignee. This may be inferred from the fact that the reciprocal obligations under the contract are to endure for a period sufficiently long to exclude the possibility or probability of their being performed by the original parties. And this inference may hold good even though the provisions of the contract involve the element of *delectus personæ*. In *Tolhurst* v. *Associated Portland Cement Co.*,[4] *A.*, the proprietor of chalk quarries, undertook to supply a company, known as the Imperial Company, with at least 750 tons of chalk weekly, or so much more as the company should require. The contract was to endure for fifty years. The Imperial Company sold its business to a company with a larger capital, and it was held that although the contract involved elements of *delectus personæ*, yet the company to which it had been assigned was entitled to enforce it. The *ratio decidendi*, as explained in a subsequent case,[5] was that the duration of the contract indicated that the intention on each side was to contract with a particular business rather than with a particular individual or company. The argument that an assignation might increase the burden of the contract, in respect that an assignee might require more chalk than the original party, was met by the reply that the Imperial Company had power to increase its capital, business, and requirements.

The fact that obligations were undertaken in perpetuity was not held to render the contract assignable in a case in Scotland presenting some features of resemblance to *Tolhurst* v. *Associated Portland Cement Co.*[6] The magistrates of a burgh, by a contract recorded in an Act of Council, agreed with *S.*, the proprietor of a neighbouring estate, that they should have the right "in all time coming" to take stones from certain quarries for all the public works belonging to the burgh, and that in return *S.*, "his heirs and assignees whatsomever," should have the liberty of exporting his crops without payment of shore dues. After this agreement had been acted on, both by the magistrates and the heirs of the proprietor, for 114 years, an Act of Parliament was passed by which the harbour of the burgh was transferred to a body of harbour trustees, who were authorised to levy harbour dues, and to borrow money for the improvement of the harbour. The Act had no provisions with regard to the contract with *S.* The harbour trustees claimed the right to take stones from the quarries for extensive improvements which they proposed to make. It was held that as the contract was originally made with the magistrates, who had limited powers of rating, and therefore limited

[1] *Laing* v. *Finlayson*, 1805, Hume, 313; Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), sec. 2.

[2] *Supra*, p. 260.

[3] See opinions in *Skene* v. *Greenhill*, 1825, 4 S. 25.

[4] [1903], A.C. 414.

[5] *Kemp* v. *Baerselman* [1906], 2 K.B. 604.

[6] *Magistrates of Arbroath* v. *Strachan's Trs.*, 1842, 4 D. 538.

powers of executing improvements, it could not be supposed that it was intended that the privilege of taking stones should be enjoyed by a body possessing wider powers, and able to enter into enterprises which would make that privilege a more severe burden on its granter.

Assignation and Delegation of Work.—When the liability of the original party to the contract has not been in question the problem of assignability has consisted in deciding either whether that party can assign the right to tender performance and to sue for its counterpart, or whether he can fulfil his contract by employing some one else to do the work he has undertaken to do. When the *delectus personæ* consists of a right of compensation these problems are distinct. *A.*, contracting with his debtor, has a clear interest to object to an assignation which would entitle the assignee to sue for payment, and deprive him of the right to set his debt against his liability under the contract, though he may have no interest to object to vicarious performance.[1] When the element of compensation is absent the question whether the work can be delegated and whether it can be assigned so as to give the assignee a title to sue may often depend upon the same considerations. If there is no element of *delectus personæ* such as to demand personal and not substituted performance there would seem to be no reason why the party to whom performance may be delegated should not have the contract assigned to him and with it the title to sue. Within this rule should fall all executory contracts when the obligations are limited to performance on one side, payment on the other. The conditions may be such as to demand personal performance; if so, the contract is completely unassignable; if not, the power to tender performance by a third party should involve the power to assign to him. Thus in *Cole* v. *Handasyde*,[2] where there was a contract with a broker for the supply of black grease, the Court, having arrived at the conclusion that no reliance was placed on the personal attributes of the broker, had no difficulty in holding that the contract was assignable not merely in the sense that the broker could employ a third party to supply the grease, but in the larger sense that he could assign the right to tender delivery and to sue for damages when it was refused.

Cases with Collateral Provisions.—There is, however, another class of cases where, though the main obligations may be reducible to performance on one side and payment on the other—and this may be said of most contracts—there may also be involved collateral and subsidiary obligations on either side, and these may introduce an element of *delectus personæ* which would otherwise be lacking, and present cases where, though performance of the main obligations may be delegated, yet the contract as a whole cannot be assigned. So while a contract to supply some commodity which can be procured in the open market, or to do some work which must necessarily be done through the instrumentality of servants or workmen, does not, on the most recent authorities, present any element of *delectus personæ*, and admits of vicarious performance,[3] yet if the party who has ordered the goods or work has come under some obligation besides the obligation to pay for them, for instance, to abstain from taking similar goods from third parties, or to extend his works so that similar services may be required in future, the contract as a whole will be unassignable though the main part of it

[1] *Boulton* v. *Jones*, 1857, 2 H. & N. 564.

[2] 1910, S.C. 68.

[3] See *Asphaltic Limestone Co.* v. *Corporation of Glasgow*, 1907, S.C. 463; *Stevenson* v. *Manie*, 1920, S.C. 335.

may be delegated to a subcontractor. Thus in *Kemp* v. *Baerselman*.[1] *A.* undertook to supply *B.* with all the eggs he should require for a year. *B.* obliged himself not to take eggs from other dealers. Before the year had expired *B.* assigned his business to a company formed for the purpose of carrying it on. It was held that there was an element of *delectus personæ* in the contract, and therefore that the company could not enforce it against *A.*, though it was not disputed that *A.* could have employed a third party to supply the eggs. In *International Fibre Syndicate* v. *Dawson*,[2] *A.*, the proprietor of a machine for decorticating fibre, entered into a contract with *B.*, the owner of an estate in Borneo, under which he undertook to put up a machine on *B.'s* estate. *B.* undertook to extend his cultivation of fibrous plants by a certain number of acres every three months, and to order further machines as his business required them. These machines *A.* was to furnish at cost price. Subsequently *A.* assigned his business and contracts to a company. The company sued *B.* for, *inter alia*, damages for refusal to order machines in accordance with his contract with *A.* It was held that the pursuers had no title to sue. The contract was not assignable, in respect that it involved on each party subsidiary obligations, on *A.* to supply machines at cost price, on *B.* to extend his acreage of cultivation, introducing an element of *delectus personæ*, which, it is submitted, would have been absent in a contract merely for the supply of a certain number of machines.

The further consideration of this subject may proceed by an examination of the contracts where assignability has been the subject of decision.

Assignability of Leases.—The general principle that the right of a tenant in a lease is not assignable unless expressly declared to be so is well established.[3] Exceptions have been admitted in the case of leases of exceptional endurance or of particular subjects, founded, as has been observed, rather upon practice than upon any particular principle.[4]

Urban Leases.—Leases of urban subjects, *i.e.*, where the main subject of the contract of location is a building, if for a term of years, are assignable, in the absence of any provision to the contrary.[5] In the case of a lease for a year the Court, by a majority, found that there was no power to assign.[6] And leases of furnished houses, involving the hire of the furniture, are probably not assignable.[7] In *Earl of Elgin* v. *Walls* [8] the proprietor of all the houses in a village let an inn and bakehouse, with the exclusive right of selling spirits and bread for ten years. The rent of £160 was declared to be £20 for the subjects let, and the balance for the monopoly conferred; and there were provisions whereby the tenant was tied to a particular brewery, undertook not to keep open after specified hours, and to submit the bread he supplied to the inspection of neutral arbitrators. It was argued that as the subjects were urban the lease was assignable, but held that the contract must be read as a whole, and that its provisions shewed that it was personal to the particular lessee. The case was distinguished from the lease of a shop with the goodwill of a business (which, it was assumed, would be assignable),

[1] [1906], 2 K.B. 604. See also *Jaeger's Sanitary Clothing Co.* v. *Walker*, 1897, 77 L.T. 180, narrated *supra*, p. 413.

[2] 1900, 2 F. 636; affd. 1901, 3 F. (H.L.) 32.

[3] Stair, ii. 9, 26; Mackenzie, ii. 6; Ersk. ii. 6, 31; Rankine, *Leases*, 3rd ed., 171.

[4] See the history of the law in argument in *Elliot* v. *Duke of Buccleuch*, 1747, M. 10329.

[5] *Atchison* v. *Benny*, 1748, M. 10405, Elchies, Tack, No. 13; *Anderson* v. *Alexander*, 10th July 1811, F.C.; Bell, *Prin.*, sec. 1274; Bell, *Com.*, i. 73; Rankine, *Leases*, 3rd ed., 174.

[6] *Gordon* v. *Crawford*, 1825, 4 S. 95.

[7] Rankine, *Leases*, 3rd ed., 175.

[8] 1833, 11 S. 585.

on the ground that such a contract involved " no continued matter of obligation or prestation as to the goodwill after the single act of setting with the goodwill." [1]

Rural Leases.—Leases of rural subjects, where the main object of the lease is the cultivation of the ground, are not assignable if of ordinary duration,[2] and the same rule applies to leases of fishings or shootings.[3] There has been no decision with regard to the assignability of a mineral lease.[4]

It has long been settled that rural leases for an exceptional period are assignable, such as a lease to endure for the lessee's life,[5] or during his occupation of an office,[6] or for a term of years unusual in a lease of the particular subjects.[7] In agricultural leases it is established that a lease of nineteen years is of ordinary duration, and implies neither the power to assign nor sublet ; [8] and that a lease for thirty-eight years is of extraordinary endurance, and implies a power to assign.[9]

Partnership.—It is not an implied condition in partnership that a partner shall have no right to assign his rights in the firm. Such an assignation cannot be objected to by the other partners, except in virtue of an express prohibition in the partnership deed.[10] But though a partner may assign his rights in the firm, he has no right to assign his position in the contract. He cannot make the assignee a partner, nor can he by assigning his rights limit his liability in a question with the other partners.[11] In cases where the matter is not dealt with by an express provision in the contract, the effect of an assignation by one partner, in a question with the others, is now regulated by sec. 31 of the Partnership Act, 1890 (53 & 54 Vict. c. 39).[12] (1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. (2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the

[1] *Earl of Elgin* v. *Walls*, 1833, 11 S. 585, per Lord Glenlee.

[2] Stair, ii. 9, 26 ; Ersk. iii. 6, 31 ; Bell, *Prin.*, sec. 1216. A limited power of assignation is conferred by the Small Landholders (Scotland) Act, 1911 (1 & 2 Geo. V. c. 49), sec. 21.

[3] *Mackintosh* v. *May*, 1895, 22 R. 345, though occupancy of a house included.

[4] The question is considered in *Duke of Portland* v. *Baird*, 1865, 4 M. 10.

[5] Stair, ii. 9, 36.

[6] *Pringle* v. *M'Lagan*, 1802, Hume, 808.

[7] See Rankine, *Leases*, 3rd ed., 173.

[8] *Alison* v. *Proudfoot*, 1788, M. 15290 ; *Earl of Peterborough* v. *Milne*, 1791, M. 15293. Cp. *Earl of Cassilis* v. *Macadam*, 1806, M. App. v. Tack, No. 14 (twenty-one years).

[9] *Simson* v. *Gray*, 1794, M. 15294.

[10] *Cassels* v. *Stewart*, 1879, 6 R. 936 ; affd. 1881, 8 R. (H.L.) 1. See opinion of Lord Chancellor Selborne.

[11] Ersk. iii. 3, 22 ; Bell, *Com.*, ii. 508 ; Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 31. As to the construction of an express power to assign, see Bell, *Com.*, ii. 509 ; *Lonsdale Hematite Iron Co.* v. *Barclay*, 1874, 1 R. 417.

[12] Under the Limited Partnerships Act, 1907 (7 Edw. VII. c. 24), the assignation of the share of a limited partner must be advertised, in the case of a limited partnership registered in Scotland, in the *Edinburgh Gazette*. Until such advertisement the assignation " shall, for the purposes of this Act, be deemed to be of no effect " (sec. 10). It is also provided that, " subject to any agreement expressed or implied between the partners, a person may be introduced as a partner without the consent of the existing limited partners " (sec. 6).

assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.[1]

Bills of Lading.—The effect of a transfer of a bill of lading, as an assignation of the contract between the shipper of the goods and the shipowner, has been already considered.[2]

Contracts for Work.—A contract to do work may promise the personal exertion of the obligant, and is then clearly unassignable. "Nobody supposes that in a contract with *A.* or *B.* to paint a picture or write a book it is possible for *A.* or *B.* to say, 'I will get somebody else to paint you the picture or write you the book, and that must satisfy you, and you must pay me the price.'"[3] The same remark would apply where the skill involved was not literary or artistic, but manual or professional. And it is conceived that in such cases, as well as in service,[4] or apprenticeship,[5] there is *delectus personæ* in the choice of an employer. But there are many contracts for the performance of work where it is known that the work cannot be performed by the obligant personally, but only through the agency of servants or workmen. Then, unless there is an express or implied provision for personal superintendence,[6] the work may be delegated. In *Asphaltic Limestone Co.* v. *Corporation of Glasgow*[7] a company entered into a contract with the corporation by which they undertook to lay certain streets and maintain them for five years. The company went into liquidation, the liquidator carried out the work so far as laying the streets was concerned, and made an arrangement with another company by which they undertook to fulfil the obligation to maintain the streets in repair. It was held that the liquidator was entitled to the contract price. There was, it was held, no element of *delectus personæ* in the contract, and, that being so, the original party might employ another to do the work. In England the same result was arrived at with regard to a contract for the supply of railway waggons, with a similar obligation for upkeep.[8] In *Stevenson* v. *Maule & Son* the defenders, a firm of upholsterers and general warehousemen, contracted to remove, beat, and relay a carpet for Stevenson. They did not advertise themselves as specialists in carpet beating. Without Stevenson's knowledge they sent the carpet to be beaten by Orr, in whose premises it was destroyed by accidental fire. In an action by Stevenson it was held that the liability of Maule & Son for the loss of the carpet must depend on whether they were within their contractual rights in subcontracting with Orr. Stevenson's evidence was read as an admission that he had not considered the question whether he expected Maule & Son to beat the carpet in their own premises. It was decided that there was no *delectus personæ* in the contract, and no implied

[1] As to the construction of this section, see Lindley, *Partnership*, 9th ed., 449 *et seq.*; *Watts* v. *Driscoll* [1901], 1 Ch. 294; *In re Garwood's Trusts* [1903], 1 Ch. 236; *Bonnin* v. *Neame* [1910], 1 Ch. 732.

[2] See *supra*, p. 225.

[3] Per Lord Dunedin, *Cole* v. *Handasyde & Co.*, 1910, S.C. 68, 73.

[4] *Berlitz School of Languages* v. *Duchene*, 1903, 6 F. 181; *Brace* v. *Calder* [1895], 2 Q.B. 253.

[5] *Edinburgh Glasshouse Co.* v. *Shaw*, 1789, M. 597.

[6] *Yorke* v. *Campbell*, 1904, 12 S.L.T. 413.

[7] 1907, S.C. 463.

[8] *British Waggon Co.* v. *Lea*, 1880, 5 Q.B.D. 149, where it was observed that in *Robson* v. *Drummond* (1831, 2 Barn. & Ad. 303), the doctrine of *delectus personæ* was carried to its extreme limits.

provision that the work should be done by the defenders in their own premises.[1]

Grierson, Oldham & Co. Ltd. v. *Forbes, Maxwell & Co.*[2] is a somewhat difficult case. There *G., O. & Co.*, a firm of wine merchants, who issued a price list, entered into a contract with *F., M. & Co.*, by which they let a page of their price list for advertisements of a non-alcoholic wine, of which *F., M. & Co.* were the manufacturers. The agreement was for three years, and the sum to be paid for the page was £200 a year, payable half-yearly in advance. There was also a clause whereby *G., O. & Co.* undertook to purchase the non-alcoholic wine in question, at a specified price, "from time to time as they may require it." Six months afterwards *G., O. & Co.* transferred their business to the pursuers, a limited company, registered as *G., O. & Co. Ltd.* On the second instalment of the sum due under the contract becoming payable, *F., M. & Co.* refused to pay it. *G., O. & Co. Ltd.*, brought the present action concluding for declarator that they were in right of the contract, and that *F., M. & Co.* were bound to implement it. The defenders pleaded that the pursuers, not being parties to the contract, were not entitled to sue thereon. This plea was sustained. The Lord Ordinary (Kincairney), in an elaborate opinion, decided that the contract involved mutual obligations and *delectus personæ*. But it is very difficult to see what obligations were laid upon *F., M. & Co.* except the obligation to pay for the advertisement. If that were sufficient to infer *delectus personæ*, no contract for the supply of goods could ever be assignable—a conclusion which the Lord Ordinary expressly declined to reach, and which is negatived by *Cole* v. *Handasyde & Co.*[3] But possibly the underlying theory of the judgment may be that there is *delectus personæ* in any executorial contract, unless it can be affirmed that the thing to be done could be done as well by any assignee (not merely by the particular assignee) as by the original party; and that where a page of a publication is taken for advertisement, the value to the advertiser depends on the persons reached by the publication, so that it was conceivable that an assignee of the contract might still publish the price list, but alter the value of the service contracted for by sending it to different people. The decision was affirmed in the Inner House. The Lord Justice-Clerk, who gave the only detailed opinion, held that the case was ruled by the authority of *Boulton* v. *Jones*.[4] That case, he said, "authoritatively decided that an assignee of a business cannot have effectually assigned to him the rights of the assignor in mutual contracts, so as to give the assignee a title to sue for enforcement of the obligations undertaken by the other party to the contract."

Performance by Cedent after Assignation.—In such cases if the original

[1] *Stevenson* v. *Maule & Son*, 1920, S.C. 335, Lord Skerrington dissenting. The law was stated by Lord Cullen: "Where the work to be done under a contract is of such a simple and ordinary kind that any competent and careful tradesman in the particular line, exercising his skill or ability, is qualified duly to perform the work as required by the contract, and there is no special reliance on the skill or ability of the undertaker, the undertaker may procure performance of the contract by the work of such a tradesman with whom he subcontracts for the purpose. The subcontract does not transfer or alter his obligations under the principal contract, but is only a method of fulfilling them."

[2] 1895, 22 R. 812; and see *supra*, p. 411.

[3] 1910, S.C. 68.

[4] 1857, 2 H. & N. 564. But (1) why is *Boulton* v. *Jones*, a decision of the Court of Exchequer Chamber, a decisive authority in Scotland? (2) The cases are not really on all-fours. In *Boulton* v. *Jones*, *A.* sold his business to *B.* Thereafter an order for goods arrived addressed to *A.* *B.*, without any assignation by *A.*, supplied the goods, and was held not to be entitled to sue for the price. It by no means follows that the same result would have been arrived at had the case been a previous order addressed to *A.*, and assigned by him to *B.*

contracting party is prepared to tender performance of the contract which he has assigned, the other party has no title to object. *A.* may assign a contract to *B.*, and performance by *B.* may be successfully refused on the plea of *delectus personæ*, but if *A.*, by arrangement with *B.* or otherwise, can tender performance himself, the plea of *delectus personæ* fails. In *Fratelli Sorrentino* v. *Buerger*[1] a ship under charter was sold, and the contract under the charter-party assigned to the purchaser. The Court had to decide whether the charterer was entitled to refuse to load the ship, on a finding in fact that the seller and original contracting party was able and willing to tender performance. It was decided, even on the assumption that the obligations under a charter-party were not assignable, that the charterer had no right to refuse to load, and was liable in damages.

Author and Publisher.—It has in several cases been decided in England that a contract between author and publisher, not amounting to an assignation of copyright, involves an element of *delectus personæ* which renders it unassignable by the publisher, on the ground that the business reputation of the publisher was of material importance to the author.[2] On the same ground a licence to produce a play, granted to a well-known producer, has been held to be unassignable.[3]

Supply of Goods.—Contracts for the supply of goods which are obtainable in the open market generally present no element of *delectus personæ*, unless that element is introduced by the existence of a right of compensation, or by a restrictive covenant.[4] It was found that there was no *delectus personæ* in a contract to supply the iron required for building a ship.[5] Where a broker or agent is employed the circumstances may shew reliance on his technical knowledge or skill, and the contract will then be unassignable. But in *Cole* v. *Handasyde*[6] *A.* ordered a supply of black grease from *B.*, who was a broker possessing an expert knowledge of that commodity. It was provided that the grease must be equal to sample, and, before shipment, must be analysed by an analyst who was named. *B.* subsequently executed a deed of assignment, by which he assigned his business, and, *inter alia*, his rights and liabilities under this contract, to *C.*, who was acting on behalf of *B.'s* creditors. *C.* tendered delivery of the black grease, which *A.* refused. To an action of damages *A.'s* defence was that the contract was not assignable, and therefore that he was not bound to accept delivery when tendered by *C.* In spite of proof that *A.* had employed *B.* in reliance on his expert knowledge of black grease it was decided that where the contract provided that the article supplied must pass a certain test, in the words of Lord Dunedin, "the whole element of *delectus personæ* is gone."[7] The question whether a

[1] [1915], 3 K.B. 367. In *Grierson, Oldham & Co.* (*supra*) there was no tender of performance by the original firm, and probably could have been none, because the firm was dissolved.

[2] *Stevens* v. *Benning*, 1854, 1 K. & J. 168; *Hole* v. *Bradbury*, 1879, 12 Ch. D. 886; *Griffith* v. *Tower Publishing Co.* [1897], 1 Ch. 21. In an arbitration to which Sir Walter Scott was a party, and Lord Newton was arbiter, it was decided that a contract under which Constable had agreed to publish Scott's next novel (*Woodstock*) did not pass to the assignees in Constable's bankruptcy. See opinion of Lord Abinger, *Gibson* v. *Carruthers*, 1841, 8 M. & W. 321, 343; and Lockhart's *Life of Scott* (edition of 1882), vol. ix., p. 187.

[3] *Messager* v. *Bristol Broadcasting Co.* [1927], 2 K.B. 543.

[4] See *Kemp* v. *Baerselman* [1906], 2 K.B. 604, and *supra*, p. 418.

[5] *Anderson* v. *Hamilton & Co.*, 1875, 2 R. 355.

[6] 1910, S.C. 68.

[7] *Cole* v. *Handasyde & Co.*, 1910, S.C. 68, 74. But if *A.* orders goods from *B.*, providing that they are to be of a certain quality, or according to sample, and, to his knowledge, *B.* possesses qualities which will enable him to secure that the terms of the contract are fulfilled (as he did in the particular case), is there not a strong presumption that *A.*, in dealing with *B.* and not with anyone else, relies on *B.'s* special fitness for the contract? It surely cannot be maintained (though it seems to be implied in Lord Dunedin's opinion) that if a man orders

continuing contract for the supply of goods at stated intervals involves *delectus personæ*, in respect that the party ordering the goods may rely on the promptitude and attention of the party with whom he contracts, has been discussed but not decided.[1]

The question whether there is an implied condition, in an order for goods sent to a manufacturer, that the goods must be of his own manufacture, though cited by Lord President Dunedin as an illustration of the principle of *delectus personæ*,[2] seems only remotely connected with that topic. It is a question of construction, on the whole facts, whether the order is merely for a particular commodity, or for the commodity manufactured by the party to whom the order is sent.[3] As Lord Dunedin says: "A contract for a gun from Purdie would not be well implemented by giving you a gun bought in the ordinary market in Birmingham"; but it is quite a different question whether a purchaser of Purdie's business would or would not be entitled to supply one of Purdie's guns, and sue for the price.

Assignability of Restrictive Covenants.—An agreement not to compete in trade may or may not be assignable, according to the circumstances. If it is undertaken as an isolated obligation, as in cases where a man sells the goodwill of his business and binds himself not to carry on that particular trade within a defined area, this agreement becomes part of the goodwill, and may be enforced by a subsequent purchaser even although it is not expressly assigned to him.[4] But this rule holds only if there is nothing in the terms of the agreement to shew that it was undertaken in special relation to the person to whom the business was sold. In *Rodger* v. *Herbertson*[5] a doctor in Sanquhar sold the goodwill of his practice to his assistant, and undertook not to practise within a certain radius of that town. He also undertook to recommend the purchaser to his patients. The practice was twice resold, and the ultimate purchaser brought an action against the original seller to enforce the restriction. It was held that the provision as to recommendation to patients shewed that the contract was really a personal one, and therefore that subsequent purchasers of the practice were not entitled to enforce it. And if the agreement not to compete was merely an incident in a contract not otherwise assignable, or if its terms were such that an assignation might make it more burdensome, it holds only between the original parties and cannot be assigned. Both points are illustrated by *Berlitz School of Languages Ltd.* v. *Duchene*.[6] There *A.*, who had established schools in certain towns, known as the Berlitz School of Languages, engaged *D.* as teacher of French. It was a condition of the contract that *D.*, after leaving *A.'s* employment, bound himself not to teach French within ten miles of any town in which there was a branch of the Berlitz Schools. *A.* then sold his schools to a company, and assigned his rights under his contract with *D.* *D.*, having left the employment of the company, engaged in the teaching of French in the same town where he had previously taught in *A.'s*

goods of a particular quality it is a matter of indifference to him whether he gets the goods he orders or goods of inferior quality, *plus* a claim of damages against the party who supplies them. The decision seems inconsistent with the principles laid down by Lord Trayner in *Reid's Tr.* v. *Watson's Trs.*, 1896, 23 R. 636, 649.

[1] *Anderson* v. *Hamilton & Co.*, 1875, 2 R. 355.

[2] In *Cole* v. *Handasyde & Co.*, 1910, S.C. 68, at pp. 73, 74.

[3] *West Stockton Iron Co.* v. *Nielson & Maxwell*, 1880, 7 R. 1055; *Johnson & Reay* v. *Nicoll & Sons*, 1881, 8 R. 437; *Johnson* v. *Raylton*, 1881, 7 Q.B.D. 438.

[4] *Fraser* v. *Renwick*, 1906, 14 S.L.T. 443; *Townsend* v. *Jarman* [1900], 2 Ch. 698; *John Brothers Brewery Co.* v. *Holmes* [1900], 1 Ch. 188.

[5] 1909, S.C. 256; see also *Davies* v. *Davies*, 1887, 36 Ch. D. 359.

[6] 1903, 6 F. 181.

employment. The action was for interdict against him at the instance of the company and of *A*. It was held that the restriction to which *D*. had agreed was not assignable, and therefore that the company had no right to enforce it, on the ground (1) that it was part of a contract of service which was not in itself assignable, and (2) that as the company might set up schools where *A*. would not, there was the possibility that the restriction, if enforceable by them, would prove more burdensome than that to which *D*. had agreed.[1]

Charter-Parties. It would appear, on English authority, that the right to enforce a charter-party cannot be assigned to a purchaser of the ship.[2]

Guarantees. A contract under which *A*. guarantees *B*. against a certain liability is assignable, probably to anyone, at all events to the creditor. The result of an assignation is that the creditor may demand payment from *A*. even although *B*., having no assets, has paid nothing, and therefore could not have enforced the guarantee.[3]

Arbitration. A party to an arbitration may assign his right, so as to make the assignee a party to the proceedings, and entitle him to decree-arbitral in his own name. There is, as was pointed out by Lord Gillies, no *delectus personæ* in the choice of an antagonist.[4]

Transmissibility in Bankruptcy. —Referring to a previous page for a discussion of the transmissibility of contractual liability to the representatives of a contracting party on his death, there remains for consideration the question how far contracts are transmitted to the trustee in the sequestration of an individual, or to the liquidator of a company in the course of winding up. Transmissibility in these cases does not raise the same question as assignability, it is not purely a question of the intention of the parties. The trustee or liquidator may claim contractual rights not in virtue of any implied assignability, but because they form assets of the bankrupt or company.[5]

The act and warrant of confirmation of a trustee in bankruptcy vests in him the whole property of the debtor, and therefore the debtor's interest in contracts to which he was a party,[6] so far as these are assignable. But it is a question by no means clear, and on which the statutes relating to bankruptcy shed no direct light, how far contracts in which a bankrupt was engaged are transmissible to his trustee in sequestration.

It is probably clear law that any express clause excluding transmissibility would receive effect. So though a lease which is not assignable by the tenant may pass to his trustee, a provision to the contrary is effectual.[7]

[1] *Berlitz School of Languages Ltd.* v. *Duchene*, 1903, 6 F. 181. The latter ground of judgment seems unassailable. The former is, it is submitted, in direct conflict with the decision of the Court of Appeal in *Jacoby* v. *Whitmore* (1883, 49 L.T. 335). There, also, a servant agreed that he would, on the expiry of his engagement, abstain from exercising the particular trade within a certain radius, and, when his employer's business was sold, it was held that the purchaser could enforce the restriction. Lord Kinnear, in his opinion in *Berlitz School* (6 F., at p. 188), seems to have misread *Jacoby* v. *Whitmore*. The restriction there had nothing to do with a "demise of interests in land"; the business was one carried on in various shops in different parts of London, and what was sold was the goodwill. The case of *Elves* v. *Crofts* (1850, 10 C.B. 241), also referred to in *Berlitz School*, merely decided that *A*. might, in certain circumstances, enforce a restriction he had imposed upon *B*., though the business it was designed to protect had been discontinued. The Outer House case of *Methven Simpson* v. *Jones* (1910, 2 S.L.T. 14) seems only to decide that an express provision that a restriction should be assignable would receive effect.

[2] *Dimech* v. *Corlett*, 1858, 12 Moore P.C. 199; *Fratelli Sorrentino* v. *Buerger* [1915], 3 K.B. 367.

[3] *British Union, etc., Insurance Co.* v. *Rawson* [1916], 2 Ch. 476.

[4] *Henry* v. *Hepburn*, 1835, 13 S. 361.

[5] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), sec. 97.

[6] Goudy, *Bankruptcy*, 3rd ed., 267.

[7] *Infra*, p. 427.

Trustee Entitled to Disclaim any Contract. -It is established law that the trustee in a sequestration (or the liquidator of a company) is not bound to carry out any contract in which the bankrupt or company was engaged, and therefore that a decree for specific performance cannot be obtained against him. He is entitled to disclaim any contract, and the remedy of the other party to it is to claim damages in the sequestration.[1] And where a bankrupt has two contracts with a third party, and the trustee disclaims one and carries out the other, the third party has no right to withhold payment of sums which have become due on the contract which was performed in security of his claim of damages on the contract disclaimed, because there is no *concursus debiti et crediti* between debts due by the bankrupt and debts subsequently becoming due to the trustee.[2]

Trustee Bound to Decide within a Reasonable Time.—Where a trustee proposes to adopt and carry out a contract in which the bankrupt was engaged, he is bound to intimate his intention to do so within a reasonable time. What is a reasonable time depends on the nature of the contract. In *Anderson* v. *Hamilton & Co.*[3] the bankrupts, a firm of iron merchants, had a contract for the supply of iron to the defenders. It was to be delivered in instalments. On 14th March the iron merchants stopped payment, on 17th March they were sequestrated, and the pursuer was appointed judicial factor on their estates. On 27th March he was elected trustee in the sequestration. On 8th April he wrote to the defenders, intimating that he was prepared to carry out the contract. The defenders, on 14th March, when the fact that the bankrupts had stopped payment became known to them, had written to say that they held the contract as cancelled. To this decision they adhered, and declined to accede to the trustee's proposal to carry it on. In an action of damages at the instance of the trustee, it was held that, even on the assumption that the bankrupt's rights in the contract passed to him, and that he was entitled to carry it out, he had not timeously intimated his intention to do so. It was an important element in the case that iron was a commodity which fluctuated in price, so that in the event of a rise in price the contract might become unremunerative to the bankrupt estate, and also that the defenders had a special interest in knowing at once whether the iron was to be supplied or not. It was suggested that in such cases it was in the power of leading creditors to make arrangements at once, so that the other party to the contract might not suffer any hardship.[4] But it is very difficult to see what power leading creditors have to bind the trustee to adopt any contract.

***Delectus personae* in Question with Trustee in Bankruptcy.** The right of a trustee to carry out contracts in which the bankrupt had engaged applies only to contracts where the personal qualities of the bankrupt were not relied upon. "Where it is of the essence of the contract that the thing to be done requires special skill, genius, art, or even strict personal supervision, such a contract cannot be taken up by a trustee and creditors. Reliance is then placed on the personal power of the party contracting to do the special

[1] *Kirkland* v. *Cadell*, 1838, 16 S. 860; *Anderson* v. *Hamilton & Co.*, 1875, 2 R. 355; *Bertram* v. *Guild*, 1880, 7 R. 1122; *Asphaltic Limestone Co.* v. *Corporation of Glasgow*, 1907, S.C. 463.

[2] *Asphaltic Limestone Co.* v. *Corporation of Glasgow*, 1907, S.C. 463.

[3] 1875, 2 R. 355. It has been held in England that assignees in bankruptcy, who had the right to adopt or disclaim a contract, were not bound to decide until something fell to be done by the bankrupt (*Gibson* v. *Carruthers*, 1841, 8 M. & W. 321).

[4] *Anderson* v. *Hamilton & Co.*, 1875, 2 R. 355, per Lord Neaves.

thing. This is so not only in such a case as the painting of a picture, but, generally, wherever it appears that a *delectus personæ* is involved."[1] Beyond this general statement there is little authority on the question whether the same degree of *delectus personæ* which will exclude a voluntary assignation of contractual rights will also operate as a bar to the execution of a contract by a trustee in sequestration. A contract to carry out work through the employment of ordinary manual labour may be adopted;[2] so may a contract for the supply of goods, provided that no special reliance is placed on the technical knowledge or skill of the bankrupt.[3] On the other hand, those who are in the service of a man when he becomes bankrupt are probably not bound to continue in the service of the trustee.[4] A contract for the personal services of the bankrupt does not pass to his trustee, though the claim to any remuneration may pass.[5] It is submitted that contracts where the element of *delectus personæ* consists in the fact that collateral obligations are undertaken on each side, though not assignable by voluntary assignation, admit of being adopted and carried out by a trustee in bankruptcy.[6]

Contracts which may be Carried out through Agency of the Bankrupt.—Where the contract is one exclusively personal to the bankrupt, *e.g.*, a lease in which assignees are expressly excluded, it is open to the trustee to arrange with the bankrupt to carry out the contract.[7] There is no provision in the statutes relating to bankruptcy whereby a bankrupt may be compelled to carry out contracts for the benefit of his creditors, but there may be indirect methods of compulsitor. But such an arrangement is possible only if the bankruptcy of the obligant is not, expressly or impliedly, equivalent to an irritancy of the contract.[8]

Rights of Trustee in Lease held by Bankrupt.—In the case of a lease held by the bankrupt the position of his trustee is different from that of a voluntary assignee. Under the provisions of the Bankruptcy Act, 1913—re-enacting, in this particular, the provisions of the Bankruptcy Act, 1856—the heritable property of the bankrupt, in which leases are included, is vested in the trustee to the same effect as if a decree of adjudication, subject to no reversion, had been pronounced in his favour,[9] and it has long been settled that a lease, though at common law unassignable (*e.g.*, an agricultural lease of ordinary duration), may be attached by adjudication, unless it contains a clause by which assignees are directly excluded.[10] So, in the absence of such a clause, the trustee in sequestration is entitled to insist on a lease held by the bankrupt, if he is prepared to meet the obligations which are incumbent on him.[11] And the effect of a clause prohibiting assignation has been decided to be that the lease passes to the trustee, subject to the right of the landlord to object, a right which cannot be founded on by the bankrupt.[12]

[1] *Anderson* v. *Hamilton & Co.*, 1875, 2 R. 355, per Lord Neaves, at p. 363.
[2] *Asphaltic Limestone Co.* v. *Corporation of Glasgow*, 1907, S.C. 463.
[3] *Anderson* v. *Hamilton & Co.*, 1875, 2 R. 355; *Cole* v. *Handasyde & Co.*, 1910, S.C. 68.
[4] *Day* v. *Tait*, 1900, 8 S.L.T. 40.
[5] *Caldwell* v. *Hamilton*, 1919, S.C. (H.L.) 100.
[6] See *supra*, p. 418.
[7] Bell, *Com.*, i. 76. As to the construction of a clause in a lease excluding this right, see *Chalmers' Tr.* v. *Dick's Tr.*, 1909, S.C. 761.
[8] See *supra*, p. 363.
[9] 3 & 4 Geo. V. c. 20, sec. 97.
[10] Stair, ii. 9, 26; Ersk. ii. 6, 32; ii. 12, 6; Bell, *Prin.*, sec. 1216; *Elliot* v. *Duke of Buccleuch*, 1747, M. 10329.
[11] *Walker* v. *M'Knight*, 1886, 13 R. 599, per Lord Shand; *Chalmers' Tr.* v. *Dick's Tr.*, 1909, S.C. 761.
[12] *Dobie* v. *Marquis of Lothian*, 1864, 2 M. 788.

CHAPTER XXV

EFFECTS OF ASSIGNATION

Assignatus utitur jure auctoris.—On the assignation of an assignable contract, or in cases where, without objection, the benefits of a contract are in fact assigned, the general rule as to the rights of the assignee is expressed in the maxim *assignatus utitur jure auctoris*. In questions with the other party to the contract in relation to the enforcement of the obligations originally undertaken by him in favour of the cedent, the assignee may be met by any defence which was available against the cedent at the time when the assignation was intimated.[1] "It appears to me to be long ago settled in the law of Scotland—and I have never heard of any attempt to disturb the doctrine—that in a personal obligation, whether contained in a unilateral deed or in a mutual contract, if the creditor's right is sold to an assignee for value, and the assignee purchases in good faith, he is, nevertheless, subject to all the exceptions and pleas pleadable against the original creditor. But it seems to be said that this doctrine admits of some exceptions. Now, that I entirely dispute. I think the true view of the law is that these things which are called exceptions are classes of cases to which the doctrine does not apply. The doctrine does not apply to the transmission of heritable estate; the doctrine does not apply in the sale of corporeal moveables.[2] But within the class of cases to which the doctrine is applicable—I mean the transmission to assignees of a creditor's right in a personal obligation—I know of no exception to the application of the doctrine."[3]

Limits of Rule.—The rule expressed in this opinion may be put in another way. A contract, under which *A.* is debtor, and *B.* creditor, may be considered as part of *A.*'s liabilities or as part of *B.*'s assets. If *B.* assigns his rights, and the question is raised as to *A.*'s liabilities, the maxim *assignatus utitur jure auctoris* applies, and the assignee is subject to any defence which would have been available in a question with *B.* If, however, the claim which *B.* assigns is considered as part of his assets, and *C.* and *D.* are competing for that asset, the maxim has no application. In competing rights, both valid in a question with *B.*, the question is not what *B.* had to give,

[1] Ersk. iii. 5, 10; Bell, *Prin.*, 1468. The same general principle holds in England (Pollock, *Contract*, 9th ed., 238). There is an exception in the case where a debtor proposes to establish a defence by reference to the oath of the creditor. That method of proof is not available against an assignee of the debt (Stair, i. 10, 16; Ersk. iii. 5, 9; *Campbell* v. *Campbell*, 1860, 23 D. 159), unless the assignation was gratuitous or in trust for the cedent (*Steil* v. *Orbiston*, 1674, M. 8467), or the action had been commenced before intimation (*Houston* v. *Nisbet*, 1708, M. 8329).

[2] Lord Kames (*Elucidations*, p. 14) points out the contrast between the position of a party induced to sell goods by fraud, who is in general helpless against a sub-purchaser, and that of a party similarly induced to grant a bond, who may reduce it in a question with an assignee. The difference, he explains, is due to the historical fact that an assignee was not entitled to sue in his own name, and, suing in the name of the cedent, was necessarily subject to all defences available against him.

[3] Per Lord President Inglis, *Scottish Widows' Fund* v. *Buist*, 1876, 3 R. 1078, at p. 1082.

or could honestly give. It depends on the rules applicable to the completion of a right to that particular kind of property, and the assignee who completes his right in the appropriate manner will be preferable to one who has been content to rely on *B.'s* personal obligation. In *Redfearn* v. *Somervail*[1] Stewart was the owner of shares in the Edinburgh Glasshouse Co. These shares he held under a latent trust for a firm of which he was a partner. Stewart borrowed money from Redfearn, assigned the shares to him, and became bankrupt. In a competition between Redfearn and the firm the latter were preferred in the Court of Session, on the ground that Redfearn, as an assignee, was exposed to any claim which would have been good against Stewart. In the House of Lords it was explained that the maxim *assignatus utitur jure auctoris*, on which the Court below had relied, applied only to questions between an assignee and the debtor in the obligation assigned: it would have ruled had Redfearn attempted to enforce a claim against the Edinburgh Glasshouse Co. which that company could have resisted in a question with Stewart: it had no application in a question between parties holding competing rights both derived from Stewart. Between them the preference must depend on the completion of the right. So again if the creditor assigns the debt to more than one assignee it is clear law that the assignee who first completes his right by intimation to the debtor is to be preferred, though his assignation may be the second in date, and that it is quite irrelevant that the first assignation may be good against the cedent.[2]

The general rule of *assignatus utitur jure auctoris* has been illustrated in various circumstances. If the right assigned is a pecuniary claim, payment to the cedent before intimation of the assignation is valid in a question with the assignee, even in the case, most favourable to the assignee, where the subject of the assignation is the right of a creditor in a heritable security, recorded in the Register of Sasines.[3] So compensation is pleadable against an assignee on a debt due by the cedent, provided that the *concursus debiti et crediti* was complete before the assignation was intimated.[4] Thus where a builder was a member of a building society with unlimited liability, was employed by the society, and assigned the sums which, under architect's certificates, were due to him, it was held that the assignee, in the liquidation of the society, was exposed to the plea that the sums due to the builder were subject to compensation by the amount for which he, as a member of the society, was liable for its debts.[5] Again, if the cedent, being in breach of a material condition of the contract, could not enforce the obligation which he assigns, his assignee has no higher right: and so where a superior

[1] 1805, M. App. Personal and Real, No. 3; revd. 1813, 1 Dow, 50. See judicial comments on this case: *Burns* v. *Lawrie's Tr.*, 1840, 2 D. 1348; *North British Rly.* v. *Lindsay*, 1875, 3 R. 168; *Scottish Widows' Fund* v. *Buist*, 1876, 3 R. 1078; *Heritable Reversionary Co.* v. *Millar*, 1891, 18 R. 1166 (Lord President Inglis), 1892, 19 R. (H.L.) 43 (Lord Watson).

[2] Ersk. iii. 5, 3; *Attwood* v. *Kinnear*, 1832, 10 S. 817; *Campbell's Trs.* v. *Whyte*, 1884, 11 R. 1078

[3] Stair, ii. v. 15; *M'Dowal* v. *Fullerton*, 1714, M. 576; 2 Ross, *L.C.* 709. If payment is made before the debt is due, it is laid down by the institutional writers that in the case of ordinary debts it is good in a question with a subsequent assignee (Ersk. iii. iv. 4; Bell, *Prin.*, sec. 562), with an exception in the case where a tenant pays rent before it is due, when, in the event of a sale of the estate, he may be liable to pay again to the purchaser (*Traquair* v. *Howatson*, 1667, M. 10024). But prepayments of rent are good in a question with the trustee in the landlord's bankruptcy (*Davidson* v. *Boyd*, 1868, 7 M. 77).

[4] Bell, *Com.*, ii. 131; *Elmslie* v. *Grant*, 1830, 9 S. 200; *Shiells* v. *Ferguson, Davidson & Co.*, 1876, 4 R. 250; *Burns* v. *Lawrie's Trs.*, 1840, 2 D. 1348.

[5] *Shiells* v. *Ferguson, Davidson & Co., supra.*

had failed to implement the obligations undertaken in the feu-contract, the vassal was entitled to withhold payment of his feu-duty, in a question with a heritable creditor of the superior, to whom the right to exact the feu-duty had been assigned.[1] If the obligation assigned is subject to a resolutive condition, the assignee takes subject to it.[2] Underwriters, who have paid for a loss to ship or cargo, and sue a third party responsible for that loss, do so as assignees of the assured, and are exposed to any plea available against him.[3] So when an action was raised in Scotland by a French firm of cargo-owners against the owners of a French ship, concluding for damages for loss of the cargo, and the plea of *forum non conveniens* was taken, the case was unaffected by the fact that the parties having the real interest were English underwriters who had insured the cargo, in respect that the underwriters, as assignees, could be in no better position than the cedent.[4]

If a written contract between *A.* and *B.* is qualified by a separate agreement, an assignee from *A.* can exact from *B.* only those obligations which, taking the written contract and the separate agreement together, fell to be performed by *B.* in a question with *A.* Thus where the rights of a shipowner under a charter-party were assigned, it was held that the assignee had no absolute right to demand the freight appearing in the charter-party; he could demand only the amount which was due under a separate agreement between the shipowner and the charterer.[5] So where two parties engaged in a building speculation took the title to property in their joint names as trustees for themselves *pro indiviso*, and one of them conveyed his *pro indiviso* right in the subjects to a third party, it was held that he could confer only the right to the share which might prove to be due to him as the result of an accounting between himself and his co-adventurer.[6] It has been laid down that an assignee's right is not affected by claims against the cedent arising subsequent to the assignation: and, on this principle, that where the beneficiary in a trust estate assigned his share to the extent of £1,000, and subsequently obtained advances from the trust to an amount exceeding his total share, the assignee's right was not affected in a question with the other beneficiaries.[7]

Reduction, in Question with Assignee.—If the contract or right which is assigned is reducible in a question with the cedent on the ground of fraud, misrepresentation, or other invalidating cause, it remains so reducible in the hands of the assignee. On this principle a bond may be reduced on the ground of the fraud of the original creditor;[8] an insurance company may reduce the policy on the ground of misstatements, fraudulent or not, by the assured in his declaration, though the policy has been sold to a *bona-fide* purchaser.[9] The mortgagee of a ship, to whom policies effected by the owner have been assigned, cannot recover if the ship is lost through the owner's wilful default, although if he had insured independently the loss would have fallen within

[1] *Arnott's Trs.* v. *Forbes*, 1881, 9 R. 89; *Duncan* v. *Brooks*, 1894, 21 R. 760 (landlord and tenant); *Newfoundland Government* v. *Newfoundland Rly. Co.*, 1888, 13 App. Cas. 199. Cp. *Graeme's Tr.* v. *Giersberg*, 1888, 15 R. 691.

[2] *Johnstone-Beattie* v. *Dalzell*, 1868, 6 M. 333.

[3] *Simpson* v. *Thomson*, 1877, 5 R. (H.L.) 40.

[4] *Société du Gaz* v. *Armateurs Francais*, 1925, S.C. 332; affd. 1926, S.C. (H.L.) 13.

[5] *Mangles* v. *Dixon*, 1852, 3 H.L.C. 702.

[6] *Livingstone* v. *Allan*, 1900, 3 F. 233; *Keith* v. *Penn*, 1840, 2 D. 633.

[7] *Macpherson's Factor* v. *Mackay*, 1915, S.C. 1011.

[8] *M'Donells* v. *Bell & Rannie*, 1772, M. 4974; *Delvalle* v. *Creditors of York Building Co.*, 1786, M. 4978.

[9] *Scottish Widows' Fund* v. *Buist*, 1876, 3 R. 1078; *Scottish Equitable Life Assurance Co.* v. *Buist*, 1877, 4 R. 1076; affd. 1878, 5 R. (H.L.) 64.

the policy.[1] A claim may be open to an assignee which was not open to the cedent, if the reason why it was not open was that the cedent was bound by acquiescence in some fraudulent or illegal act. Thus where the promoter of a company has obtained a secret profit, it may be open to transferees of shares to take action, though the original holders might be barred by acquiescence.[2]

Effect of Intimation. An obligant whose contractual liabilities have been assigned, and who has received intimation of the assignation, is thereafter controlled by the rights of the assignee. A plea of compensation upon a debt subsequently becoming due by the cedent is excluded; as was decided where a heritable creditor raised an action of maills and duties, thereby intimating his right to the tenant, and it was found that the tenant could not refuse payment to him of a subsequent instalment of rent on the plea of compensation with a debt due by the landlord.[3] Where *A.* had contracted to build a ship for *B.*, and assigned his right to a future instalment of the contract price to *C.*, it was held that notice of this assignment precluded *B.* from paying to *A.*, though the payment was necessary to enable *A.* to complete the ship.[4] And where the right of a partner in a firm had been assigned, and notice had been given to the other partner, it was held that the assignee was entitled to object to an arrangement whereby the cedent sold his share of the business to the other partner and dissolved the partnership, on the principle that after notice of the assignment nothing could be done to prejudice the rights of the assignee.[5] Trustees, however, who have under the trust-deed a discretionary power to render the shares of a beneficiary alimentary and therefore unassignable, may exercise this power even after they have received intimation that the beneficiary has assigned his right; but this rule rests on the special ground that such a power involves a duty to exercise it should the circumstances render it advisable.[6]

Personal Bar in Questions with Assignee. The application of the maxim *assignatus utitur jure auctoris* may be defeated by the principle of personal bar. A debtor may be barred from maintaining, in a question with an assignee, defences available against the cedent, either by his conduct after receipt of intimation, or by the form in which the obligation is constituted.

Notice of Latent Defence. It is probably the law that a debtor has no general duty to warn a party to whom the debt has been assigned that he possesses grounds of defence which are not apparent.[7] But that duty may arise if the form of intimation shews that the assignee is relying on the apparent right.[8] And if a debtor, knowing that he has a latent defence, accepts payments from the assignee (such as payments of premiums on a

[1] Marine Insurance Act, 1906, sec. 50 (2); *Graham Shipping Co.* v. *Merchants' Marine Insurance Co.* [1924], A.C. 294.

[2] *Edinburgh Northern Tramways Co.* v. *Mann*, 1891, 18 R. 1140, per Lord Kinnear, at p. 1152; affd., on another ground, 1892, 20 R. (H.L.) 7.

[3] *Chambers' Judicial Factor* v. *Vertue*, 1893, 20 R. 257; contrast *Stevenson, Lauder & Gilchrist* v. *Dawson*, 1896, 23 R. 496, where, when a bondholder had taken no steps to enforce his assignation to rents, it was held that a factor for the proprietor might set off the rents against a debt due by his employer.

[4] *Brice* v. *Bannister*, 1878, 3 Q.B.D. 569.

[5] *Watts* v. *Driscoll* [1901], 1 Ch. 294.

[6] *Weller* v. *Ker*, 1863, 2 M. 371; affd. 1866, 4 M. (H.L.) 8; *Chambers' Trs.* v. *Smiths*, 1877, 5 R. 97; revd. 1878, 5 R. (H.L.) 151 (arrestment); *Train* v. *Clapperton*, 1907, S.C. 517; affd. 1908, S.C. (H.L.) 26; *Macpherson's Factor* v. *Mackay*, 1915, S.C. 1011, opinion of Lord Johnston. In *Adam & Forsyth* v. *Forsyth's Trs.* (1867, 6 M. 31) it was held that trustees were personally barred from exercising their power, but the case was very special.

[7] *Mangles* v. *Dixon*, 1852, 3 H.L.C. 702; *Low* v. *Bouverie* [1891], 3 Ch. 82.

[8] Per Lord Chancellor St Leonards in *Mangles* v. *Dixon*, *supra*, at p. 733.

voidable policy of insurance), he will be barred from challenging the validity of his obligation.[1] Again, if a debtor recognises the right of the assignee, in circumstances which make his recognition an admission of liability, he cannot afterwards dispute it. What amounts to an admission of liability is a question of the circumstances of each case.[2] But, as a general rule, no such admission can have any effect unless the party making it was aware of the grounds on which he might challenge his obligation. Thus an insurance company may recognise an assignee of a policy and accept premiums from him, and yet afterwards reduce the policy on the ground of the fraud of the assured, provided that the premiums were accepted before the grounds of reduction were known.[3] To this there is an apparent exception in company law. If a company, deceived by a forged transfer, issue a share certificate, it is held to be barred from denying its validity to the party to whom it is issued or to a transferee from him, and must therefore make good the value of the shares, irrespective of the question whether there has been negligence on the part of the company or not.[4] But these cases rest on the principle that it was the intention of the Legislature, in the provisions of the Companies Acts, that share certificates should be documents on which buyers might safely rely,[5] and form no ground for assuming that mere recognition of an assignee's right, in ignorance of the objection to the right of the cedent, can preclude the assertion of that objection.

Obligations in Negotiable Form.—The form in which an obligation is undertaken may result in barring the obligant from insisting on latent defences in a question with an assignee. Thus a party to a bill of exchange, or other negotiable instrument, cannot assert, in a question with an onerous and *bona-fide* holder, any latent defence which he may have against the cedent.[6] Even where an instrument is not negotiable, its terms may impose a similar disability, as in a case where debentures were issued with the statement that they would be paid without regard to equities between the company and the original holder.[7] The mere fact that debentures are issued in a transferable form does not necessarily give a transferee a title free from all latent objection (unless they are negotiable instruments). Thus where bonds were issued by a company below their face value, in circumstances which made their issue a fraud upon other creditors, and were so conceived as to pass from hand to hand, it was held, in the liquidation of the company, that *bona-fide* holders could not claim on them for more than had been actually received at their issue by the company.[8] But while transferable

[1] *Scottish Equitable Insurance Co.* v. *Buist*, 1877, 4 R. 1076 (affd. 5 R. (H.L.) 64), per Lord President Inglis, at p. 1081.

[2] See *Adam & Forsyth* v. *Forsyth's Trs.*, 1867, 6 M. 31; *Macfarlane* v. *Lister*, 1887, 37 Ch. D. 88; *Bovill* v. *Dixon*, 1854, 16 D. 619; affd. 1856, 3 Macq. 1.

[3] *Scottish Equitable Insurance Co.* v. *Buist*, 1877, 4 R. 1076; affd. 1878, 5 R. (H.L.) 64.

[4] *Clavering, Son & Co.* v. *Goodwins, Jardine & Co.*, 1891, 18 R. 652; *In re Bahia* v. *San Francisco Rly. Co.*, 1868, L.R. 3 Q.B. 584; *Balkis Consolidated Co.* v. *Tomkinson* [1893], A.C. 396; Buckley, *Companies Acts*, 10th ed., 45. See Forged Transfers Acts, 1891 and 1892 (54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36).

[5] See opinion of Blackburn, J., in *Bahia & San Francisco Rly. Co.*, 1868, L.R. 3 Q.B. 584, at p. 596.

[6] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), sec. 35; *London Joint-Stock Bank* v. *Simmons* [1892], A.C. 201; *Walker & Watson* v. *Sturrock*, 1897, 35 S.L.R. 26.

[7] *In re Goy & Co.* [1900], 2 Ch. 149.

[8] *Delvalle* v. *Creditors of York Buildings Co.*, 1786, M. 4978. From the terms of the final interlocutor it would appear that the Court must have come to the conclusion that the bonds were not negotiable. In a subsequent case relating to bonds by the same company, where the objection of fraud in their issue was not taken, it was held that assignees might claim for the full value (*York Buildings Co.* v. *Martin*, 1791, M. 10466). But possibly the two cases are irreconcilable.

bonds or debentures may leave open the objection that the company was induced to grant them by fraud, their form bars the company from insisting on a plea of compensation or set-off, on any other debt due by the original holder, on the ground that as the company intended them to be transferable, and must have known that they would not be transferable if subject to latent claims, their issue amounted to a representation that no such latent claims existed, or would be asserted.[1] And the English Courts have arrived at the conclusion that if the issue of debentures is *ultra vires*, and even if it amounts to a contravention of the provisions of the statute under which the particular company acts, the debentures are valid in the hands of *bona-fide* and onerous assignees, on the ground that the company is barred from denying their validity.[2]

Indorsee of Delivery Order. Where a manufacturer of goods, in pursuance of a sale, issues a delivery order for them, and that order is transferred to an indorsee, the position of the parties is so far modified that the manufacturer cannot assert a right of vendor's lien for the price in a question with the indorsee.[3] Whether in other respects the indorsee takes any better title than his author may be doubted. If the question were open there might be much to be said for holding that a party who granted an apparently unqualified obligation to deliver goods, in the knowledge that his obligation would pass to third parties, was barred from insisting, in a question with them, on any latent defences. But the authorities, it is submitted, are to the opposite effect. It was established at an early period in the law of Scotland that orders for goods, couched in the form of a bill of exchange, were not negotiable instruments, and that where the owner of salt mines granted a bill for salt drawn on his salt-grieve he might dispute his obligation, in a question with an indorsee, on the ground that the indorser had not implemented the conditions of the contract under which the bill was granted.[4] When warrants for iron, framed as obligations to deliver to the bearer, came into use, it was held in the Court of Session that the granter of such a warrant could not assert a lien for the price in a question with an onerous and *bona-fide* transferee, on the principle that the granter of such obligations undertook an independent contract with each successive bearer, a principle which would obviously preclude the granter from asserting, in a question with the bearer, any defences which were not apparent on the face of the instrument.[5] But little reliance can be placed on this theory, because, on *Bovill* v. *Dixon* being appealed to the House of Lords, the Lord Chancellor (Cranworth) laid down the rule that warrants so conceived were invalid, and did not confer on a party to whom they were transferred any title to sue the

[1] *Higgs* v. *Northern Assam Tea Co.*, 1869, L.R. 4 Ex. 387; Buckley, *Companies Acts*, 9th ed., 468. Cp. *Ex parte Asiatic Banking Corporation*, 1867, L.R. 2 Ch. 391 (letter of credit).

[2] *Webb* v. *Commissioners of Herne Bay*, 1870, L.R. 5 Q.B. 642; *In re Romford Canal Co.*, 1883, 24 Ch. D. 85. If this is law in Scotland it must be treated as an isolated exception to the rule that a body acting under statutory powers cannot, by personal bar or acquiescence, incur liabilities which they have no power to incur. See *General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282 (opinions of Lord President Inglis and Lord Shand).

[3] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sec. 47; Factors Act, 1889 (52 & 53 Vict. c. 45), sec. 10, extended to Scotland by 53 & 54 Vict. c. 40.

[4] *Douglas* v. *Erskine*, 1715, M. 1397; approved by Lord Curriehill in *Colvin* v. *Dixon*, 1867, 5 M. 603, at p. 608; but see *Hamilton* v. *Dalrymple*, 1724, M. 1403; *Hope* v. *Neilson*, 1744, M. 1403, which seem to give to such instruments some of the characteristics of negotiability. The subject is discussed with much learning, but very scant deference to authority, in Brown, *Sale of Goods Act*, 2nd ed., 221 *et seq.*

[5] *Bovill* v. *Dixon*, 1854, 16 D. 619; affd. (on specialties) 1856, 3 Macq. 1; *Dimmack* v. *Dixon*, 1856, 18 D. 428 (decided before the appeal in *Bovill* v. *Dixon*).

manufacturer who issued them.[1] It would appear that undertakings to deliver goods expressed in favour of a particular person, or his order, or assignee, though, as above stated, they preclude a claim of lien for the price, do not confer on the indorsee or assignee a title in other respects independent of that of his author, and do not therefore bar the party who issues them from asserting such a defence as that he was originally induced to issue them by fraud.[2]

[1] *Bovill* v. *Dixon*, 1856, 3 Macq. 13.

[2] *Colvin* v. *Dixon*, 1867, 5 M. 603, per Lord President Inglis, at p. 613 ; *Hamilton* v. *Dixon*, 1873, 1 R. 72, per Lord Benholm, at p. 83. See also *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 1877, 5 Ch. D. 205 ; *Farmeloe* v. *Bain*, 1876, 1 C.P.D. 445.

CHAPTER XXVI

ERROR

Error in Expression or Intention. A contract may be affected by error—in English legal terminology, by mistake—in two separate cases: (1) where by some slip or blunder the contract is concluded or recorded in terms other than those to which the parties to it consented; (2) where, though the contract accurately represents the immediate intention of the parties, that intention was formed, by one or both of them, owing to a misapprehension as to some matter regarded as material in determining whether they should enter into the contract. Error, to put it more briefly, may be in expression or in intention. It will be convenient to deal first with the law applicable to the various cases of error in expression.[1]

Clerical Errors. If an agreement is embodied in a document intended to be obligatory, such as a bond, lease, or policy of insurance, and by some mistake it is drawn up and executed incorrectly, the Court has a very wide equitable power to rectify the document and so to give effect to the real intention of the parties. Between the original parties, and in the case of an admitted mistake, there is no difficulty; no one can be allowed to take advantage of a clause of obligation which he admits to be due to a mere clerical error.[2] And if the error is not admitted, but is obvious on an inspection of the document, there is no doubt that it can be rectified. Where an accident insurance policy provided that a claim under it should be invalid six months from the date of the accident, unless "legal proceedings have *not* been taken by the insured," it was held that as the word "not" had obviously been inserted by a mistake, the Court had power to rectify the policy, and the insured could not take advantage of the blunder.[3] And in such cases it is immaterial that the party proposing to correct the mistake may have been the one responsible for it.[4] The Court will not, however, supply the want of statutory formalities necessary to the validity of an instrument as a probative deed, although these have obviously been omitted owing to the carelessness of the writer;[2] nor will it insert words necessary to the efficacy of the prohibitory and irritant clauses of an entail.[5]

[1] Kerr, *Fraud and Mistake*, 4th ed., 465 *et seq.*; Leake, *Contracts*, 7th ed., 213.

[2] Ersk. iii. 3, 87; *Glasgow Feuing and Building Co.* v. *Watson's Trs.*, 1887, 14 R. 610, per Lord Young, at p. 618. Cp. *Grant's Trs.* v. *Morison*, 1875, 2 R. 377; *Wallet* v. *Ramsay*, 1904, 12 S.L.T. 111 (O.H.); *Jamieson* v. *M'Innes*, 1887, 15 R. 17; *Wilkie* v. *Hamilton Lodging House Co.*, 1902, 4 F. 951. And see cases on the application of the principle *falsa demonstratio non nocet* to the interpretation of wills, *Macfarlane's Trs.* v. *Henderson*, 1878, 6 R. 288; M'Laren, *Wills*, 3rd ed., i. 359.

[3] *Glen's Trs.* v. *Lancashire, etc., Insurance Co.*, 1906, 8 F. 915. See *Coutts* v. *Allan*, 1758, M. 11549. Cp. *Magistrates of Dundee* v. *Duncan*, 1883, 11 R. 145.

[3] *Glen's Trs.* v. *Lancashire, etc., Insurance Co.*, 1906, 8 F. 915.

[4] *Johnston* v. *Pettigrew*, 1865, 3 M. 954.

[5] *Sharpe* v. *Sharpe*, 1835, 1 Sh. & M'L. 594 (*Hoddam* case). Cp. *Macdonald* v. *Macdonald*, 1874, 1 R. 858; affd. 1875, 2 R. (H.L.) 28; *Munro* v. *Butler-Johnstone*, 1868, 7 M. 250.

There is more difficulty when the mistake is not admitted by one party, and can be established only by extrinsic proof. But it would appear that proof of anything which can be termed a clerical error is competent, and that there is no restriction as to the evidence which may be led. In *Waddell* v. *Waddell* [1] it was averred that a bond, recorded in the Register of Sasines, had been taken in favour of *A.* instead of in favour of *B.*, through a mistake on the part of the law agent employed. The action was for declarator of the fact, and adjudication of the bond. It was held that the action was competent, that it was not necessary to reduce the bond, and that the pursuer's averments might be proved by parole evidence. So an arithmetical error, or an entry by mistake, in an account docqueted as correct, may be proved by parole evidence.[2] In *Krupp* v. *Menzies* [3] a contract with the manager of an hotel gave him a right to one-fifth of the profits. The owner averred that the real agreement was for 5 per cent., and that a clerk, instructed to draw out the contract on the lines of a former one, but to half the share in the profits, which in the former contract was one-tenth, had by a mistake put one-fifth as the half of one-tenth. It was argued that to allow proof of this was to infringe the general rule that a written contract cannot be contradicted by parole evidence,[4] but proof before answer was allowed.

If a clerical error is not discovered until the interests of third parties are involved, rectification is still competent, unless the third parties interested can appeal to the law of negotiable instruments or to the principle that purchasers of land are entitled to rely on the Register of Sasines. Thus the survivor of two spouses was held entitled to prove, in a question with the trustee on the sequestrated estate of the deceased spouse, that a policy of insurance, taken in favour of the deceased spouse and his executors, had been so taken by a mistake on the part of a clerk to the insurance company, and should have been taken in favour of the spouses and their survivor.[5] In *Glasgow Feuing and Building Co.* v. *Watson's Trs.*[6] a superior undertook to make certain roads on the subjects feued. In the missives of feu these roads were correctly identified by being coloured brown in a plan appended thereto. In the conveyance (which was recorded in the Register of Sasines) the plan appended shewed other roads as to which no arrangement had been made, also coloured brown. The mistake was due to the colourist employed to draw up the plan, and was not noticed by either party. A singular successor of the vassal called upon the superior to make the roads coloured brown in the final plan. The superior brought an action concluding for the partial reduction of the contract. It was held that he was entitled to decree of reduction in so far as the feu-contract imposed any obligation to make roads beyond those to which he had originally agreed. The judgment proceeded on the ground that a singular successor is not entitled to rely on the records with regard to personal obligations, such as an obligation to make roads. It would not, therefore, rule a case where a clerk, in copying out a conveyance, made a mistake in the description of the subjects conveyed. Then, though the mistake could be rectified in a question between the

[1] 1863, 1 M. 635.

[2] *M'Laren* v. *Liddell's Trs.*, 1862, 24 D. 577; *Commercial Bank of Scotland* v. *Rhind*, 1857, 19 D. 519; revd. 1860, 3 Macq. 643 (entry by mistake in banker's pass-book).

[3] 1907, S.C. 903. See also *Coutts* v. *Allan*, 1758, M. 11549.

[4] *Supra*, Chap. XX.

[5] *North British Insurance Co.* v. *Tunnock*, 1864, 3 M. 1.

[6] 1887, 14 R. 610. See also *Earl of Errol* v. *Mouat*, 1664, M. 11515.

original parties, a singular successor would be entitled to insist on his right to the subjects as they appeared on the Register of Sasines.[1]

The question whether there is any difference between the laws of England and Scotland, in the power of the Court to rectify mistakes, is considered below.[2]

Offers made by Mistake. Another case of error in expression occurs when a man, by a slip of the tongue or the pen, makes an offer in terms which he did not intend and that offer is accepted. If a man, meaning to offer £500, accidentally writes £5,000, is he bound by an acceptance? Clearly not, if the acceptor knew that a mistake had been made. No one is entitled to snap at an offer which he knows to have been made by mistake. Thus when *A.* sent a written offer to sell a particular property for £1,100, a sum which he had arrived at owing to a mistake in addition, and gave notice of the mistake as soon as he received the acceptance, it was held that the acceptor, who knew that the offer could not have been intended, was not entitled to specific performance.[3]

There are cases which seem to go the length of holding that if a party knows that an offer has been made to him under a definite mistake in fact, he is not entitled to accept it. In *Steuart's Trs.* v. *Hart*,[4] *A.* advertised for

[1] *Mansfield* v. *Walker's Trs.*, 1833, 11 S. 813; affd. 1835, 1 Sh. & M'L. 203.

[2] A passage in the opinion of Lord Hatherley in *Inglis* v. *Buttery & Co.* (1878, 5 R. (H.L.) 87) seems to point to a distinction, in cases of this kind, between English and Scotch law. "We are informed . . . that in Scotland an agreement could not, as with us, be re-formed and be made conformable, if it was previously inconformable, to the intention of the two parties. There is no such process in Scotland. An agreement must either be upheld altogether or set aside altogether. No action will lie for having it set straight, or re-formed, as we call it, between the parties. If an agreement did not carry out the intention of the parties the only result would be that the party who thought himself aggrieved in this respect could ask the Court to hold that there was no agreement at all." This passage hardly rises to the dignity of an *obiter dictum*; it is merely a very loose summary of the argument of counsel on a point on which it was not necessary to decide. It uses the word "agreement" in a very misleading way. To re-form an "agreement" would be to make for the parties a bargain which they have not made for themselves, and to do so is not within the competence of the Courts in either country. "Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for the plaintiff to shew that there was an actual concluded contract, antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument" (per James, V.-C., *Mackenzie* v. *Coulson*, 1864, L.R. 8 Eq. 368, at p. 375). The case was a very strong one for the interference of the Court, yet it was refused. An underwriter's "slip" was signed with the addition of letters which meant that the risk was undertaken free from average. By a mistake of a clerk, who failed to notice the letters, the policy as made out and signed included average risks. It was held that the Court would not rectify the policy, on the ground that as the "slip" was not an agreement, or evidence of one, to do so would be to re-form a contract, and not merely an instrument following on a contract. So neither in England nor Scotland can an employer, who has tied down an employee by a restrictive agreement so wide as to be unenforceable as an unreasonable restraint upon trade, induce the Courts to re-form the contract, and make it enforceable within narrower limits (*Baker* v. *Hedgecock*, 1888, 39 Ch. D. 520; *Dumbarton Steamboat Co.* v. *Macfarlane*, 1899, 1 F. 993; *Mulvein* v. *Murray*, 1908, S.C. 528). But where an instrument or conveyance is admitted by both parties to have been drawn up incorrectly, the Chancery Division of the High Court in England will rectify it, if both parties admit the mistake, and the cases cited in the text shew that the Court of Session will exercise a power hardly distinguishable. Indeed *Krupp* v. *Menzies* (1907, S.C. 903) and *Waddell* v. *Waddell* (1863, 1 M. 653) seem to indicate that the Court will go further, in allowing proof of a mistake in expression which one party does not admit, than the English Courts would be prepared to go (see *May* v. *Platt* [1900], 1 Ch. 616; *Craddock* v. *Hunt* [1923] 2 Ch. 136). In neither country can a party take advantage of what he admits to be a clerical error, and in neither is the party whose interests are affected by the error tied down to the alternative of rescinding the contract or accepting it as mistakenly expressed.

[3] *Webster* v. *Cecil*, 1861, 30 Beav. 62. See also *Harris* v. *Pepperall*, 1867, L.R. 5 Eq. 1; *Paget* v. *Marshall*, 1884, 28 Ch. D. 255 (but doubts have been thrown on these cases in *May* v. *Platt* [1900], 1 Ch. 616).

[4] 1875, 3 R. 192.

sale a piece of land, part of the estate of *P.*, said to be burdened with a feu-duty of £9. 15s. The statement was made by mistake, the fact being that £9. 15s. was the feu-duty applicable to the whole estate of *P.*, of which the part sold was only a small portion, and that the sum by which its purchaser would be burdened was only 3s. *B.*, who purchased the subjects, was aware of the mistake. In an action by *A.*, concluding for reduction of the sale, the Lord Ordinary decided in favour of the pursuer on the ground that there was an error with regard to the price, and that, consequently, the parties had never arrived at any real agreement. It requires some special pleading to maintain that when a property is sold for a definite sum the parties are not agreed on the price merely because the seller would not have accepted that sum had he been aware of the true facts of the case. In the Inner House the judgment was altered, and decree of reduction was pronounced on the ground of essential error known to and taken advantage of by the defender.[1] A case presenting somewhat similar features is *Moncrieff* v. *Lawrie*.[2] There two contiguous houses were sold by auction. Certain back premises were within the title-deeds of lot No. 2, which was sold to Moncrieff, but, by an unauthenticated marginal addition to the articles of roup, it was provided that these premises should be included in lot No. 1, which was bought by Lawrie. Moncrieff was aware that it was not intended to sell the back premises with his lot. He, nevertheless, demanded a disposition in terms of the title (*i.e.*, including the back premises), and the seller, after some correspondence, assented. The action was at Moncrieff's instance for declarator that the back premises belonged to him. It was defended by the seller, and by Lawrie. It was held that the seller, as he had granted a disposition in full knowledge of the facts, had no title to object. Lawrie's case failed on the specialty that the minute of enactment of sale in his favour had been signed by only one witness. But for this specialty, it would appear from the opinions given that he might have defended the action successfully, on the ground that Moncrieff was trying to take advantage of what he knew to be a mistake. It is doubtful how far the principle of these cases—that *A.* is not entitled to accept *B.'s* offer if he knows *B.* made it owing to a mistake—would be carried. When a book is exposed for sale in a bookstall it is generally supposed that a collector may buy it at the price asked, though he knows that it is rare and valuable, and must know that the bookseller is unaware of its value, and yet, in all essential points, such a case is on all-fours with *Steuart's Trs.* v. *Hart*.[3]

When the party to whom the mistaken offer is made has no knowledge of the mistake, and accepts in good faith, there is some authority for saying that he may hold to his bargain. In *Seaton Brick and Tile Co.* v. *Mitchell*[4] *A.* tendered for work, offering to do it for a lump sum. Owing to a mistake in arithmetic in working out his calculation he had made his tender lower than he really intended. His tender was accepted in good faith, and it was held that he was bound by the contract. This decision, however, is irreconcilable with the earlier case of *Sword* v. *Sinclair*[5] (which was not cited), where *A.* instructed his agent not to sell tea under a certain price, and in writing the instructions put 2s. 8d. per lb. by mistake for 3s. 8d. The agent sold to *B.* at 2s. 8d., and it was held that the sale was reducible. And in

[1] *Steuart's Trs.* v. *Hart*, 1875, 3 R. 192. This ground of judgment appears in the interlocutor, and the case has been so interpreted (*Welsh* v. *Cousin*, 1899, 2 F. 277, per Lord Kyllachy (Ordinary), at p. 281). But from the terms of the opinions it might be argued that the Court adopted the Lord Ordinary's ground of judgment.

[2] 1896, 23 R. 577. [3] 1875, 3 R. 192. [4] 1900, 2 F. 550. [5] 1771, M. 14241.

cases where the tender did not state merely a lump sum, but gave fixed items, and a total sum arrived at by adding the items incorrectly, it was held, in questions arising after the work was done, that the tenderer was entitled to be paid on the correct summation.[1] Again, where a man, by a mere slip of the tongue, offered more than he had intended at a sale by auction, and the article was knocked down to him, it was decided that he was not bound.[2] On the whole, then, in spite of *Seaton Brick and Tile Co.* v. *Mitchell*,[3] it is conceived that a man is not bound by a clerical or lingual slip in making an offer, even although the party to whom it is made accepts in good faith.

When a party has accepted an offer made by mistake, in circumstances where he cannot maintain his bargain, the English Courts have given him the option of assenting to rescission of the contract or taking it on the terms in which it was truly intended.[4] In Scotland, in *Steuart's Trs.* v. *Hart*,[5] it was held that the contract must be reduced, but this may have been on the ground that rectification of the contract presented especial difficulties in the particular case, in respect that it involved the creation of a real burden on land which would not appear on the record.

Mistake in Transmission of Offer.—Another way in which an error in expression may arise is when an offer is incorrectly transmitted, a hazard to which telegraphic offers are obviously exposed. If the result be that the offer is read by the recipient in terms materially different from those in which it was made, his acceptance does not conclude a contract, because it is clear that the parties have never arrived at any agreement. In *Verdin Brothers* v. *Robertson* [6] the defender (Robertson) sent a telegraphic order for salt to be dispatched to his address at Peterhead. By a mistake on the part of the telegraph clerk, the order, as received, bore that the salt was to be delivered to "Morice, Peterhead." Verdin Brothers wrote to Robertson accepting his order, and forwarded the salt, with invoices, to "Morice, Peterhead." The invoices were returned through the dead letter office, and Robertson refused to accept the salt, as, by the time the mistake was discovered, it was too late for the purpose for which he required it. It was held that there had been no mutual consent to a contract of sale, and therefore that Robertson was not bound to accept the salt. In a similar case in England, when a telegraphic order for three rifles was altered to an order for fifty, it was held that the party who sent it was not bound to accept more than three.[7] Where parties correspond by telegraphic code, the one who alleges that a contract has been completed must shew that the other could not reasonably have mistaken his meaning.[8]

Error in Intention. Turning from error in the expression of a contract to error affecting intention, error is present in contract whenever it is shewn that one of the parties would not have entered into the contract, or would not have assented to the particular terms, if he had been aware of the true state of the facts. If his misapprehension can be ascribed to untrue

[1] *Jamieson* v. *M'Innes*, 1887, 15 R. 17; *Wilkie* v. *Hamilton Lodging House Co.*, 1902, 4 F. 951.

[2] *Phillips* v. *Bistolli*, 1824, 2 B. & C. 511. In *Scott* v. *Littledale* (1858, 8 E. & B. 815) *A.* sold to *B.* certain chests of tea in a particular ship, warranting it equal to a sample which he exhibited. By mistake, a sample of a different tea was exhibited. *A.* claimed the right to declare the contract rescinded. It was held that he had no such right; *B.* was at least entitled to delivery of the tea. Whether, if that were delivered, *B.* could claim damages, on the ground that it was not equal to the sample, was not decided. See also *Scriven Brothers* v. *Hindley & Co.* [1913], 3 K.B. 564, narrated *infra*, p. 446-7.

[3] 1900, 2 F. 550.

[4] See cases cited *supra*, p. 437, note.

[5] 1875, 3 R. 192.

[6] 1871, 10 M. 35.

[7] *Henkel* v. *Pape*, 1870, L.R. 6 Ex. 7.

[8] *Falck* v. *Williams* [1900], A.C. 176.

statements made by the other party, or by an agent for him, the decision of the case depends on the law of fraud, or innocent misrepresentation, as the case may be, and forms the subject of the ensuing chapter. In the present it is proposed to consider the case where one of the parties is in error in contracting, but his error cannot be ascribed to any misrepresentations made by the other.

Error, when Immaterial. It is established as a general rule that mere error by one party has no legal effect. It is not a sufficient ground for the reduction of a contract that one party gave his assent to it under a mistake. Parties are supposed to inform themselves on points material to their contracts, or to take the consequences if they do not. As it is put by an editor of Bell's *Principles*, if a man "buys too dear, or sells too cheap, he is not by reason of his mistake protected from loss."[1] Nor, in cases where consent to a contract is admitted, and the allegation is that the consent was given under error, is it material to consider whether the error alleged was or was not, from the point of view of a third party, in a matter of sufficient importance to be considered essential.[2] Such an inquiry is unnecessary and irrelevant, because the law refuses to allow effect to an error by one party, whether essential or not. "Error," said Lord Watson, in a case of misrepresentation, "becomes essential whenever it is shewn that but for it one of the parties would have declined to contract. He cannot rescind unless his error was induced by the representation of the other contracting party, made in the course of negotiation, and with reference to the subject-matter of the contract."[3] The law has been recently summarised by Lord Skerrington: "As a general rule, essential error is not in itself enough, according to Scots law, to nullify a contract. It must further be proved that the error was mutual, *i.e.*, common to both parties, or that it was induced by misrepresentation, either innocent or fraudulent, made by the other party to the contract, or that it was induced by fraudulent concealment."[4] In *Stewart* v. *Kennedy*[5] a party who had entered into a contract for the sale of an entailed estate sought to reduce it on the ground that he had contracted in error as to the legal effect of an agreement for the sale of property of that character. In addition to issues based on averments of misrepresentation and fraud, he tabled a separate issue for reduction on the ground of essential error. In the Court of Session this issue was refused, on the ground that the error averred was not essential. Lord Shand dissented, holding that the error was essential, and was, *per se*, a sufficient ground of reduction. In the House of Lords, while the judgment (on this issue) was affirmed, the House proceeded on the general principle that mere essential error by one party, not averred to have been induced by the misrepresentation of the other, was not a relevant ground for the reduction of a contract. Lord Watson put the law as follows: "Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that in the case of onerous contracts

[1] Bell, *Prin.*, sec. 11. "The action that a party, voluntarily purchasing shares in a joint stock company, and becoming a partner, is entitled to get free on the ground that he was in error, *i.e.*, that he found he had made a bad bargain when he intended to make a good one, is so utterly preposterous as to be unworthy of any attention." Per Lord Fullerton in *Forth Marine Insurance Co.* v. *Burnes*, 1848, 10 D. 689, at p. 700.

[2] As to the meaning of the phrase "essential error" in cases of misrepresentation, see *infra*, p. 473, note.

[3] *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108, at p. 142.

[4] *Stein* v. *Stein*, 1914, S.C. 903, 908. See also opinion of Lord Trayner in *Murray* v. *Marr*, 1892, 20 R. 119. As to a mutual error, see *infra*, p. 453.

[5] 1889, 16 R. 857; 1890, 17 R. (H.L.) 25.

reduced to writing, the erroneous belief of one of the parties in regard to the nature of the obligations which he has undertaken will not be sufficient to give him the right" to rescind "unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract." [1]

Error Induced by Fraud of Third Party.—When a party meets a demand for the fulfilment of a contractual obligation to which he is alleged to have consented by the averment that he consented in error, but does not proceed to charge his adversary or his agent with misrepresentation, it is immaterial whether his error arose from a too confident reliance on his own source of information or was induced by the fraud of a third party. In an action for the reduction of a guarantee to a bank, under which the guarantor had undertaken liability for all advances made to the principal debtor, the pursuer proved that he had been induced to sign the guarantee in the belief that it rendered him liable only for a small fixed amount, and that this belief had been induced by the fraud of the principal debtor. It was held that neither the error into which the guarantor had fallen, nor the fact that his error was due to the fraud of the principal debtor, were relevant grounds of reduction in a question with the bank.[2] "The case is settled surely beyond dispute that the cautioner takes his chance of what is told him by the person whose solvency or responsibility or conscientious acting he proposes to guarantee." [3]

Error Excluding Consent.—But the general rule that error by one party has no legal effect, and is not a ground on which the validity of a contract can be challenged, is limited by a principle equally general—that contract requires the agreement of parties, and that the error into which one of them has fallen may be so material as to preclude any agreement. If *A.* and *B.* enter into a seeming contract, and it is proved that their unison is merely in words, and that they were thinking of different things, it cannot be said that they have arrived at any agreement, or that either of them has consented to be bound by any contractual obligation. The question then is not whether a contract is reducible on the ground of error, but whether there is any contract to enforce. Error, though not a ground for the avoidance of an obligation founded on consent, may preclude the giving of that consent. It is in this sense, it is conceived, that the dictum of Lord Stair is to be taken: "Those who err in the substantials of what is done, contract not." [4]

The question then comes to be to distinguish between cases of error so fundamental or essential as to exclude any agreement, and error as to collateral matters, sometimes spoken of as *error concomitans*, which admits of agreement, though of an agreement to which one of the parties has assented under a mistake. The former case excludes contract, or, what amounts to the same thing, renders a seeming contract void; the latter, as a general rule, leaves the obligation of the parties as they would be had no error been alleged. It may, perhaps, be laid down that error is a ground for declaring

[1] *Stewart* v. *Kennedy, supra*, 17 R. (H.L.), at p. 29. See also opinion of Lord Kinnear in *Laing* v. *Provincial Homes Investment Co.*, 1909, S.C. 812, at p. 826.

[2] *Young* v. *Clydesdale Bank*, 1889, 17 R. 231. See also *Wallace's Factor* v. *M'Kissock*, 1898, 25 R. 642; *Royal Bank* v. *Greenshields*, 1914, S.C. 259; *North of Scotland Bank* v. *Mackenzie*, 1925, S.L.T. 236 (O.H., Lord Blackburn). For facts making the principal debtor the agent for the creditor, and the latter therefore liable for his statements, see *Sutherland* v. *Low*, 1901, 3 F. 972.

[3] Per Lord President Robertson in *Wallace's Factor* v. *M'Kissock*, 1898, 25 R. 642.

[4] Stair, i. 10, 13.

what purports to be a contract to be void; it is not a ground on which a contract can be reduced as voidable.

It may be said that when one party is in error as to the obligations in which he has involved himself by contract, it necessarily follows that the parties have not arrived at any complete agreement. Their minds have never truly met. There is, therefore, an apparent conflict between the proposition that error is not sufficient to invalidate a contract and the fundamental rule that a contract involves an agreement between two parties. But the conflict is only apparent. It disappears if it is kept in view that contractual obligations are not, as a rule, to be construed by considering the intentions of the party who undertook them, but rather by considering the impression which the words or acts of one party are calculated to convey to the other, or to a neutral and disinterested third party.[1] To this general principle of construction the cases where error has been found to be so material as to preclude consent and therefore to preclude obligation may be regarded as exceptions. Of course it may often be a very narrow question whether a particular case falls within the rule or the exception. The distinction may be suggested that a man cannot be barred from saying that he never meant to contract: he may be barred from saying that he meant to contract on terms inconsistent with the reasonable interpretation of his words or acts.

There is no difficulty, even in theory, where the error alleged relates merely to external facts which induce one party to think, mistakenly, that it is desirable for him to enter into the contract, and such error, as a rule, leaves the validity of the contractual tie unaffected. But when the error relates to the identity of the other party, to the contract undertaken, to the subject-matter, or to the obligations involved, the question comes to be one of degree. To what extent may error be present in the mind of one party without excluding the consent which the law requires in contract?

Professor Bell, in a section which has the added authority of Lord Watson's approval, deals with the subject of error in the following terms:[2] "Error in substantials, whether in fact or in law, invalidates consent[3] where reliance is placed on the thing mistaken. Such error in substantials may be (1) in relation to the *subject* of the contract or obligation, as where one commodity is mistaken for another; (2) in relation to the person who undertakes the engagement or to whom it is supposed to be undertaken, wherever personal identity is essential; (3) in relation to the price or consideration for the undertaking; (4) in relation to the quality of the thing engaged for, if expressly or tacitly essential to the bargain;[4] or (5) in relation to the nature of the contract itself supposed to be entered into." Noting this analysis, it is proposed to consider the law by tracing the various sources from which an error in contract may arise.

Error as to Identity.—Where a party enters into a contract under a mistake as to the identity of the party with whom he is contracting, and the circumstances are such that identity is a material point, there is no true

[1] *Supra*, pp. 7, 398.

[2] The quotation is from the 4th edition, the last published during Professor Bell's lifetime. It has been considerably enlarged and qualified by subsequent editors. Lord Watson expresses his general approval in *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25, at p. 28.

[3] This should be "excludes consent," if the section is to be read in accordance with the decision of the House of Lords in *Stewart* v. *Kennedy*, *supra*; but it is clear from the whole statement that Professor Bell—it is conceived, erroneously—thought that error was a ground for reducing a contract as voidable, even although it did not exclude consent.

[4] This seems to confuse cases of error with cases depending on the express or implied terms of the contract. See *infra*, p. 449.

consent, and the contract is void.[1] Such cases generally involve fraud: but as the principle is that the contract is void for want of any real agreement, and not merely voidable as induced by fraud, its invalidity may be declared even in a question with third parties. In *Morrisson* v. *Robertson*[2] one Telford purchased two cows from Morrisson, inducing him to sell them by the statement that he was the son and agent of Wilson, whom Morrisson knew as a person in good credit. These cows Telford resold to Robertson. It was afterwards discovered that Telford's description of himself as the son and agent of Wilson was untrue. It was held that Morrisson might recover the cows from Robertson. The legal principle was put by Lord Kinnear as follows: "If a man obtains goods by pretending to be somebody else, or by pretending that he is agent for somebody who has in fact given him no authority, there is no contract between the owner of the goods and him; there is no *consensus* which can support a contract. The owner—in this case the pursuer—does not contract with the fraudulent person who obtains the goods, because he never meant to contract with him. He thinks he is contracting with an agent for a different person altogether. He does not contract with the person with whom he in fact supposes he is making a contract, because that person knows nothing about it and never intended to make an agreement; therefore there is no agreement at all." In a case presenting similar features in England, Blenkarn ordered goods from a manufacturer. They were supplied in the belief that the order came from Blenkiron, a well-known dealer who had premises in the street from which Blenkarn wrote. Having got the goods, Blenkarn resold them. In a question with the sub-purchasers it was held that as the manufacturers had acted under a mistake as to the identity of the person with whom they were contracting, in circumstances where identity was material, there had been no contract, the property in the goods had not passed to Blenkarn, and he therefore conveyed no title to the sub-purchasers.[3] So when *A.* was fraudulently induced to become a member of a particular company by the statement that it was another company, of similar name and objects, of which he desired to become a member, the case was treated as one of error of identity excluding any real consent. *A.* was not liable as a contributory in the winding-up of the company he had actually joined, because the contract by which he joined it was not merely voidable but void.[4]

In the reduction of a contract on the ground of error in identity the Court must be satisfied that the pursuer regarded the identity of the person

[1] Stair, i. 9, 9 (putting the case of marriage under mistake as to the person); Ersk. iii. 1, 16; Bell, *Com.*, i. 314; Bell, *Prin.*, sec. 11; Pollock, *Contracts*, 9th ed., 507. Cases in following notes and *Ex parte Barnett*, 1876, 3 Ch. D. 123; *Gordon* v. *Street* [1899], 2 Q.B. 641; *Dunlop* v. *Crookshanks*, 1752, M. 4879.

[2] 1908, S.C. 332; see Pothier, *Obligations*, sec. 19; Brown on *Sale*, sec. 221; *Smith* v. *Wheatcroft*, 1878, 9 Ch. D. 223; *Said* v. *Butt* [1920], 3 K.B. 497. In *Hollins* v. *Fowler*, 1872, L.R. 7 H.L. 757, it was assumed as clear law that where a man got goods by pretending to be agent for a third party the contract was not merely voidable but void.

[3] *Cundy* v. *Lindsay*, 1878, 3 App. Cas. 459. But a different case is presented where a man assumes a name, pretends to be carrying on a business under that name, and thereby obtains goods which he does not pay for. There is then a contract under which sub-purchasers may obtain a title. In *King's Norton Metal Co.* v. *Edridge* (1897, 14 T.L.R. 98) *A.* had paper prepared representing that "Hallam & Co.," a non-existing firm, had a large factory and various agencies. He obtained goods from the plaintiffs to the order of "Hallam & Co." and resold them to the defendants. It was held that the defendants obtained a good title. *Cundy* v. *Lindsay* was distinguished on the ground that there the parties supplying goods believed that they were dealing with a person whom they knew; here they had no such belief, and treated the identity of their customers as immaterial.

[4] *Baillie's* case [1898], 1 Ch. 110.

with whom he was dealing as material. In *Phillips* v. *Brooks*[1] a man got goods from a jeweller by pretending to be a baronet known to the jeweller by reputation. He resold them, and it was decided that the sub-purchaser got a good title. It has since been explained that this was a case where the judge came to the conclusion, on the evidence, that the jeweller was prepared to deal with the man who stood before him, whoever he might happen to be.[2]

Error as to Contract.- If a man enters into one contract in the belief that he is entering into another, he has given no consent, and incurred no obligation.[3] The obvious case is where a signature to an obligatory document is obtained, and the party who signs is under the impression that he is merely signing as a witness, or signing a document of a different character. So where a bill of exchange was signed, under the impression, induced by fraud, that it was a guarantee, it was held that no obligation was constituted, and that the bill could not be enforced even by a holder in due course.[4] The same rule was applied where a promissory note was signed by a man who was led to believe that he was witnessing a deed.[5] Where a married woman was induced, by the fraud of her husband, to sign a mortgage under the impression that she was executing a power of attorney, it was held that the mortgagee, though he was not a party to the fraud, could not recover.[6] Where a party proposing to take a farm signed two separate offers, containing different terms, there was no *consensus*, and therefore no lease.[7]

In *Ritchie* v. *Ritchie's Trs.*[8] it was decided that a party attempting to reduce a deed on the ground that he signed under the impression that it was a deed of a different character, must put in the issue for trial by jury the nature of the error into which, as he alleged, he fell. In *Fletcher* v. *Lord Advocate*[9] the Lord Ordinary (Sands), whose judgment was not reclaimed on this point, held that in a similar case the pursuer must set forth the facts and circumstances which induced his erroneous belief, and that in the absence of any such statements the averments were irrelevant. "The bald averment, that he signed the document not knowing what it was, will not do."

Effect of Negligence.—In the majority of cases in which a man is fraudulently induced to sign a document under a mistake as to its nature the fraud could not have been successful if the party who signed had exercised a reasonable amount of care. His carelessness cannot import consent where there was none, but may operate as personal bar or estoppel. It has been held in England that where a man was induced to sign a guarantee under the impression that it was a paper relating to a policy of insurance, the fact that he was negligent in doing so did not preclude him from maintaining that he had never given any real consent, in a question with a party who had advanced money on the faith of the guarantee.[10] Negligence, it was pointed out, is of importance only when it involves failure

[1] [1919], 2 K.B. 243 (Horridge, J.). [2] *Lake* v. *Simmons* [1927], A.C. 487.

[3] *Dig.*, xviii. 1, 9; Pothier, *Vente*, sec. 37; Bell, *Com.*, i. 313; Bell, *Prin.*, sec. 11.

[4] *Foster* v. *Mackinnon*, 1869, L.R. 4 C.P. 704. See also *Thoroughgood's* case, 1584, 2 Co. Rep. 9; *Kennedy* v. *Green*, 1834, 3 My. & K. 699; *Wardlaw* v. *Mackenzie*, 1859, 21 D. 940, per Lord Justice-Clerk Inglis, at p. 947; *Ellis* v. *Lochgelly Iron and Coal Co.*, 1909, S.C. 1278, per Lord President Dunedin, at p. 1282.

[5] *Lewis* v. *Clay*, 1897, 14 T.L.R. 149. [6] *Bagot* v. *Chapman* [1907], 2 Ch. 222.

[7] *Buchanan* v. *Duke of Hamilton*, 1877, 4 R. 854; affd. 1878, 5 R. (H.L.) 69, narrated *supra*, p. 45.

[8] 1866, 4 M. 292. [9] 1923, S.C. 27.

[10] *Carlisle, etc., Banking Co.* v. *Bragg* [1911], 1 K.B. 489. The opinions given suggest an exception where the document signed is a negotiable instrument, and the party suing on it is a holder in due course.

in a duty, and the party who signed owed no duty in the matter. But, on prior authorities, it is conceived that if a party knows that a document relates to his property, and chooses to sign it without consideration and in blind confidence in his solicitor's statement that it is a mere matter of form, he will be barred from maintaining that he gave no consent if the solicitor fraudulently uses the document to obtain money from third parties. He, and not the parties whom his negligence has enabled the solicitor to deceive, must bear the loss arising from the fraud.[1] And the authorities in Scotland, so far as they go, are in favour of the view that where a man of ordinary education and intelligence has signed a document which he knew to relate to business he is bound by it in a question with third parties, and cannot defend himself on the plea of *non est factum*, *i.e.*, that he thought the document was something different from what it was. In *Gillespie* v. *City of Glasgow Bank*[2] the question was whether *G.* had accepted the position of a trustee, and thereby agreed to become a shareholder in the City of Glasgow Bank in respect of shares held by the trust, involving liability as a contributory in its liquidation. It was proved that *G.* had been assumed as a trustee without his knowledge or consent, but he had admittedly signed a letter authorising payment of dividends to the law agents of the trust. His evidence, according to the construction placed upon it by the majority of the Court, was that he had signed this letter without considering it, and in the belief that it related to the affairs of a different trust. It was held that there was no proof that *G.* had agreed to become a trustee. Lord Deas, dissenting, laid down the rule that if a man negligently signs an obligatory document he must take the consequences of his negligence in a question with third parties who have acted upon it. The Lord President (Inglis) pointed out that the question was not as to the effect of the letter as an obligatory document, but as to its effect as evidence of a matter of fact—the fact, namely, that *G.* had agreed to become a trustee—and intimated that if it had been a question of any obligation imposed by the letter, he would have agreed with Lord Deas that *G.*, having been undoubtedly negligent in signing it, must be bound by it whether he knew what it was or not. Again, where the accounts of an inspector of poor had been annually docqueted as correct by a committee of the parochial board, and it was sought to reduce the docquets on the ground that the members of the committee had never examined the accounts, it was observed that this averment did not present a case of essential error justifying the reduction of the docquets, but a case of neglect of duty on the part of the members of the committee, from the consequences of which their successors in office could have no relief.[3] But while, on these authorities, it may be held that a man is responsible for a document which he has negligently signed, in a question with third parties who have acted upon it, and are not implicated in the fraud which led to the signature, negligence is not a bar to reduction in a question with gratuitous takers from the party responsible for the fraud.[4] And probably negligence, in this connection, is not to be taken as the want of that degree of care which may be expected from the reasonable man, but of the care which might be expected from the particular individual, and therefore a contract or obligation, signed under a complete error as to

[1] *National Provincial Bank* v. *Jackson*, 1886, 33 Ch. D. 1; *Hunter* v. *Walters*, 1871, L.R. 7 Ch. 75; *Lloyd's Bank* v. *Bullock* [1896], 2 Ch. 192; *Howatson* v. *Webb* [1908], 1 Ch. 1.

[2] 1879, 6 R. 813.

[3] *Laing* v. *Laing*, 1862, 24 D. 1362.

[4] *Hogg* v. *Campbell*, 1864, 2 M. 848.

its nature, might bind a man trained to business, but not one who was uneducated or inexperienced.[1]

Error as to Term of Contract.—The principle that an error as to the nature of the contract undertaken excludes consent, and therefore renders the contract void, does not cover the case where a party knows the contract into which he is entering, but misapprehends its legal effect—a question discussed subsequently[2]—nor the case where an obligatory document is signed in the knowledge of its general character but in ignorance of some particular clause or provision. Consent has then been given, though it may be under a misapprehension. So if a man signs a proposal form for insurance he is bound by the statements made therein, though he may have allowed the insurance agent to insert answers to the questions in the form without applying his own mind to a consideration of their accuracy.[3] And when *A.*, after revising the draft of a deed, signed the extended copy in the knowledge that the draft he had revised had been altered, but without knowing what the alterations were, it was held that there was no ground for reduction.[4]

But the question is one of degree. A particular clause may alter the whole bearing of a deed, and then it would be difficult to maintain that the man who was induced to sign the deed without knowing of that particular clause had given any real consent.[5] The case of *Ellis* v. *Lochgelly Iron and Coal Co.*[6] is probably very near the line. There, in an appeal on a case stated under the Workmen's Compensation Act, the Sheriff had found in fact that the workman had signed a general discharge under the impression that it was merely a discharge for compensation already due, and had found in law that the claim was not barred by the discharge. The Court, being of opinion that the case was a narrow one, decided that it had not been shewn that the Sheriff was in error in law.

Error as to *res*.—An error as to the subject-matter of the contract may arise either where parties are at variance as to the particular thing about which they are contracting, or because they differ, more or less materially, about the qualities which the thing is supposed to possess. In the former case if *A.* thinks he is buying *X.*, and *B.* that he is selling *Y.*, and the language used is sufficiently wide and general to cover both *X.* and *Y.*, there is no agreement between *A.* and *B.* which either of them can enforce.[7] Thus in a verbal bargain for the supply of stone coping at so much per foot, it was proved that the one party believed that the price quoted was for lineal feet, the other that it was for superficial feet, and decided that there was no agreement, and therefore no binding contract.[8] Where at a sale by auction a buyer bid for a bale which he believed to contain hemp, and the auctioneer knew that it contained tow, and thought that the bid was for

[1] See opinion of Lord Justice-Clerk Hope, *Purdon* v. *Rowat's Trs.*, 1856, 19 D. 206, at p. 220. *Boil* v. *Wilkie*, 1669, M. 16590.

[2] *Infra*, p. 450.

[3] *Life and Health Association* v. *Yule*, 1904, 6 F. 437; *Macmillan* v. *Accident Insurance Co.*, 1907, S.C. 484.

[4] *Selkirk* v. *Ferguson*, 1908, S.C. 26.

[5] *Hogg* v. *Campbell*, 1864, 2 M. 848; *Wallace* v. *Fisher & Watt*, 1870, 9 M. 75.

[6] 1909, S.C. 1278.

[7] *Dig.*, xviii. 1, 9. It should be noted in cases of this kind that error excludes consent only when *A.* understands that he is dealing with a particular thing, not in cases where the real subject of the contract is *B.'s* interest in the thing. If *A.* buys *B.'s* interest in the thing he has got what he bargained for, and the mere fact that he thought *B.'s* interest was larger than it has turned out to be cannot affect the reality of the consent to the contract of sale (*Robertson* v. *Pattinson*, 1844, 6 D. 944; affd. 1846, 5 Bell's App. 259).

[8] *Stuart & Co.* v. *Kennedy*, 1885, 13 R. 221.

tow, it was held that their minds had never met, and that there was no sale.[1] In *Raffles* v. *Wichelhaus*,[2] *A.* brought cotton to arrive "*ex Peerless*" from Bombay. There were two ships of that name, both sailing from Bombay with cotton, but at different dates. It was proved that *A.* meant to buy cotton arriving by the one ship, the seller meant to sell cotton arriving by the other. It was held that there was no contract. And if an estate is sold by its name, and without reference to titles by which its boundaries are fixed, and seller and purchaser differ materially as to the acreage covered by the name, there is no binding contract between them.[3] Such cases are rare, and can hardly arise except in verbal contracts. In those reduced to writing, it is for the Court, in construing the contract, to determine the obligations involved, and the fact that one of the parties construed it differently is immaterial.[4] Only in the exceptional case where a word has been used which has two separate meanings will the Court be induced or driven to hold that there has been no completed contract.[5] Even in verbal contracts it is not necessarily sufficient to prove that there has been an honest misunderstanding: it must further appear that the misunderstanding was not attributable to one party more than to the other. If the conclusion arrived at is that it lay on one party to make his meaning plain, or that the language used by one party was calculated to mislead the other, the contract will be sustained on the general principle that the words or acts of a contracting party must be understood in the sense which a reasonable man would give to them.[6]

Error as to Qualities of *res*.—When parties are agreed as to the particular thing about which they are contracting, as in the case of a sale of an article which is before their eyes, the general rule, as will be shewn immediately, is that an error by one party as to the qualities of the article does not affect the validity of the contract, assuming, as in other cases in this chapter, that his error is not due to the representations of the other party. But it is conceived that there may be extreme cases, when, though parties are agreed as to the specified and identified thing, yet the contract may be void because one of the parties supposed that the thing possessed qualities which in fact it did not possess, provided that the difference between the thing as he supposed it to be and the thing as it actually was amounted to a difference in kind. Though a thing purchased may be actually seen or handled, the purchaser's senses may be so completely deceived as to preclude any real consent on his part to buy it. Thus Ulpian contrasts the case of the sale of a female slave, the buyer being under the impression that she is a virgin, while in fact she is not—a sale which would hold good because the error is merely as to the quality of the thing sold—with the case of the sale of a female slave believed by the purchaser to be a boy. In the latter case the sale, he holds, would be void, because the mistake is as to sex, *i.e.*, because the mistake amounts to a difference in kind.[7] Though it is not directly stated, it is con-

[1] *Scriven Brothers* v. *Hindley & Co.* [1913], 3 K.B. 564. [2] 1864, 2 H. & C. 906.

[3] *Hepburn* v. *Campbell*, 1781, M. 14168; *Houldsworth* v. *Gordon Cumming*, 1909, S.C. 1198; revd. 1910, S.C. (H.L.) 49, where, however, both parties maintained the contract. Cp. *Hamilton* v. *Western Bank*, 1861, 23 D. 1033.

[4] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25; and see *infra*, p. 450.

[5] *E.g.*, "foot" in *Stuart & Co.* v. *Kennedy*, 1885, 13 R. 221, which might mean either a lineal or a superficial foot. So the instance in *Dig.*, xlv. i. 83; "*Si Stichum stipulatus de alio sentiam, tu de alio, nihil actum erit.*"

[6] *Supra*, p. 7.

[7] *Dig.*, xviii. 1, 11. In another extract from the same book of Ulpian (ad Sabinum) an analogous case is stated (*Dig.*, xviii. 1, 9): "*Inde quæritur, si in ipso corpore non erratur, sed in substantia error sit, ut puta si acetum pro vino veneat, aes pro auro vel plumbum pro argento*

ceived that this distinction refers to the case when the slave sold is before the parties; when the seller in effect says, "Here is a slave; will you buy?" not to the case when the seller had obliged himself to supply a slave, when he would fulfil his contract by supplying a slave, whether male or female, or to the case where he had undertaken to supply a female slave, when he would not fulfil his contract by tendering a boy.[1] The case of *Earl of Wemyss* v. *Campbell*[2] seems to be an instance where an error as to the qualities of an identified thing, amounting to a difference in kind, was held sufficient to render a contract void, though it was an error by one party only. The lessee of the right of "shooting of the deer forest of Dalness" brought a reduction of the lease on the ground of error. He averred that the lands let were not a deer forest, in respect that stags were never to be found there during the proper stalking season. There were also averments of misrepresentation by the lessor, but these were not insisted on. The Court allowed an issue "whether the pursuer entered into the [lease] on the footing that the tract of ground therein referred to as the deer forest of Dalness was a deer forest in which the sport of shooting stags therein during the season proper for such sport could be enjoyed, and whether the pursuer entered into the said [lease] under essential error as to the true nature of the said subject, the said tract of ground not being a deer forest in which such sport could be enjoyed." The terms of this issue, and the opinions of the judges, seem to make it clear that the decision did not proceed on the ground that the lessor had broken his contract by not supplying a deer forest, but on the error of the lessee with regard to the subject which he was leasing. So, though a party who has agreed to take shares in a company, under error as to the advantages which the company may possess, has no remedy if the error was merely his own, and, if the error was induced by fraud, cannot reduce the agreement as voidable unless he takes action before the company goes into liquidation, yet if the company's objects, as set forth in the memorandum of association, are materially different from those indicated in the prospectus, he may successfully maintain that his application for shares, if induced by the prospectus, is actually void, on the principle that the difference between the company,

vel quid aliud argento simile, an emptio et venditio sit. Marcellus scripsit . . . emptionem esse et venditionem, quia in corpus consensum est, etsi in materia sit erratum. Ego in vino quidem consentio, quia eadem prope substantia est, si modo vinum acuit; ceterum si vinum non acuit, sed ab initio acetum fuit, ut embamma, aliud pro alio venisse videtur. In cæteris autem nullam esse venditionem puto, quotiens in materia erratur."

[1] Sir F. Pollock holds that the sale of an identified thing can only be void if there is an error amounting to a difference in kind, and if that error is common to both parties (*Contract*, 9th ed., 525). But Ulpian, in the passages referred to in the text and in the preceding note, is speaking of an error of one party only. He goes on to consider the case of a common error (*Dig.*, xviii. 1, 14): "*Quid tamen dicemus, si in materia et qualitate ambo errarent? ut puto si et ego me vendere aurum putarem et tu emere, cum aes esset . . . si autum aes pro auro veneat, non valet.*" And see Savigny, *System*, 3, secs. 137, 138.

Professor Bell deals with the subject as follows (*Com.*, i. 314): "Error as to quality, the thing itself being identically what the parties understood to be the subject of their agreement, may or may not be sufficient to annul the consent. If it be a quality touching the very object of the contract, and of which the seller must be aware, it will be held essential; and a manifest defect in regard to such quality, provided the defect be not open to observation, and such as would have prevented the bargain, will be fatal to the consent required to a valid contract. Thus it is implied in mercantile bargains that the article shall be merchantable, and if it be found not so, there is no sale." But this passage fails to distinguish between error on the part of the buyer and breach of an implied condition of the contract by the seller, and also between causes which render a contract void (want of consent) and causes which render it voidable (breach of warranty). See also opinion of Lord President (Dunedin) in *Edgar* v. *Hector*, 1912, S.C. 348.

[2] 1858, 20 D. 1090, the Lord Justice-Clerk dissenting on the ground that the lessee was bound either to satisfy himself or to obtain from the lessor an express warranty.

as portrayed in the prospectus, and as ultimately formed, is a difference in kind and not merely in quality.[1] A company formed to work a mine, for example, is a different thing from a company formed to lend money on heritable security; and if the prospectus proposes to work the mine, while the memorandum of association takes powers to lend money, an application for shares based on the prospectus cannot be fairly taken as a consent to take shares in the company.

Sales by Description and Wrong Article Supplied. Certain cases following on sales by description seem at first sight cases of error excluding consent, but really depend on a different principle. In a sale by description the seller warrants that the goods are of that description.[2] If, therefore, the goods he tenders are not of that description, he does not fulfil his contract, and is liable in damages. The classic illustration is that if peas are sold the buyer cannot be compelled to take beans.[3] So, in *Jaffé* v. *Ritchie*,[4] *A.* contracted to supply *B.* with "3 lb. flax yarn." The yarn he supplied had an admixture of jute. The evidence of parties engaged in the trade was that yarn with an admixture of jute was a different thing from flax yarn. It was decided that *B.* was not bound to accept the yarn, because it was not the article he bought; that *A.* was in breach of contract, and liable in damages. So where a house was sold as burdened with a feu-duty of £2. 5s., and it turned out that the feu-duty had never been allocated, and that it amounted to £4. 8s. (subject to a right of relief against the owner of a neighbouring house), it was held that the seller was not able to provide what he had professed to sell (*i.e.*, a house with a feu-duty of £2. 5s.), and therefore could not insist on the buyer carrying out his bargain.[5] Cases of this kind, however, though they resemble cases of error in respect that the parties differ as to the article to be supplied, are decided on the ground that the seller is bound to supply what he has undertaken to sell, as his undertaking is construed by the Court, and their relevancy in this connection lies in their value as examples of what amounts to a difference in substance or kind, as opposed to a mere difference in quality.[6] In a sale by description the question is whether the seller had fulfilled his contract by supplying what he sold; in the sale of a specific article, whether the buyer's error as to the qualities of the article is so complete as to preclude any real consent to buy it.

Error as to Quality or Value.—Where an error or mistake as to the subject-matter of a contract does not produce a divergency amounting to a difference in kind, but merely consists in an error as to the quality or value of the thing, the validity of the contract is not affected.[7] "The mere fact that a contracting party is ill-informed about the subject-matter of a contract

[1] *Downes* v. *Ship*, 1868, L.R. 3 H.L. 343; *Stewart's* case, 1866, L.R. 1 Ch. 574; *City of Edinburgh Brewery Co.* v. *Gibson's Tr.*, 1869, 7 M. 886, per Lord President Inglis, at p. 891; *Mair* v. *Rio Grande Rubber Estates Co.*, 1913, S.C. 182, per Lord President Dunedin, at p. 190; revd. 1913, S.C. (H.L.) 74.

[2] Sale of Goods Act, 1893, sec. 13.

[3] *Chanter* v. *Hopkins*, 1838, 4 M. & W. 399, per Lord Abinger, at p. 404; cited by Lord Blackburn in *Bowes* v. *Shand*, 1877, 2 App. Cas. 455, 480.

[4] 1860, 23 D. 242.

[5] *Bremner* v. *Dick*, 1911, S.C. 887. See also *Critchley* v. *Campbell* (1884, 11 R. 475), where it was held that a lessor of the exclusive right of shooting over certain lands did not fulfil his contract when it turned out that part of the lands were a commonty, over which others had a common right of shooting.

[6] See cases of the sale of seeds, and delivery of the wrong kind (*Adamson* v. *Smith*, 1799, M. 14244; *Carter* v. *Campbell*, 1885, 12 R. 1075; *Smith* v. *Waite, Nash & Co.*, 1888, 15 R. 533; *Wallis* v. *Pratt* [1911], A.C. 394).

[7] Stair, i. 9, 9; Bankton, i. 11; Ersk. iii. 1, 16; Bell, *Com.*, i. 314; Pollock, *Contract*, 9th ed., 525.

has never, so far as I am aware, been held to be a reason for reducing it." [1] So, in the absence of misrepresentation, a mere error in the value of land leased,[2] or sold,[3] is not a ground of reduction. And the fact that a company has not obtained a valuable contract, which has been described as secured in the prospectus, is merely an element affecting the value of the shares; it does not render the shares as they are actually issued different in kind from the shares as set out in the prospectus, so as to entitle a party who had applied for shares on the faith of the prospectus to maintain that he had never given any real consent to become a shareholder.[4] In *Smith* v. *Hughes* [5] the case related to a sale of oats. They were, as the seller was aware, new oats; the buyer thought they were old. The sale was by sample, which the buyer had examined without discovering his mistake. After the bulk had been supplied he insisted on the right to rescind the sale, on the ground of want of any real consent. It was held that if the buyer believed the oats to be old, and also believed that the seller was contracting to sell old oats, whereas the seller was aware that the oats were new, and was also aware of what the buyer thought, the sale could be rescinded, on the ground that the parties had never agreed as to the subject of their bargain, but that if all that could be proved was that the buyer thought he was getting old oats, the sale would stand, being then a case of error merely as to quality.

Error as to Price, etc.—Where in a sale, lease, or other contract, it appears that the parties held conflicting views as to the price, rent, or other consideration,[6] it may be considered that the case is in substance one in which there is a difference as to the contract such as to preclude any real consent. The apparent contract may be reduced if matters are still entire; if goods have been supplied, possession taken, or services rendered, the law will infer an obligation to pay a reasonable price, rent, or wage.[7] So where cattle were sold verbally, and it was proved that one party thought that the price had been fixed, the other that it was to be settled according to the quality of the cattle, it was held that there was no concluded contract, but that as the buyer did not offer to return the cattle he must pay the market price.[8]

Error as to Legal Effect of Contract.—It may be regarded as settled that a mutual contract, involving obligations on both parties, is not reducible on the ground that one of the parties was in error as to its legal effect. Assuming that a party knows the contract into which he enters, it is for the Courts to determine what obligations he has incurred, and it would be idle to appeal to a Court to interpret a contract if the law allowed the losing party to rescind, on the plea of error, in respect that his contractual obligations as judicially determined were other than he had supposed them to be.

***Stewart* v. *Kennedy*.**—In the law of Scotland *Stewart* v. *Kennedy* is the leading case.[9] There Stewart, heir of entail in possession of the estate of

[1] Per Lord Kincairney (Ordinary), *Scott* v. *Craig's Reprs.*, 1897, 24 R. 462, at p. 468.
[2] *Hamilton* v. *Duke of Montrose*, 1906, 8 F. 1026.
[3] *Woods* v. *Tulloch*, 1893, 20 R. 477; *Tamplin* v. *James*, 1879, 15 Ch. D. 215.
[4] *Kennedy* v. *Panama Mail Co.*, 1867, L.R. 2 Q.B. 580. Cp. *Ward* v. *Hobbs*, 1878, 4 App. Cas. 13.
[5] 1871, L.R. 6 Q.B. 597.
[6] As to the case where the consideration is left for future settlement, see *supra*, p. 40.
[7] *Stirling* v. *Honyman*, 1824, 2 S. 765; *Anderson* v. *Wilson*, 1856, 19 D. 39; *Wilson* v. *Marquis of Breadalbane*, 1859, 21 D. 957; *Stuart & Co.* v. *Kennedy*, 1885, 13 R. 221; *Douglas* v. *Baynes* [1908], A.C. 477.
[8] *Wilson* v. *Marquis of Breadalbane*, *supra*.
[9] 1889, 16 R. 857; affd. (on this point) 1890, 17 R. (H.L.) 25. As to the averments of fraud and misrepresentation in the case, see *infra*, p. 472.

Murthly, had offered to sell it to Kennedy. The offer contained the words: "In the event of your acceptance, the sale is made subject to the ratification of the Court." The offer was accepted, and in a litigation which followed it was decided that Stewart was bound to implement the contract by applying for a ratification of the sale under sec. 5 of the Entail Amendment Act, 1853.[1] Stewart then brought a reduction of the sale, and proposed, *inter alia*, an issue of essential error. The error alleged was that he was under the impression that the Court would not ratify the sale unless they were satisfied that the price was fair and reasonable, whereas he found that the law made no provision for an inquiry into that point. He proposed an issue of essential error as to the import and effect of the offer to sell.[2] The issue was refused on the ground that mere error of one party as to the import and effect of a contractual obligation was not a ground on which that obligation could be set aside. On this point the various tribunals before which the case depended were agreed, and it is nowhere put more clearly than in the opinion of the Lord Ordinary (Kinnear): "A contract deliberately executed in the terms which the parties intended cannot be set aside on the ground that one of them misunderstood its legal effect. They are bound by the contract according to its true construction, and the pursuer cannot be relieved of his obligation because upon a question of construction judgment has been given against him."[3] The same principle was applied to a case where the averments of the pursuer amounted to a statement that she had not understood the legal consequences of an obligatory contract with a building society into which she had entered.[4] Again, *A.* gave to a mutual assurance society an unqualified guarantee of all calls exigible in respect of a particular ship. His intention was to guarantee the calls while a mortgage, in which he was interested, subsisted. It was held that the duration of his liability was to be determined by the construction of the terms of the guarantee, that it imported liability until it was withdrawn, and that it was immaterial that *A.* had not put that meaning upon it.[5]

The cases referred to have related to written contracts, but there is authority for holding that the same rule—that error by one party as to the legal import of the obligation does not affect his liability—applies also to verbal contracts.[6]

But while it is the general rule that parties must submit to the construction which the Court may place on their obligations, however unexpected by one of them that construction may be, there are certain cases which form exceptions to it. The rule assumes that the parties are dealing at arm's-length; it is not applicable to the case where the one stands to the other in a fiduciary or *quasi*-fiduciary relation.[7] Nor is it applicable to gratuitous obligations.[8] And the election by a widow to accept, or to refuse, provisions

[1] 16 & 17 Vict. c. 94.

[2] In *M'Conechy* v. *M'Indoe* (1853, 16 D. 315) a deed was reduced on an affirmative answer to an issue of essential error as to its import and effect. But the case seems to have been treated as one of error induced by misrepresentation. In any other view it is overruled by *Stewart* v. *Kennedy*.

[3] *Stewart* v. *Kennedy*, 1889, 16 R. 857, at p. 862. See also quotation from the opinion of Lord Watson, *supra*, p. 440. English authorities to the same effect are reviewed by Swinfen-Eady, L.J., in *Eastes* v. *Russ* [1914], 1 Ch. 468, 480.

[4] *Laing* v. *Provincial Homes Investment Co.*, 1909, S.C. 812. But in *Smith* v. *Soeder* (1895, 23 R. 60) Lord Wellwood held that a discharge was reducible on the ground that the granter was too stupid to understand it.

[5] *Britannia Steamship Insurance Association* v. *Duff*, 1909, S.C. 1261.

[6] *Muirhead & Turnbull* v. *Dickson*, 1905, 7 F. 686, per Lord M'Laren.

[7] *Infra*, Chap. XXXI.

[8] *Infra*, p. 453.

made for her in her husband's will in lieu of her legal rights, is not treated as an ordinary contract. Such an election is not, it is conceived, revocable; that is to say, that if the widow has elected while fully advised as to the material facts, she cannot withdraw her election merely on the ground that she has changed her mind.[1] But error as to the results of the election, though due merely to the widow's failure to understand the material considerations, and not ascribable to any misrepresentations or unfair dealing by the trustees on the husband's estate, will be a ground of reduction.[2]

Error as to Collateral Facts. -Where parties are fully informed as to the nature and effects of the contract into which they have entered, but one of them alleges that he would not have contracted had he not been in error as to some external circumstances, the authorities are clear that the contract is not affected. Extreme cases—*e.g.*, where a man buys a thing in the mistaken belief that his circumstances warrant the purchase—are too obvious for decision. Where a party leased a theatre, it was held that he could not rescind the lease on discovering that the plays which he proposed to produce were illegal.[3] Where a party was asked to guarantee the interest on a loan over subjects in Windsor Circus, and assented, under the mistaken impression that the request related to a loan over subjects in Windsor Quadrant, for which he was already liable, it was decided that the guarantee was binding.[4] In *Welsh* v. *Cousin*[5] the pursuer of an action, in ignorance of the fact that the defenders had lodged a tender of £50, settled his claim for £20. The Court, holding that in the circumstances there was no legal obligation on the defenders to disclose the fact of the tender, and that they were entitled to deal with the pursuer alone, though they knew that he was represented by a law agent, came to the conclusion that there was no relevant ground on which the settlement could be set aside. The distinction between a mistake amounting to error as to the nature of the contract, and error merely affecting the motive, is well brought out in *Hogg* v. *Campbell*.[6] There a deed of entail was challenged on two grounds: (1) that it had been signed by one party under error as to the provisions of a previous deed; (2) that he had signed it in ignorance that a material clause which he had revised in the draft had been omitted from the final copy. An issue of reduction on the ground of essential error was asked on both of these averments. It was allowed on the second ground, on the principle that—the clause in question being material—the deed actually signed was not the one the party had agreed to sign. It was refused on the first ground, in respect that error as to the provisions of a prior deed was an error merely affecting the motive of the party.

Error in Law.—It is difficult to imagine a case in which an error in law by one party only can be so fundamental as to exclude any real consent. Such error will as a rule relate either to the interpretation of the express or implied terms of the contract, or to the reasons which induce the party to contract. Neither of these forms of error is, as has been explained, a ground for reduction. In exceptional cases the error in law may relate to the

[1] Per Lord Kinnear in *Dawson's Trs.* v. *Dawson*, 1892, 23 R. 1006; per Lord Kincairney (Ordinary) in *Stewart* v. *Bruce's Trs.*, 1898, 25 R. 965.

[2] M'Laren, *Wills*, 3rd ed., i. 249; *Dawson's Trs.* v. *Dawson* and *Stewart* v. *Bruce's Trs.*, *cit. supra*; *Donaldson* v. *Tainsh's Trs.*, 1886, 13 R. 967; *M'Fadyen* v. *M'Fadyen's Trs.*, 1882, 10 R. 285.

[3] *Cloup* v. *Alexander*, 1831, 9 S. 448. Cp. *Adams* v. *Weare*, 1784, 1 Bro. C. C. 567.

[4] *Bennie's Trs.* v. *Couper*, 1890, 17 R. 782.

[5] 1899, 2 F. 277.

[6] 1864, 2 M. 848.

qualities of the subject to which the contract relates, for instance, if a house is bought when, on a mistaken reading of the law, the purchaser believed that the sitting tenant could be removed. But this would be an error merely as to the quality or value of the house, and would not exclude consent to buy it, or, apart from any fraud or misrepresentation, form a ground for reduction.

Error in Gratuitous Obligations. The general rules that a contract is not affected by the error of one party as to the obligations it imposes, or with regard to extraneous facts which influence him in deciding to enter into it, suffer exception in the case of obligations entered into gratuitously. There it is now established that the party who has acted under error may reduce the obligation. In *Purdon* v. *Rowat's Trs.*[1] a party who had granted a general discharge of all claims was held entitled to reduce it, on the ground that there were certain claims open to him of which he was not aware. A certain amount of stress is laid, in the opinions given, on the fact that the discharge was, *quoad* these claims, entirely gratuitous, but it is not clear whether this was the crucial point in the case. In *M'Laurin* v. *Stafford*[2] the pursuers' averments, in an action of reduction, were that they had granted a conveyance of property to their daughter under the impression that the deed was merely testamentary and revocable. They proposed an issue of essential error. The defenders (the daughter and her husband) contended that the words "induced by the defenders" must be inserted in the issue, and argued that the error alleged, if not induced by misrepresentation on their part, was not a relevant ground for reduction. A Court of seven judges unanimously approved the issue as originally proposed. No reasons are given for the judgment, but from the argument it seems clear that the case was decided on the ground that the conveyance was gratuitous. On that assumption it was followed in *M'Caig's Tr.* v. *University of Glasgow*.[3] The University Court were trustees under a will by which the testator's whole estate was destined to certain charitable purposes. They obtained from his sister, who was his sole representative *ab intestato*, a deed of confirmation and assignation, by which she renounced all her right, title, and interest in her brother's estate. In an action of reduction of this deed the sister averred that she had granted it under essential error, in respect that she was unaware that there were strong grounds for contesting the validity of the will. The Court, expressly proceeding on the fact that the deed was gratuitous, allowed an issue of essential error. So, in a later case, where a workman, proved to be "of low mental type," signed a discharge of all claims competent to him under the Workmen's Compensation Act, in consideration of a payment which merely covered the compensation already due to him, and which therefore was in substance a gratuitous deed, it was held, on proof that the workman had not understood the effect of the discharge, that it did not preclude him from a further claim.[4]

Mutual Error. Where both parties have contracted on the assumption of the existence of a certain state of facts, and it turns out that the assumption is mistaken, the contract may be void on the ground that the existence of the assumed facts was impliedly made a condition precedent to liability. Thus

[1] 1856, 19 D. 206. See also *Dickson* v. *Halbert*, 1854, 16 D. 586. [2] 1875, 3 R. 265.

[3] 1904, 6 F. 918. See also *Shedden* v. *Shedden's Trs.*, 1895, 23 R. 228; *Sawrey-Cookson* v. *Sawrey-Cookson's Trs.*, 1905, 8 F. 157, per Lord President Dunedin, at p. 165; *Armour* v. *Glasgow Royal Infirmary*, 1909, 1 S.L.T. 40; *Lady Hood of Avalon* v. *Mackinnon* [1909], 1 Ch. 476.

[4] *Macandrew* v. *Gilhooley*, 1911, S.C. 448.

it is conceived that it is a general rule that if a contract relates to a specific thing, and that thing has, without the knowledge of the parties, ceased to exist, any agreement for the sale or use of it is void. In the case of sale, the rule is expressed in the Sale of Goods Act, 1893 (sec. 6): "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void." So where a cargo of corn was sold, on the assumption that it was in transit from Salonica to England, whereas in fact it had been destroyed before the date of sale, the contract was held to be void.[1] A similar decision was pronounced in regard to the assignment of a policy of insurance on the life of a man whom both parties to the contract believed to be alive, and who had died before the contract was made.[2] So if a ship which has in fact been lost is chartered, it is conceived that neither party can enforce the obligation under the charter-party;[3] that if a house were let, and it turned out that it had already been burnt, the contract of lease would be void.[4] Where a heritable creditor was in the course of realising his security, and the trustee under a trust-deed induced him to delay by granting an obligation to pay the debt out of the first available funds, and it turned out that the security was bad, the Court, although upholding the obligation on the ground that the error was not the inducing cause of the trustee's action, expressed the opinion that but for this specialty it would have been reducible, on the ground that it was granted as the result of a mutual mistake.[5] In *Hamilton* v. *Western Bank*[6] there was a sale of a small piece of land with the buildings thereon. Both parties understood that the whole property belonged to the seller. It turned out that about a fifth part belonged to a third party. It was held that the contract might be reduced on the ground of essential error, and seems to have been a case where both parties contracted on an assumption which turned out to be wrong. In *Huddersfield Banking Co.* v. *Lister*[7] a mortgagor agreed to a consent order under which certain looms situated on the premises covered by the mortgage were sold by a receiver in the debtor's bankruptcy. The order was set aside on the ground that both parties were acting under the mistaken belief that the looms in question were not affixed to the building, and therefore did not fall within the mortgage.

Discharge under Mutual Error. On the ground of mutual error a discharge is reducible if it is granted and taken under a material error as to the nature or extent of the right in question. In *Mercer* v. *Anstruther's Trs.*[8] a daughter, by contract with her father, renounced her share in her mother's estate, which (as it was ultimately held) had vested in her, and, as both parties had acted on the assumption that the right had not vested, it was held that the discharge was reducible. And where general discharges have been granted on specific payments, both parties being under the impression that the payment was all that could be claimed, it has been held, on that impression being found to be erroneous, that the discharge was not

[1] *Couturier* v. *Hastie*, 1856, 5 H.L.C. 673.

[2] *Scott* v. *Coulson* [1903], 2 Ch. 249. See also *Cochrane* v. *Willis*, 1865, L.R. 1 Ch. 58.

[3] *Sibson & Kerr* v. *Barcraig Co.*, 1896, 24 R. 91, opinion of Lord Young, at p. 98. See Carver, *Carriage by Sea*, 7th ed., 135.

[4] *Dig.*, xviii. 1, 57; Pothier, *Louage*, Part I., Ch. ii., sec. 1.

[5] *Grieve* v. *Wilson*, 1828, 6 S. 454; affd. 1833, 6 W. & S. 543.

[6] 1861, 23 D. 1033. The sellers had expressly disclaimed any warrandice of title.

[7] [1895], 2 Ch. 273.

[8] 1871, 9 M. 618; affd., on other grounds, 1872, 10 M. (H.L.) 39. Cp. *Rigg* v. *Paterson*, 1788, M. 2102; *Leslie* v. *M'Leod*, 1868, 6 M. 445 (see p. 469); affd. 1870, 8 M. (H.L.) 99.

binding.[1] In these cases the question was much discussed whether the reduction of the discharge was barred by the fact that the mutual error was in a question of law,[2] having regard to opinions expressed in the House of Lords to the effect that money paid under an error in law could not be recovered.[3] The Court, in *Dickson* v. *Halbert*,[4] while recognising the authority of these opinions, came to the conclusion that a distinction could be drawn between the case of payments made under the mistaken belief that they were due, and a discharge granted under the mistaken belief that all claims had been satisfied, and that, in the latter case, a mutual error, though only in law, was a ground for reduction.

Purchase of *res sua*. To the same principle of the invalidity of a contract entered into under a mutual mistake as to a material point may be ascribed the rule that the purchase of a thing which already belongs to the purchaser, though neither party is aware of the fact, is void.[5] It is conceived that the usual clause in articles of roup of heritable property, to the effect that the purchaser must be held to have satisfied himself as to the validity of the title, would not save a sale where it turned out that the subjects already belonged to the purchaser.[6] Where a railway company, in response to a notice by a quarrymaster that he proposed to work freestone under the line, sent a notice to treat under the Railways Clauses Consolidation (Scotland) Act, 1845, it was held that they were not thereby precluded from maintaining that, as the freestone did not fall within the reservation of minerals in the conveyance under which they obtained the property on which the line was built, it already belonged to them.[7]

Mutual Error in Expectation. If the mutual error was merely on a matter of opinion, or of expectation for the future, the validity of the contract is not affected. A bargain may be a bargain, though it turn out unexpectedly good. So where a full discharge was given for a claim under the Workmen's Compensation Act in reliance on a medical report which stated that the injured workman would shortly recover, and this report, which both parties trusted, turned out to be erroneous, it was held that the accuracy of the report was not an implied condition of the contract, and that there was no ground for the reduction of the discharge. It was pointed out by Lord Moncreiff that in such transactions each party takes the risk that the opinion on which he relies may turn out to be wrong.[8] If the existence of the thing to which the contract relates is known by both parties to be doubtful the fact that it turns out to be non-existent will not affect the validity of the contract.[9]

Mutual Error as to Value of *res*. So also it would appear that if a particular thing is sold, the sale cannot be reduced on the discovery that the thing has a value which neither party suspected at the time. The

[1] *Ross* v. *Mackenzie*, 1842, 5 D. 151; *Dickson* v. *Halbert*, 1854, 16 D. 586; *Purdon* v. *Rowat's Tr.*, 1856, 19 D. 206; *Alexander's Trs.* v. *Muir*, 1903, 5 F. 406, opinion of Lord Stormonth Darling (Ordinary).

[2] In *Dickson* v. *Halbert* the error was as to the legal effect of a deed; in *Ross* v. *Mackenzie* as to the effect, on the amount due as legitim, of discharges during the parent's lifetime by other children.

[3] As to this, see *supra*, p. 62.

[4] 1854, 16 D. 586.

[5] *Dig.*, xviii. 1, 16; xliv. 7, 10; l. 17, 45; *Cochrane* v. *Willis*, 1865, L.R. 1 Ch. 58; *Cooper* v. *Phibbs*, 1867, L.R. 2 H.L. 149. Cp. *Scrabster Harbour Trs.* v. *Sinclair*, 1864, 2 M. 884; *Magistrates of Inverness* v. *Highland Rly. Co.*, 1893, 20 R. 551.

[6] *Morton* v. *Smith*, 1877, 5 R. 83; *Hamilton* v. *Western Bank of Scotland*, 1861, 23 D. 1033.

[7] *Caledonian Rly. Co.* v. *Symington*, 1911, S.C. 552; revd. on other grounds, 1912, S.C. (H.L.) 9.

[8] *Dormer* v. *Allan & Son*, 1900, 3 F. 112. See also *M'Guire* v. *Paterson*, 1913, S.C. 400.

[9] *Pender-Small* v. *Kinloch's Trs.*, 1917, S.C. 307.

trustee on the bankrupt estate of a manufacturer of white lead sold the whole articles on the premises to *A*. *A*. resold the various articles by auction, and some vats were knocked down to *B*. for £2. It was afterwards discovered that these vats contained white lead to the value of £300, a circumstance which was unknown to any of the parties. The trustee brought an action against *B*., concluding for interdict against his using the white lead. It was held that as the original sale to *A*. was not impugned, the trustee had no title to challenge the sub-sale to *B*., but opinions were expressed that mutual error as to the value of a specific thing sold did not affect the validity of the sale. The rule in such cases is, in the words of the Lord Ordinary, ***caveat venditor***.[1]

Compromise under Error.—If a contract is of the nature of a compromise, or, more technically, a transaction, under which a disputed point is settled by mutual concessions, the mere fact that one or both parties were in error does not make the compromise reducible. It is binding, even should it appear that the claim originally put forward by one of the parties was unanswerable.[2] This principle has been applied in cases where disputed rights under a family settlement have, after negotiations, been arranged :[3] and in the case of a compromise of a controversy with regard to the rights of the Crown to minerals, whereby a lease was accepted, and the rights of the Crown conceded.[4] But cases of this class are not properly cases of error. The consideration given on each side is the avoidance of the trouble and expense likely to be involved in deciding the point in dispute, and, with regard to that consideration, there is no error.

Remedy in Cases of Error.—Where a contract is void or voidable on the ground of error the remedy is reduction, neither party can insist that it should be enforced on the terms which would probably have been agreed to had the truth been known. Where an estate was sold on the terms that the purchaser should pay part of the price in cash, and relieve the seller of a real burden, and it turned out that the real burden did not exist, it was held that the remedy of the seller, if any, lay in a reduction of the sale, he could not demand payment in cash of the whole price.[5]

[1] *Dawson* v. *Muir*, 1851, 13 D. 843. The Lord Ordinary (Murray) puts the case of a sale of a number of old books at a lump price, and a subsequent discovery that one of them was a valuable *editio princeps*. The sale, he holds, would stand. See, however, *Merry* v. *Green*, 1841, 7 M. & W. 623, where the purchaser of a bureau found a purse in it, and was charged with larceny for keeping it; and opinions in *The Queen* v. *Hehir* [1895], 2 Ir. R. 709. According to Ulpian (*Dig.*, xviii. 1, 14) the question is one of degree. The sale of a bracelet, in fact brass, but believed by both parties to be gold, is void, but is valid if it is partly gold and partly brass. But how much brass may a bracelet contain and still deserve the epithet golden? In *Wieler* v. *Schilizzi*, 1856, 17 C.B. 619, Willes, J., suggests, as a *reductio ad absurdum*, one carat gold. As to the case of the purchase of a *jactus retis*, and a gold cup found in the net, see Pothier, *Vente*, sec. 6, deciding that it should belong to the fisherman.

[2] Stair, i. 17, 2. But in liquidation subject to the supervision of the Court a compromise is reducible on the ground that essential facts were not brought before the Court. The Court is a party to the transaction (*Henderson* v. *Stewart*, 1894, 22 R. 154). And the Crown, which cannot suffer from the ignorance or negligence of its officials, may set aside a compromise under which a certain sum has been accepted on payment of duties. *Lord Advocate* v. *Meiklem*, 1860, 22 D. 1427; *Lord Advocate* v. *Miller's Trs.*, 1884, 11 R. 1046.

[3] *Stewart* v. *Stewart*, 1836, 15 S. 112; affd. 1839, 1 M'L. & R. 401; *Kippen* v. *Kippen's Trs.*, 1874, 1 R. 1171. See also *Johnston* v. *Johnston*, 1857, 19 D. 706. It has been held in England that where a disputed question is compromised under the advice of a solicitor acting for all the parties, it is reducible if the solicitor conveyed a false impression of the law or facts, either by mistake, or in the hope of thereby inducing the parties to agree (*In re Roberts* [1905], 1 Ch. 704). As to mistake by counsel in compromising an action, see *Hickman* v. *Berens* [1895], 2 Ch. 638.

[4] *Lord Advocate* v. *Wemyss*, 1896, 24 R. 216; revd. 1899, 2 F. (H.L.) 1.

[5] *Pender-Small* v. *Kinloch's Trs.*, 1917, S.C. 307.

CHAPTER XXVII

MISREPRESENTATION AND CONCEALMENT

In the last chapter an attempt was made to explain the legal effect of error in contract, on the assumption that the error was not attributable to any misrepresentation made by the other contracting party. In the present it is proposed to deal with the case where the element of misrepresentation is involved.

Scope of Chapter.—The subject is not without difficulties, and in certain important questions the law still admits of doubt. Reserving for the next chapter the question when a misrepresentation amounts to fraud, it is proposed to consider (1) what amounts to a misrepresentation: (2) in what cases it affects the validity of a contract: and (3) the legal effect of misrepresentation when made without fraudulent intent.

One party to a contract may, intentionally or otherwise, produce a misapprehension in the mind of the other, either by failure to disclose facts which it is material for him to know, or by actual misrepresentations, conveyed by words or by acts.

In the question whether concealment of material facts may amount to a misrepresentation, it must first be noticed that there are certain contracts, commonly spoken of as contracts *uberrimæ fidei*, in which the law lays upon each party the duty to disclose all material facts known to him, with the result that if this duty is not fulfilled, the other party is entitled to avoid the contract. These contracts, as forming an exception to ordinary rules too important to be dealt with incidentally, will be considered in a separate chapter.[1]

Concealment of Material Facts.—In ordinary contracts the general rule is that each party relies on his own means of knowledge, and cannot complain if the other possesses more accurate information which he does not disclose. "Whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."[2] "Concealment by a contracting party is not held in law to be fraudulent, if he is not under an obligation to disclose what he conceals to the other contracting party. The understood object of parties in entering into bargains in business matters is to make gain, and neither is bound to inform the other of the grounds upon which he makes his prospective estimate of gain, or of the extent of the profit he expects to realise; and in the ordinary case he is not guilty of fraud, although he conceals the grounds of his own calculations and expectations from the other contracting party, and although he in consequence obtains a better bargain than he might have got if the other contracting party had possessed

[1] Chap. XXX.

[2] Per Blackburn, L.J., in *Smith* v. *Hughes*, 1871, L.R. 6 Q.B. 597, at p. 607. See also opinion of Lord Cairns in *Peek* v. *Gurney*, 1873, L.R. 6 H.L. 377, 403; and of Scrutton, L.J., in *Moody* v. *Cox* [1917], 2 Ch. 71, 88.

the same degree of sagacity or knowledge."[1] So in general it does not amount to a misrepresentation, nor does it give any ground for the reduction of a contract of sale, that things are sent to market having defects of which the seller is aware, but which the buyer has no reason to suspect.[2] "The defender's contention in law, that where a seller gives no warranty the buyer must protect himself, must be conceded."[3] Where *A.* was aware that an order in Privy Council had been passed which was certain to increase the price of spirits, and bought spirits from *B.* when *B.*, to his knowledge, had not heard of the order, it was held that he might stand by his bargain.[4] Where a party purchases or leases land, he is under no obligation to inform the seller or lessor that the land has a value which the latter does not suspect.[5] Where the defenders in an action of damages had lodged a tender of £50, and, in an interview with the pursuer, found that he was not aware of the tender and persuaded him to settle for £20, it was held that they had acted within their legal rights, and were under no obligation to inform the pursuer of the tender.[6] In cautionary obligations the creditor is not bound to volunteer information as to the state of the debtor's account, and the cautioner cannot escape liability on the ground that no such information was given to him, and that he signed the guarantee under error on that point.[7] And the same principle, that there is no general obligation to disclose superior knowledge, has been illustrated in other contracts.[8] The limits of permissible silence were reached—it may be thought outstepped—in *Russell* v. *Farrel.* A law agent, acting for *A.*, wrote to *B.*, who was a creditor of *A.*, for £145, offering a composition of £45. He added that *A.* was blind and deaf, and unable to do anything for a living. *B.* replied, asking for the law agent's assurance that *A.* had no hopes or expectations of any kind. To this the answer was that the law agent could not be responsible in the matter. *B.* then accepted £45 and granted a discharge. He brought a reduction of the discharge, on the ground that, as he averred, *A.* was possessed of £700, and this fact had been concealed from him. The action was held irrelevant, on the principle that a party trying to compromise a debt was under no obligation to disclose his financial position, even, apparently, though his letters had, to his knowledge, misled the creditor on that point.[9]

Sale of Defective Articles.—While it is submitted that the law is as stated in the preceding paragraph, there is a certain amount of authority for the proposition that the seller of a specific article is bound to reveal all defects known to him, if the circumstances preclude any effective examination by the purchaser. Pothier contrasts the sale of animals which had come from a district infected by disease, when, he says, concealment would be

[1] Per Lord Curriehill in *Gillespie* v. *Russell*, 1856, 18 D. 677, 686

[2] Sale of Goods Act, 1893, sec 14; *Smith* v *Hughes*, 1871, L.R. 6 Q.B. 597; *Ward* v. *Hobbs*, 1878, 4 App. Cas. 13; *Patterson* v. *Landsberg*, 1905, 7 F. 675. As to implied warranties see *supra*, p. 311.

[3] Per Lord Kincairney in *Patterson* v. *Landsberg*, *supra*, at p. 678.

[4] *Morison* v. *Boswall*, 1801, Hume, 679; affd. 1812, 5 Paton, 649; *Paterson & Co.* v. *Allan*, 1801, Hume, 681.

[5] *Gillespie* v. *Russell*, 1856, 18 D. 677; 1857, 19 D. 897; affd. 1859, 3 Macq. 757; *Keates* v. *Lord Cadogan*, 1851, 10 C.B. 591.

[6] *Welsh* v. *Cousin*, 1899, 2 F. 277; *Turner* v. *Green* [1895], 2 Ch. 205.

[7] *Broatch* v. *Jenkins*, 1866, 4 M. 1030; *Young* v. *Clydesdale Bank*, 1889, 17 R. 231; *Royal Bank* v. *Greenshields*, 1914, S.C. 259.

[8] See *Irvine* v. *Kirkpatrick*, 1850, 7 Bell's App. 186 (purchase of share of succession; no duty to disclose terms of settlement with holder of another share); *Lonsdale Hematite Iron Co.* v. *Barclay*, 1874, 1 R. 417 (obligation to offer share in firm to other partners before assigning it. No duty to disclose amount of prior offers by third parties).

[9] *Russell* v. *Farrel*, 1900, 2 F. 892.

fraudulent,[1] with the case of a merchant, in time of famine, concealing the fact that supplies were imminent.[2] In *Duthie* v. *Carnegie*,[3] the sale of a ship, at that time on a voyage, was reduced on the ground of defects known to the seller. In two cases,[4] in neither of which did the point arise for decision, opinions were expressed that concealment of defects of which he was aware was fraudulent on the part of a seller of seeds. Where, however, a horse was sold on terms excluding all warranties it was held to be clear that the purchaser could not complain of over-disclosure of defects known to the seller.[5]

Concealment of Insolvency.—A man, in entering into a contract, is not bound to inform the other party that he has doubts whether his circumstances will enable him to fulfil the obligations involved. "A trader is not bound to advertise his doubts of his own solvency." So goods may be purchased by a man who knows that his chance of paying for them is remote, without rendering the transaction open to reduction on the ground of fraud.[6] But it is a different case where a man has made up his mind to stop payment. He is not then entitled to enter into fresh commitments without disclosing his circumstances, and concealment of them amounts, in civil questions, to fraud.[7] The question whether the trustee in his bankruptcy can take advantage of that fraud, and enforce the contracts, will be considered later.[8]

Offer Made by Mistake.—But while it seems clear that a man, in making an offer, is not bound to disclose the reasons which induce him to make it, even although he knows that the disclosure of these reasons would preclude all chance of acceptance, he is not always entitled to accept an offer which he knows to be made in consequence of a definite mistake in fact, or to take advantage of a mere clerical or lingual slip. The cases on this point have already been considered.[9]

Active Concealment.—Conduct which is characterised as active concealment amounts to misrepresentation, and, usually, to misrepresentation of a fraudulent character.[10] Under this head fall devices adopted to conceal defects in an article. So the sale of a ship with all faults was set aside on proof that the seller had set her afloat in order to prevent the purchaser from discovering that her bottom was unsound.[11] It has been observed that it would be fraudulent, in a sale by auction, to exhibit unrepresentative specimens of goods to be sold in bulk.[12] And it is probably the law that if articles are manufactured so as to appear to be something which they are not, such as sham antiques or imitation jewellery, it amounts to fraud to

[1] *Vente*, sec. 213. The English Courts, in *Ward* v. *Hobbs*, 1878, 4 App. Cas. 13, came to the opposite conclusion.

[2] *Vente*, sec. 241. He remarks that Cicero's decision against the merchant (*De Officiis*, Book iii., Ch. 12) was valid only for the "*for de la conscience*."

[3] 21st Jan. 1815, F.C. The case is reported without opinions, and, from the argument, may have turned on implied warranty.

[4] *Stewart* v. *Jamieson*, 1863, 1 M. 525; *Hardie* v. *Austin and M'Aslan*, 1870, 8 M. 798.

[5] *Philip's Trs.* v. *Reid*, 1884, 21 S.L.R. 698.

[6] *Ehrenbacher* v. *Kennedy*, 1874, 1 R. 1131; *Clarke & Co.* v. *Miller & Co.'s Tr.*, 1885, 12 R. 1035; *Ex parte Whittaker*, 1875, L.R. 10 Ch. 446.

[7] *Carnegie* v. *Hutchinson*, 1815, Hume, 704; *Schuurmans* v. *Tweedie's Tr.*, 1828, 6 S. 1110; *Watt* v. *Findlay*, 1846, 8 D. 529; *Gamage* v. *Charlesworth's Tr.*, 1910, S.C. 257.

[8] *Infra*, p. 537.

[9] *Supra*, p. 435.

[10] *Dig.*, xviii. 1, 43: "*Dolum malum a se abesse præstare venditor debet, qui non tantum in eo est, qui fallendi causa obscure loquitur, sed etiam qui insidiose obscure dissimulat.*"

[11] *Schneider* v. *Heath*, 1813, 3 Camp. 506.

[12] *White* v. *Dougherty*, 1891, 18 R. 972.

sell them without explaining what they really are. In *Patterson* v. *Landsberg*,[1] jewels, so arranged as to have an apparent historical interest, were sold by a wholesale to a retail dealer. As a matter of fact the seller had made them himself. The contract was rescinded at the instance of the purchaser. The decision proceeded on proof of actual fraudulent statements, but Lord Kyllachy was of opinion that it would have been enough to prove that the jewels were sold without explaining that they were not what they appeared to be. Where a manufacturer of cash registers sold one which had been reconditioned, so as to appear to be new, to a party who thought he was buying a new one, it was held that the onus of proof that he had explained the true facts lay upon the manufacturer, and that, if he failed to discharge that onus, his conduct amounted to fraud which would render him liable in damages.[2]

Half-Truths.— Again, there are cases where if a party says anything at all he is bound to tell the whole truth. A half-truth may be a misrepresentation. It has been pointed out that to read over a deed and omit a clause was misrepresentation and not concealment.[3] A party inviting tenders for work, and giving particulars of the subjects on which the work is to be done, is bound to disclose all facts within his knowledge which it would be material for an intending contractor to know.[4] As has been already explained, a banker is not bound to inform an intending guarantor of the state of his customer's account,[5] but any statement by him which is misleading, though not definitely untrue, will entitle the guarantor to reduce the guarantee. In *Royal Bank* v. *Greenshields* [6] *A.* was indebted to a bank in £300 on an overdrawn account, and in about £1100 on certain accommodation bills. He induced *B.* to become security for him to the extent of £500. In an action by the bank against *B.* the defence was the failure of the bank agent to disclose the state of *A.'s* account with the bank. There was a conflict of evidence as to what the parties had said, but the Court arrived at the conclusion that the point which was proved was that the bank agent had said, on a guarantee of £300 being spoken of, that that would not be of much use, as it would be taken up by the bank. It was held that this did not amount to a statement from which *B.* was entitled to infer, if no further information was given to him, that *A.'s* indebtedness to the bank did not exceed £300. But it was observed that if the bank agent had been asked as to *A.'s* account, an answer to the effect that he was due £300 to the bank on overdraft, without mention of *A.'s* liability on the accommodation bills, would have amounted to a misrepresentation. Where leasehold property was sold with a list of incumbrances, but by accident no mention was made of a ground rent not usual in that class of property, specific performance of the contract was refused.[7] In *Crossan* v. *Caledon Shipbuilding Co.*[8] the agent for a firm in whose service a workman had been injured obtained from him a discharge of all claims for compensation. He told him that in the opinion of a doctor he would shortly recover; he failed, without any fraudulent intention, to mention that the doctor had added that the case was one in which he could not predict. It was held that the discharge was reducible,

[1] 1905, 7 F. 675.
[2] *Gibson* v. *National Cash Register Co.*, 1925, S.C. 500.
[3] *Couston* v. *Miller*, 1862, 24 D. 607.
[4] *Mackay* v. *Lord Advocate*, 1914, 1 S.L.T. 33.
[5] *Supra*, p. 441.
[6] 1914, S.C. 259.
[7] *Jones* v. *Rimmer*, 1880, 14 Ch. D. 588.
[8] 1906, 43 S.L.R. 852; 14 S.L.T. 33 (H.L.).

but it was an important element in the case that the workman was in a weak state of health and without legal advice.

Correction of Statement Found to be Untrue. If a man has made a statement which is true at the time when he made it, but owing to change of circumstances ceases to be true, he is bound to explain the true facts to anyone whom he knows to be dealing with him in reliance on his original statement. A prospectus stated, truly, that *A.* and *B.* had agreed to act as directors. Before the company was formed they withdrew their consent. It was held that applications for shares made in reliance on the statement in the prospectus, and without notice of the change in the facts, were revocable.[1] In *Shankland* v. *Robinson* [2] a traction engine had been sold by auction, and bought by *R.* It was requisitioned by the military authorities. *R.*, to whom immediate delivery was of importance, refused to pay the price, on the ground that he had bought under essential error, induced by misrepresentation. It was proved that *R.* had inquired as to the possibility of requisition, and had been assured by *S.* that the military authorities had decided against it. It was admitted that the assurance was truthfully given at the time. In the meantime statements had been made by an officer, which, in the opinion of the majority of the Court of Session, should have suggested to *S.* that the official attitude had been altered. The Court held that the fact should have been intimated to *R.*, and reduced the sale on the ground that it had not. The House of Lords, taking a different view of the negotiations, decided that nothing had occurred which should have suggested to *S.* that requisition was probable, and therefore sustained the sale, but all the judges concurred in holding that where a representation had been made there was an obligation to disclose any subsequent fact which affected its truthfulness. It is conceived that the obligation, in such cases, is to disclose all new developments which would affect the mind of a reasonable man, and that non-disclosure will render the contract voidable even although the party may have honestly thought the new developments immaterial.[3]

The same principles apply to the case where a statement is made in the belief that it is true and its untruth is afterwards discovered. The maker is bound to reveal the true facts.[4]

Devices to Conceal True Facts. A merely general averment that the defender's conduct was fraudulent, if his specific acts amount to nothing but concealment of facts which he had no duty to disclose, will not make a relevant case for reduction.[5] But if the pursuer shews a studied effort to conceal the truth, and avers that the intention was fraudulent, his case may be relevant, though he cannot lay his finger on any statement which can be characterised as false. "The statement of a portion of the truth, accompanied by suggestions and inferences which would be possible and credible if it contained the whole truth, but become neither possible nor credible whenever the whole truth is divulged, is, to my mind, neither more nor less than a false statement." [6] Thus where a bank had made an arrangement with an

[1] *In re Scottish Petroleum Co.*, 1883, 23 Ch. D. 413.

[2] *Shankland* v. *Robinson*, 1919, S.C. 715; revd. 1920, S.C. (H.L.) 103.

[3] *Gowans* v. *Dundee Steam Navigation Co.*, 1904, 12 S.L.T. 137 (O.H., Lord Stormonth Darling); opinions of Lords Dundas and Guthrie in *Shankland* v. *Robinson*, *supra*; opinion of Turner, L.J., in *Traill* v. *Baring*, 1864, 4 De Gex J. & S. 318.

[4] *Brownlie* v. *Miller*, 1880, 7 R. (H.L.) 66, per Lord Blackburn, at p. 79; *Davies* v. *London and Provincial Marine Insurance Co.*, 1878, 8 Ch. D. 469.

[5] *Broatch* v. *Jenkins*, 1866, 4 M. 1030.

[6] Per Lord Watson, *Aaron's Reefs* v. *Twiss* [1896], A.C. 273, 287.

insolvent customer, under which he granted a bond for £2,000 and assigned a policy on his life, it was held that the description of this arrangement as an advance of £2,000, in a cautionary obligation for the interest and premium, amounted to a misrepresentation on which the cautioner might reduce his obligation, though, from the form in which the settlement had been carried out, the description of the £2,000 as an advance could not be characterised as entirely untrue.[1] In *Dempster* v. *Raes*,[2] legatees under a will induced the heirs *in mobilibus*, to whom the residue was left, to agree to an equal division of the estate, without explaining to them the nature of their interest, and with the statement, misleading though literally true, that their names were not mentioned in the will. The Court had no difficulty in arriving at the conclusion that the conduct of the legatees amounted to fraud.

What Amounts to Misrepresentation. When more than mere concealment is averred, and an actual statement has been made which is not borne out by facts, the question whether it amounts to a misrepresentation depends upon the character of the statement. A statement may be an expression of opinion, an assertion of fact, or an indication of the party's intention. It may often be very difficult to determine, in particular cases, to which of these three categories a statement belongs.

Expressions of Opinion.—A mere expression of opinion, though it may turn out to be unfounded, and although the other party may have relied upon it, is not a misrepresentation, if the opinion be honestly held. But it is clearly fraudulent to state an opinion which one does not hold, or to express a definite opinion on a point on which the state of one's mind is complete ignorance, if the intention is to induce another party to act upon it.[3] And the question whether a particular statement is to be read as a mere opinion, or as a definite assertion, may often be a narrow one. Though no absolute rules can be laid down, there is a tendency to hold that a statement on a point on which both parties have equal means of information is to be read as a mere expression of opinion, especially if, in the circumstances, a reasonably prudent man would have investigated the matter for himself.[4] Thus, in agricultural leases, the extent and carrying capacity of the farm are matters on which an intending lessee should satisfy himself, and very considerable discrepancies between the statements made by the lessor and the actual facts may pass as mere expressions of opinion, which, if honestly made, leave the contract unaffected.[5] Where a lessee of minerals claimed the right to abandon the lease, on the ground that the minerals were not sufficient to pay the cost of working, and founded on a representation by the landlord that there was a large stratum of freestone capable of being worked to profit, it was held that statements of this character were statements as to mere matters of opinion, and, even though erroneous, formed no ground for reducing the lease.[6]

Misrepresentation of Law. Probably a general statement of law, if

[1] *Falconer* v. *North of Scotland Bank*, 1863, 1 M. 704; *Royal Bank of Scotland* v. *Ranken*, 1844, 6 D. 1418; *Lee* v. *Jones*, 1864, 17 C.B. N.S. 482.

[2] 1873, 11 M. 843.

[3] See *infra*, p. 475.

[4] See opinions in *Brownlie* v. *Miller*, 1878, 5 R. 1076; affd. 1880, 7 R. (H.L.) 66.

[5] *Oliver* v. *Suttie*, 1840, 2 D. 514; *Campbell* v. *Boswall*, 1841, 3 D. 639; *Hamilton* v. *Duke of Montrose*, 1906, 8 F. 1026; *Woods* v. *Tulloch*, 1893, 20 R. 477 (sale); *Dobbie* v. *Duncanson*, 1872, 10 M. 810. See also *Gillespie* v. *Russell*, 1856, 18 D. 677; (2nd case) 1857, 19 D. 897; affd. 1859, 3 Macq. 757; *Bisset* v. *Wilkinson* [1927], A.C. 177.

[6] *Gowans* v. *Christie*, 1871, 9 M. 485; affd. 1873, 11 M. (H.L.) 1, opinion of Lord Ordinary (Mackenzie), at p. 487, approved in the House of Lords.

honestly made, would be treated as a statement of opinion.[1] But where a party took out a policy on a life in which he had no insurable interest, being told by the company's agent that his interest was sufficient, it was held that the insurer was entitled to rely on the agent's knowledge of the law, and could found on his statement a claim to avoid the policy and recover the premium.[2] And a statement as to the legal effects of a particular document may be treated as a statement of fact. So where the misrepresentation alleged was as to the legal effect of a contract to sell an entailed estate, it was held that the seller, in an action of reduction, was entitled to an issue of error induced by misrepresentation, without being obliged to peril his case on proof that the misrepresentation was fraudulent.[3]

Verba jactantia.—Within limits impossible to define, the law makes allowance for exaggerated statements in trade. An advertisement, unduly laudatory, does not necessarily amount to a misrepresentation.[4] Nor will a prospectus readily be held fraudulent merely because it expresses an outrageously sanguine view of the prospects of the company.[5] "The law will not allow persons who have become partners in such a company to escape from liability merely on account of some high colouring or grandiloquence in a statement of the prospectus which is substantially true."[6] The cases afford no definite rule. Where a patented contrivance for the prevention of smoke was sold, and failed to fulfil its purpose, it was held that the purchaser was not entitled to reject it on the ground that in an advertisement sent to him it was represented as having virtues which it did not possess.[7] A statement in a sale by auction that land was "very fertile and improvable," while in fact it had been found to be partly useless, was treated as a mere expression of opinion.[8] On the other hand, an untruthful statement, made to underwriters in Leith, that eight guineas per cent. was the highest premium charged by underwriters in London, was held to be a sufficient ground for avoiding a policy of marine insurance.[9] And the purchase of an hotel, on a statement that the existing occupier was "a most desirable tenant," whereas he was unable to pay his rent and on the verge of bankruptcy, was reduced on the ground of misrepresentation.[10]

Conventional Expressions.—A merely conventional expression, to which no definite meaning is commonly attached, does not amount to a misrepresentation. So where a prospectus stated that *A.* and *B.* had retired from the directorate owing to the pressure of their parliamentary duties, it was held irrelevant to aver, as a ground for the reduction of an agreement to take shares, that this was not the true reason for their retirement.[8]

Statements as to Intention.—An expression of intention cannot be a

[1] *Brownlie* v. *Miller*, 1878, 5 R. 1076; affd. 1880, 7 R. (H.L.) 66.

[2] *Harse* v. *Pearl Life Assurance Co.* [1903], 2 K.B. 92; [1904], 1 K.B. 558.

[3] *Stewart* v. *Kennedy*, 1889, 16 R. 857; revd. 1890, 17 R. (H.L.) 25.

[4] Stair, i. 9, 10; *Dig.*, xxi. 1, 18; *City of Edinburgh Brewery Co.* v. *Gibson's Tr.*, 1869, 7 M. 886. As to the degree of misstatement which will render a business a fraud on the public, disentitling it to the ordinary protection of its trade name, see *Bile Beans Manufacturing Co.* v. *Davidson*, 1906, 8 F. 1181; *Plotzker* v. *Lucas*, 1907, 15 S.L.T. 186.

[5] *Dunnett* v. *Mitchell*, 1887, 15 R. 131.

[6] Per Lord President in *City of Edinburgh Brewery Co.* v. *Gibson's Tr.*, 1869, 7 M. 886, at p. 891.

[7] *Prideaux* v. *Bunnett*, 1857, 1 C.B. N.S. 613. Cp. *Paul* v. *Corporation of Glasgow*, 1900, 3 F. 119, where it was unsuccessfully argued that such a circular amounted to a warranty.

[8] *Dimmock* v. *Hallett*, 1866, L.R. 2 Ch. 21.

[9] *Sibbald* v. *Hill*, 10th June 1809, F.C.; revd. 1814, 2 Dow, 263.

[10] *Smith* v. *Land and House Property Corporation*, 1884, 28 Ch. D. 7. This was not a case of fraud; the statement had been inserted, without authority, by the auctioneer.

[11] *Chambers* v. *Edinburgh and Glasgow Aerated Bread Co.*, 1891, 18 R. 1039.

misrepresentation unless the party has not in fact formed the intention he professes. A man who states his intention does not bind himself not to change his mind, and anyone who contracts in reliance on a statement of intention takes his chance that the intention will be carried out. But it is a question of construction whether a statement that a party intends to do a certain thing is a mere expression of revocable intention, a promise to do the thing in question, or an offer to do it which may be made binding by acceptance.[1] But in no event is an expression of actual intention a misrepresentation; it is either a contractual obligation, or it has no legal effect. But a man may misrepresent his intentions, and if he does so with the object of misleading another party, his act will amount to fraud. "The state of a man's mind is just as much a matter of fact as the state of his digestion," [2] though proof of it may be more difficult. So where directors stated that money to be raised by debentures was intended to be applied to a particular purpose, and it was proved that no such intention had been formed, it was held that the statement was fraudulent, and that the directors were liable in damages.[3] And to indicate an intention to contract, where no such intention has been formed, with the result that another party is led into expense, is an actionable wrong.[4]

Reasonable Reading of Statements Made.—Assuming now that a statement is construed as an assertion of fact, and not as a mere expression of opinion or intention, it may first be noted that the party who has acted upon it, and asserts any right in respect of its untruth, is bound to interpret the statement fairly. He is not entitled to put a strained construction on the words used, and complain that he was thereby misled. It is for the Court to determine whether the defender's statements are justified by the facts. Thus where a prospectus stated that a large number of gentlemen in the trade and others had already become shareholders, it was held that this statement was sufficiently justified by the fact that twelve out of fifty-five existing shareholders were persons connected with the trade in question.[5] Where a stockbroker sent a circular recommending the shares of a new company, on the ground that it was brought out "under the auspices of the directors of the *A. Co.*, who have taken a large interest in the shares," and the party to whom the circular was sent subscribed for shares in reliance on this statement and sued for damages on the ground that it was untrue and fraudulent, it was decided that the terms of the circular were borne out by the facts, which were that four out of the eight directors of the *A. Co.* were interested in the new company either as shareholders or underwriters.[6]

Misrepresentation by Agent.—A misrepresentation by an agent is, in so far as its effect in invalidating a contract is concerned, to be treated as a misrepresentation by the principal.[1] If the agent's conduct amounts to fraud, this may be rested on the ground that the principal is liable for his

[1] See *supra*, p. 17.

[2] Per Bowen, L.J., in *Edgington* v. *Fitzmaurice*, 1885, 29 Ch. D. 459, at p. 483.

[3] *Edgington* v. *Fitzmaurice*, *supra*.

[4] *Gilchrist* v. *Whyte*, 1907, S.C. 984, per Lord Ardwall; *Clydesdale Bank* v. *Paton*, 1895, 23 R. 38; revd. 1896, 23 R. (H.L.) 22.

[5] *City of Edinburgh Brewery Co.* v. *Gibson's Tr.*, 1869, 7 M. 886.

[6] *Romanes* v. *Garman*, 1912, 2 S.L.T. 104.

[7] *Stewart* v. *Kennedy*, 1889, 16 R. 857; revd. (on this point) 1890, 17 R. (H.L.) 25; *Laing* v. *Provincial Homes Investment Co.*, 1909, S.C. 812, both narrated *infra*, p. 472; *Kettlewell* v. *Refuge Assurance Co.* [1909], A.C. 243; *Mair* v. *Rio Grande Rubber Estate Co.*, 1913, S.C. 183; revd. 1913, S.C. (H.L.) 74; *Sutherland* v. *Low*, 1901, 3 F. 972.

agent's fraud if committed while acting within the scope of his authority. But there is a wider principle, which covers the case of innocent misrepresentation by the agent, viz., that a man cannot take any advantage obtained by his agent's misstatements. In cases of fraud this has, in recent cases, been treated as a commonplace. "It is elementary law that no person can take advantage of the fraud of his agent."[1] In *Mair* v. *Rio Grande Rubber Estates Co.*[2] a prospectus quoted a favourable report by *L.*, who was one of the directors, on a property over which the company had an option. It stated that *L.*, from long residence in the locality, was a person well qualified to judge of the property, but it did not in any way assert the truth of the statements in his report, and added that the purchase would not be completed until *L.'s* verdict was confirmed by an independent report. Mair, who had taken shares on the faith of the prospectus, sued for rescission, and averred that *L.'s* report was false and fraudulent. He did not aver that the other directors were cognisant of the fraud. In the Court of Session the action was dismissed as irrelevant on the ground that the prospectus contained no misrepresentation, as it merely stated that *L.* had made a certain report and did not vouch for the truth of his statements. The House of Lords reversed, and allowed a proof, holding that *L.* was the agent of the company, and that the case fell under the general rule that no one can retain a contract obtained by the fraud of his agent.

The same rules hold in the case of a misrepresentation made by an agent without fraudulent intent. It is to be treated as a misrepresentation by the principal. Thus in cases where the question has been whether a misrepresentation is a ground for the reduction of a contract, without proof of fraud, no distinction is drawn between misrepresentation by an agent or by a principal.[3] And in *Mair* v. *Rio Grande Rubber Estates Co.*,[4] though it was unnecessary to determine the point, the Lord Chancellor (Haldane) intimated not obscurely—Lord Shaw even more plainly—the opinion that the decision would have been the same though fraud on the part of the agent had not been averred.

Disclaimer for Responsibility for Agent.—It was recognised in the opinions given in the House of Lords in *Mair* v. *Rio Grande Rubber Estates Co.*[5] that a principal, in contracting, may dissociate himself from the statements made by his agents, and if he does so in sufficiently explicit terms, may maintain the contract in spite of any innocent misrepresentation which the agent may have made. But responsibility for the truth of the agent's representations must be disclaimed in very clear terms, and, as was pointed out by Lord Moulton, in the case of a company, the more intimately the agent is connected with the company, and the higher his authority in its management, the clearer must be the warning that the company does not vouch for the accuracy of

[1] Per Lord Moulton, *Mair* v. *Rio Grande Rubber Estates Co.*, *supra*, 1913, S.C. (H.L.) 74.

[2] *Supra.* A company can have no agent before it is incorporated, and therefore a contract to take shares is not reducible merely on the ground that it was induced by the misstatements of the promoter, made before the company was formed (*Karberg's* case [1892], 3 Ch. 1; *Lurgan's* case [1902], 1 Ch. 707). But if the directors know that an application for shares is based on a statement by the promoter, the contract may be rescinded if that statement turns out to be untrue (*Karberg's* case, *cit.*; *Lynde* v. *Anglo-Italian Hemp Spinning Co.* [1896], 1 Ch. 178; opinion of Lord President Dunedin in *Mair* v. *Rio Grande Rubber Estates Co.*, *supra*; Buckley, *Companies Acts*, 10th ed., 90).

[3] *Stewart* v. *Kennedy*, *supra*; *Laing* v. *Provincial Homes Investment Co.*, *supra*; *Crossan* v. *Caledon Shipbuilding Co.*, 1906, 43 S.L.R. 852; 14 S.L.T. 33.

[4] *Supra.*

[5] 1913, S.C. (H.L.) 74.

his statements.[1] In *Laing* v. *Provincial Homes Investment Co.*,[2] a company, of the nature of a building society, expressly stated that "no agent, or other representative, is authorised to vary, cancel, or waive the terms or conditions of this certificate, and the company will not be responsible for any representations, verbal or otherwise, made by any of its agents." *L.*, who had taken a certificate involving, according to its terms, a liability on her part, sued for the reduction of the contract, on the ground that it had been induced by representations made by the company's agent that no such liability would result. It was held, in a question of relevancy, that the pursuer was entitled to a proof of her averment that, in spite of the disclaimer above quoted, the agent, in making the representations she alleged, was acting within the scope of his authority.

Fraudulent misrepresentations by an agent are in another category. The general rule has been expressed by an English judge: "Every person who authorises another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract."[3] So no merely general disclaimer of responsibility for an agent's statements will save the contract from challenge on the ground that it was induced by the agent's fraud.[4] And where conditions for tenders from contractors contain a narrative of reports obtained from experts employed by the advertiser, coupled with a statement that these reports are not guaranteed, and that intending tenderers are expected to satisfy themselves, this disclaimer is read as meaning that the advertiser will not be responsible for the accuracy of the reports or the truth of the statements contained therein; his responsibility on proof that the reports were actually fraudulent is not affected.[5] But it has never been decided that an express contract that a principal is not to be responsible for his agent's fraud is illegal or ineffectual; and it is conceived that there are cases where it might be a reasonable precaution. When a contract has to be carried out by subordinates, it may often be impossible for the principal to exercise any efficient control over them, while it may be easy for the other party to verify the accuracy of their statements.[6]

Representations, when Amounting to Warranties. It is often important, and not always easy, to distinguish between a representation inducing a contract and a statement forming an undertaking or warranty, for the truth of which the party engages, and on which the validity of the contract, as a source of obligation, is made to depend. A mere representation, if not made fraudulently, may be a ground for reducing the contract which has followed upon it, but does not involve the party who has made it in any liability for damages, because he has neither broken his contract nor committed a civil wrong.[7] But if it is possible to construe a statement not

[1] *Mair, supra*, 1913, S.C. (H.L.), at p. 83. See *In re Pacaya Rubber, etc., Co.* [1914], 1 Ch. 542 (Astbury, J.).

[2] 1909, S.C. 812.

[3] Bramwell, L.J., in *Weir* v. *Bell*, 1878, 3 Ex. Div. 238; approved by Lord Chancellor Haldane in *Mair* v. *Rio Grande Rubber Estates Co.*, 1913, S.C. (H.L.) 74.

[4] *Mair* v. *Rio Grande Rubber Estates Co., supra.*

[5] *Pearson & Son Ltd.* v. *Dublin Corporation* [1907], A.C. 351; *Boyd & Forrest* v. *Glasgow and South-Western Rly. Co.*, 1911, S.C. 33; revd. (on the ground that no fraud was proved) 1912, S.C. (H.L.) 93.

[6] The question is considered in *Pearson* v. *Dublin Corporation, supra.* See *Dig.*, ii. 14, 27: "*Illud nulla pactione effici potest, ne dolus præstetur.*" See also *Dig.*, l. 17, 23.

[7] *Manners* v. *Whitehead*, 1898, 1 F. 171.

merely as a representation that certain facts exist, but as a warranty that they do exist, their non-existence involves a breach of contract, for which damages may be claimed.[1]

In determining whether a given statement is merely a representation, or whether it amounts to a warranty, certain points are fairly clear. If the statement does not relate to the *res* which is the subject-matter of the contract, but merely to collateral matters which may influence the party in contracting, it amounts at the highest to a representation.[2] A statement regarding the past history of the *res* may be expressly made a warranty, as is commonly done in contracts of life insurance. If not, the opinion may be hazarded that a statement as to the past history of the *res*—*e.g.*, that there had been no complaints as to Sunday drinking at an hotel[3]—will not be construed as a warranty on which an action of damages may be founded, though it may amount to a misrepresentation on which the contract may be rescinded.

If the statement relates to the existing state of the *res*, and the contract is a sale by description, or by sample and description, statements as to the description of the goods are not representations, but warranties by the seller.[4] In other contracts, including the sale of a specific article, it has been laid down by the House of Lords that where there is a written contract, and it is alleged that a particular statement regarding the subject has been made verbally by one of the parties, the question whether he has thereby warranted that the facts are as he has stated them is one of the intention of the parties, to be deduced from the whole of the evidence.[5] A distinction previously suggested[6]—that if the statement related to a fact of which the speaker had means of knowledge, while the other party was ignorant, it was to be regarded as a warranty, whereas if it was merely a statement of opinion or judgment on a matter on which both had equal means of information, it was merely a representation—was expressly disapproved, and it was laid down that the point that the one party assumed to assert a fact of which the other was ignorant was merely important as evidence from which it might be inferred that the intention of the parties was that that particular fact was warranted. In *Heilbutt, Symons & Co.*[7] *A.* asked the agent of a firm who were promoting a company whether they were bringing out a "rubber company." The answer was in the affirmative, and, on the company being formed, *A.* applied for and obtained shares. The company was not successful, and *A.* sued the firm for damages. He relied on fraudulent misrepresentations, which he failed to prove. He also maintained that the statement that the firm were bringing out a "rubber company," amounted to a warranty that the company, when formed, would be a rubber company, *i.e.*, a company having as its main business the production of rubber. A jury found that the company, which was actually formed, and in which *A.* obtained shares, was not a "rubber company" and on that ground found that *A.* was entitled to damages. In the House of Lords it was held that

[1] See opinion of Lord Chancellor (Haldane) in *Heilbutt, Symons & Co.* v. *Buckleton* [1913], A.C. 30.

[2] See, *e.g.*, *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25; *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108.

[3] *Hart* v. *Fraser*, 1907, S.C. 50.

[4] Sale of Goods Act, 1893, sec. 13.

[5] *Heilbutt, Symons & Co.* v. *Buckleton* [1913], A.C. 30. See also *Harrison* v. *Knowles & Foster* [1918], 1 K.B. 608.

[6] Per A. L. Smith, L.J., in *De Lassalle* v. *Guildford* [1901], 2 K.B. 215.

[7] *Supra* [1913], A.C. 30.

this question should not have been left to the jury, as there was no evidence that the parties intended that the statement that a rubber company was impending should be a warranty that the company, when formed, should satisfy the definition of a rubber company. On the facts the case was a weak one for the plaintiff, but the opinions indicate that though a statement collateral to the main contract may be read as a warranty, it will in general be construed merely as a representation.

In Scotland the cases, mostly relating to verbal contracts, have treated it as a question to be determined on the whole evidence whether the parties intended a warranty or not. The law has been stated by Lord Kyllachy: "Where a contract of sale has been, as here, made verbally, a warranty or condition may, of course, be constituted verbally, and proved like any other part of the contract. And to constitute a warranty no *voces signatæ* are necessary. A representation may be a warranty if it appears that it was so intended or understood, the question whether it was so or not being always a jury question depending on the evidence."[1] The real question for the jury, it is submitted, is—Was the buyer, as a reasonable man, entitled to suppose that the seller intended his statement as a warranty?

Effect of Misrepresentation. Assuming now that a misrepresentation has been made by one of the parties to the contract, we have to consider in what circumstances the validity of the contract is thereby affected. To have any legal effect the misrepresentation must have produced error in the mind of the party to whom it was addressed, and that error must have been the motive, or one of the motives, which induced him to enter into the contract, or to assent to the particular terms. Unsuccessful attempts to deceive effect no injury, and therefore afford no remedy. "We do not inquire into fraudulent transactions merely to ascertain that representations were in fact made, but in order to give relief to suitors who can shew that they have been wronged."[2] "If one party misrepresents . . . however fraudulently . . . to another with whom he is contracting, and if that other, notwithstanding that misrepresentation, discovers the truth . . . the misrepresentation goes for just absolutely nothing, because it is not *dolum qui dat locum contractui*."[3]

Where True Facts Known. So if the party to whom a misrepresentation is made is quite aware of the true facts, the misrepresentation is immaterial. In *Paterson* v. *Landsberg*,[4] where a retail dealer sued for the rescission of a sale on the ground of fraudulent statements by a wholesale dealer with regard to the article sold, one defence—unsuccessful on the facts, but quite relevant—was that the pursuer was aware of the real nature of the articles, but had desired the misrepresentations in order that she might repeat them to customers. And in this connection the knowledge of an agent employed to negotiate the contract may be treated as the knowledge of his principal. So an insurance company cannot found on untrue statements in a proposal for insurance if the truth was within the knowledge of the insurance agent at the time the proposal form was filled up,[5] except on the ground that the

[1] *Hyslop* v. *Shirlaw*, 1905, 7 F. 875, at p 881. See *Scott* v. *Steele*, 1857, 20 D. 253; *Robeson* v. *Waugh*, 1874, 2 R. 63; *Rough* v. *Moir & Son*, 1875, 2 R. 529; *Robey & Co.* v. *Stein*, 1900, 3 F. 278; *Paul* v. *Corporation of Glasgow*, 1900, 3 F. 119.

[2] Per Lord M'Laren in *Edinburgh United Breweries Co.* v. *Molleson*, 1893, 20 R. 581, at p. 599.

[3] Per Lord Chancellor (Brougham) in *Irvine* v. *Kirkpatrick*, 1850, 7 Bell's App. 186, at p. 237.

[4] 1907, 7 F. 675. See also *Begbie* v. *Phosphate Sewage Co.*, 1875, 1 Q.B.D. 679.

[5] *Cruikshank* v. *Northern Accident Insurance Co.*, 1895, 23 R. 147; *Bawden* v. *London, Edinburgh, etc., Insurance Co.* [1892], 2 Q.B. 534.

accuracy of the statements in question was expressly made a condition of the validity of the policy.[1]

Where Party not Misled.—Again, though a party may not have been aware of the true state of the facts, he has no remedy if the misrepresentation did not actually influence his decision on the question whether he should contract or not. Where *A.* exposed certain heritable subjects for sale by public roup, there being then a question whether a small portion thereof belonged to him or to *B.*, and *B.*, without examining the articles of roup, gave orders to an agent to purchase the property at any price it might fetch, it was held that he could not reduce the sale on the ground that the portion in question belonged to himself, because the circumstances shewed that any error in this respect had not really influenced his mind.[2] Where fraudulent devices were resorted to in order to conceal the defects in a gun, it was held that the purchaser could not found on these as a ground for refusing to pay the price, because he had bought the gun without examining it, and had not therefore been deceived by the seller's fraud.[3] And an untruthful statement in a prospectus that *A.* had agreed to become a director did not afford a ground of reduction of a contract to take shares, brought by a person who knew nothing of *A.*, and had not been influenced by the statement.[4] So the liability imposed by the statutory provision that a prospectus which fails to specify existing contracts shall be deemed fraudulent in a question with any party taking shares on the faith thereof was excluded in a case where it was proved that the shares had been taken solely in reliance on the advice of one of the directors.[5] And, generally, if a man refuses to accept statements made to him, and insists on making inquiries for himself, he cannot afterwards quarrel the contract on the ground that the statements were untrue, because he has clearly relied on the facts elicited by his own inquiries, and not on the other party's statements.[6]

But a man is not bound to attempt the impossible task of proving that the misrepresentation on which he founds formed his only motive for entering into the contract. In general, at least in cases of fraud, he does enough if he shews that he would not have entered into the contract, or would not have assented to the particular terms, if he had not believed the misrepresentations made to him by the other party.[7] "Supposing that the reports of the directors formed a material part of the inducement to take the shares, I cannot think that the effect of them is destroyed because other influences were at the same time at work which contributed to the success of these false representations."[8] Thus in an action of damages against the directors of a company, the plaintiff averred that he had been induced to take debentures by a fraudulent misstatement that the money raised was to be used for a

[1] *Macmillan* v. *Accident Insurance Co.*, 1907, S.C. 484; *Life and Health Association* v. *Yule*, 1904, 6 F. 437; *Biggar* v. *Rock Life Assurance Co.* [1902], 1 K.B. 516.

[2] *Morton* v. *Smith*, 1877, 5 R. 83.

[3] *Horsfall* v. *Thomas*, 1862, 1 H. & C. 90.

[4] *Smith* v. *Chadwick*, 1884, 9 App. Cas. 187. See also opinion of Lord Shand in *Lees* v. *Todd*, 1882, 9 R. 807, at p. 846; *Cooke* v. *Eshelby*, 1887, 12 App. Cas. 271. Cp. *Robertson* v. *Harvey*, 1901, 9 S.L.T. 55.

[5] *M'Morland's Trs.* v. *Fraser*, 1896, 24 R. 65; *Nash* v. *Calthorpe* [1905], 2 Ch. 237.

[6] *Attwood* v. *Small*, 1840, 6 C. & F. 232, as explained in *Redgrave* v. *Hurd*, 1881, 20 Ch. D. 1. But see *Earl of Wemyss* v. *Campbell* (1858, 20 D. 1090), a case of error excluding consent, though independent inquiries had been made.

[7] *Addie* v. *Western Bank*, 1867, 5 M. (H.L.) 80, per Lord Chancellor (Chelmsford), at p. 85; *Gamage* v. *Charlesworth's Tr.*, 1910, S.C. 257, per Lord Kinnear, at p. 265; *Arnison* v. *Smith*, 1889, 41 Ch. D. 348, opinion of Lord Chancellor (Halsbury), at p. 369.

[8] Lord Chancellor (Chelmsford) in *Addie* v. *Western Bank*, *ut supra*.

particular purpose. In giving evidence he admitted that he had also been influenced by the erroneous impression (for which the directors were not responsible) that the debentures were covered by a security. It was held that he might succeed in obtaining damages, though the fraud he alleged was not the only reason inducing him to enter into the contract.[1]

If a statement made is ambiguous—true in one sense, untrue in another—the party alleging that he was misled by it is at least bound to give evidence that he understood it in the sense in which it was untrue.[2] In the case of statements clearly untrue, and even fraudulent, the onus of proof that the party to whom it was made was deceived is more doubtful. In *Gamage* v. *Charlesworth's Tr.*,[3] where fraudulent statements were made to a salesman in order to induce a sale, and his evidence was that he repeated them to his employer, by whom the sale was actually made, Lord Kinnear was of opinion that the Court could not hold that the sale was induced by fraud, because the employer was not examined as a witness. The question was one of fact—What had induced him to sell?—and as to that fact there was no proper evidence. Lord Salvesen, on the other hand, held that when fraudulent statements were made to an agent, and by him repeated to his principal, the Court would assume that the principal was influenced by them, in the absence of evidence that he was not.

Means of Knowledge Irrelevant. Means of knowledge is not the same thing as knowledge, and so, as a general rule, it is no answer to a plea founded on misrepresentation that the party might with due care have discovered the true state of the facts. And it is submitted that a party who has been guilty of fraud can never complain that he has been taken at his word, though in one case it is suggested by Lord Johnston that the maxim *vigilantibus non dormientibus jura subveniunt* might apply to a case of fraud, and that a party who neglected obvious means of information, and chose to trust to the other's representations, might have no remedy if the interests of third parties were in any way involved.[4] But as a general rule, with or without fraud, a definite statement of fact, on which the other party is intended to act, and does act, will afford the remedies offered by the law in cases of misrepresentation, even although its untruth might have been discovered.[5] In *Redgrave* v. *Hurd*[6] a solicitor sold his house and the goodwill of his practice. He stated that his practice was worth £300 a year. He placed before the purchaser papers which, if examined, would have shewn that it was worth much less. The purchaser completed the bargain without examining the papers, and, on discovering the true facts, sued for rescission of the contract and the return of the price he had paid. Fraud, though alleged, was not proved. It was held that the plaintiff was entitled to succeed, on the ground that he had entered into the contract on a definite misrepresentation of fact, and that the seller, who had made that misrepresentation, could not plead that it should not have been believed. So where

[1] *Edgington* v. *Fitzmaurice*, 1885, 29 Ch. D. 459.

[2] *Smith* v. *Chadwick*, 1884, 9 App. Cas. 187. The statement was—"the present value of the turnover or output of the entire works is £100,000 per annum." This was true if read as referring to the capacity of the works, untrue, if a statement of the actual output. The plaintiff was not examined as to the meaning he put upon it. It was held that he had failed to prove that he had been misled.

[3] 1910, S.C. 257.

[4] *Gamage* v. *Charlesworth's Tr.*, *supra*, 1910, S.C. 257, at p. 270.

[5] Pollock, *Contract*, 9th ed., 613; *Scottish Widows' Fund* v. *Buist* 1876, 3 R. 1078, per Lord President Inglis, at p. 1083; *Redgrave* v. *Hurd*, 1881, 20 Ch. D. 1; see also *Bloomenthal* v. *Ford* [1897], A.C. 156.

[6] *Supra*.

the prospectus of a company misrepresented the effect of a particular contract, it was held that an agreement to take shares was voidable, in spite of the fact that the prospectus also stated that the contract in question might be seen and examined at the offices of the company.[1] Nor is it a good answer to a charge of fraudulent statements in a prospectus that a careful scrutiny of the terms used, aided by expert knowledge, would have revealed the truth.[2] But in cases where fraud is not proved, means of knowledge may be very important in deciding whether a particular statement is to be taken as a statement of fact or as a mere expression of opinion.[3]

Innocent Misrepresentation. A misrepresentation inducing a contract is spoken of as innocent in cases where the party making it believed what he said, as fraudulent when he did not believe it. In certain cases the distinction is of cardinal importance. If the party who has been misled sues for damages, not on the ground of any breach of contract, but merely because he has suffered loss by acting on misrepresentations made to him, he must establish that these misrepresentations were made fraudulently and therefore amount to a civil wrong or delict.[4] Again, if the statement founded on is merely an expression of opinion, it does not as has been already explained,[5] amount to a misrepresentation if made honestly, whereas it is fraudulent for a man to state as his opinion what he does not actually think. But while in these cases it is of the utmost importance to determine whether a misrepresentation was innocent or fraudulent, it is conceived that if the statement made was one of fact, and if the remedy sought is the reduction or rescission of the contract, or if the misrepresentation is founded on in defence to an action for the enforcement of the contract, it is not material to consider whether the party responsible was acting fraudulently or not. A contract, it is submitted, is voidable if induced by misrepresentation, whether that misrepresentation is made innocently or fraudulently. The principle is not that an innocent misrepresentation amounts to a wrong, but that a man has no right to insist on a contract which he would not have obtained if he had not led the other party into error by misrepresenting the facts, or that, if fraud is necessary, it is involved in maintaining an advantage so derived.[6] "Fraud is not far away from—nay, indeed, it must be that it accompanies—a case of any defendant holding a plaintiff to a bargain which has been induced by representations which were untrue; for it is contrary to good faith, and it partakes of fraud, to hold a person to a contract induced by an untruth for which you yourself stand responsible. It is elementary that a party cannot take advantage of a benefit derived from a contract sprung out of his own fraud, and I think it is equally sound that a party cannot take a benefit from a contract sprung out of a falsehood which he has placed before the other party as an inducing cause."[7]

Misrepresentation a Ground for Reduction.—It is conceived that it may be stated as a general principle, not confined to contracts *uberrimæ fidei*

[1] *Central Railway Co. of Venezuela* v. *Kisch*, 1867, L.R. 2 H.L. 99; *Aaron's Reefs* v. *Twiss* [1896], A.C. 273.

[2] *Gluckstein* v. *Barnes* [1900], A.C. 240.

[3] See opinions of Lord Ardwall (Ordinary) in *Hamilton* v. *Duke of Montrose*, 1906, 8 F. 1026.

[4] So in actions of damages where fraud is alleged the pursuer will fail if he can only prove a non-fraudulent misrepresentation (*Brownlie* v. *Miller*, 1878, 5 R. 1076; affd. 1880, 7 R. (H.L.) 66; *Dunnett* v. *Mitchell*, 1887, 15 R. 131; *Manners* v. *Whitehead*, 1898, 1 F. 171; *Boyd & Forrest* v. *Glasgow and South-Western Rly.*, 1914, S.C. 472; revd. 1915, S.C. (H.L.) 20.

[5] *Supra*, p. 462.

[6] See opinion of Jessel, M.R., in *Redgrave* v. *Hurd*, 1881, 20 Ch. D. 1.

[7] *Mair* v. *Rio Grande Rubber Estates Co.*, 1913, S.C. (H.L.) 74, per Lord Shaw, at p. 82.

where even non-disclosure is a ground of reduction, that a contract is reducible if induced by a misrepresentation, although there may be no proof of fraud, and that in a reduction on this ground it is not necessary to prove that the misrepresentation produced such error in the mind of the party misled as to preclude any real consent on his part. Thus while mere error as to the obligations involved in the contract, or as to facts which form the motive for contracting, or as to the quality of the subjects to which the contract relates, is not, as explained in the preceding chapter, a relevant ground for reduction when the other party is not responsible for the error, the fact that he is so responsible makes a cardinal difference, and renders the contract reducible.[1] The general rule was expressed by Lord Watson, in a passage which has been regarded as the ruling authority—"Error becomes essential whenever it is shewn that but for it one of the parties would have declined to contract. He cannot rescind unless his error was induced by the representations of the other party, or of his agent, made in the course of negotiation, and with reference to the subject-matter of the contract. If his error is proved to have been so induced, the fact that the misleading representations were made in good faith affords no defence against the remedy of rescission."[2] Thus the relevancy of an action for reduction has been sustained on averments of misrepresentation as to the legal effect of an offer to sell an entailed estate "subject to the ratification of the Court:"[3] as to the obligations involved in an obscurely expressed certificate issued by a building company:[4] as to the financial difficulties in which the pursuer would be involved if he refused to enter into the contract:[5] as to the meaning of a medical report which had led a workman to settle his claim under the Workmen's Compensation Act:[6] as to the fact (stated in a prospectus) that a particular party had agreed to act as director of the company:[7] as to the checks to be placed on a bank teller whose actings had been guaranteed:[8] as to the time when delivery of an unfinished ship could be given:[9] as to the amount of steam which an engine would develop from a given quantity of coal:[10] as to the fact that there had been complaints

[1] A party would probably fail to reduce a contract on the ground of a misrepresentation as to some unimportant detail (see *Smith* v. *Chadwick*, 1884, 9 App. Cas. 187); but that would be because he would fail to prove that his error had in fact induced him to contract. His case would fail in credibility, not in relevancy. Possibly a pursuer, in order to obtain relief, must establish an error which would have affected the mind of a reasonable man (*Drummond's Tr.* v. *Melville*, 1861, 23 D. 450; *City of Edinburgh Brewery Co.* v. *Gibson's Tr.*, 1869, 7 M. 886; *Gowans* v. *Dundee Steam Navigation Co.*, 1904, 12 S.L.T. 137; *Redgrave* v. *Hurd*, 1881, 20 Ch. D. 1, opinion of Jessel, M.R.; *Straker & Sons* v. *Campbell*, 1926, S.L.T. 262; Marine Insurance Act, 1906 (6 Edw. VII. c. 41), sec. 20).

[2] *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108, at p. 142. The phrase "with reference to the subject-matter of the contract" must be taken in a very wide sense. The misrepresentation in question in Menzies did not relate directly to the contract (a consent to disentail) but to the means open to the pursuer, if he refused to consent, of obtaining money to satisfy his creditors. See opinion of Lord President Clyde, *Westville Shipping Co.* v. *Abram Shipping Co.*, 1922, S.C. 571, 579.

[3] *Stewart* v. *Kennedy*, 1889, 16 R. 857; revd. (on this point) 1890, 17 R. (H.L.) 25. And see *supra*, p. 450.

[4] *Laing* v. *Provincial Homes Investment Co.*, 1909, S.C. 812.

[5] *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108.

[6] *Crossan* v. *Caledon Shipbuilding Co.*, 1906, 43 S.L.R. 852; 14 S.L.T. 33 (H.L.) See Lord Robertson's observations on the Lord Justice-Clerk's statement of the law as to innocent misrepresentation.

[7] *Blakiston* v. *London & Scottish Banking Corporation*, 1894, 21 R. 417.

[8] *British Guarantee Association* v. *Western Bank*, 1853, 15 D. 834.

[9] *Westville Shipping Co.* v. *Abram Steamship Co.*, 1922, S.C. 571; affd. 1923, S.C. H.L.) 68.

[10] *Robey & Co.* v. *Stein*, 1900, 3 F. 278, per Lord M'Laren, p. 291.

about the management of an hotel which the pursuer had bought:[1] as to the probability that an article, about to be sold by auction, would be requisitioned by the military authorities:[2] as to the profits of a business, in questions both of its sale,[3] and of entering into partnership.[4] In all these cases it was averred or proved that the misrepresentation had led the pursuer into error which had induced the contract, in none of them was the error so fundamental or essential as to preclude any real consent to contract, and they seem to establish very clearly that there is a distinction between mere error and error induced by an innocent misrepresentation, and that in the latter case the contract is reducible if the misrepresentation induced it. But it is difficult to reconcile this conclusion with the decision and opinions in *Woods* v. *Tulloch*.[5] There the purchaser of a mineral property brought an action for the reduction of the sale on the ground that he had been induced to buy by representations that its extent was 132 acres and its rental £157, whereas in fact the extent was 125 acres and the rental £120. 10s. There was no averment of fraud. It was held that the pursuer's averments were irrelevant. The Lord Ordinary (Kyllachy) with the approval of the Inner House, drew a distinction between a misrepresentation which was material because it in fact induced the contract and a misrepresentation which was essential because it induced error sufficient to exclude any real consent. As to the former case he said: "I know no authority, in the law of Scotland for the proposition that an innocent misrepresentation, not warranted, and not inducing essential error, can invalidate a contract.[6] Our rule, as I understand it, has always been that statements by a party in negotiating a contract are, unless warranted, held to be merely statements of his knowledge and belief, and that if the other party means to rely on such statements his business is to get them warranted, that is to say, to get them made parts of the contract." It may be possible to explain this decision, though hardly the reasons given for it, on the ground that the representation was treated merely as a statement of opinion; if not, the case would seem in conflict with the other authorities on the point.[7]

Misrepresentation as to Credit. -A misrepresentation relating to the

[1] *Hart* v. *Fraser*, 1907, S.C. 50.
[2] *Shankland* v. *Robinson*, 1919, S.C. 715; revd. 1920, S.C. (H.L.) 103, narrated *supra*, p. 461.
[3] *Straker & Sons* v. *Campbell*, 1926, S.L.T. 262 (O.H., Lord Constable).
[4] *Ferguson* v. *Wilson*, 1904, 6 F. 779; *Adam* v. *Newbigging*, 1888, 13 App. Cas. 308.
[5] 1893, 20 R. 477.
[6] *British Guarantee Association* v. *Western Bank*, 1853, 15 D. 834, might be suggested.
[7] Some support may be found for the distinction drawn by Lord Kyllachy in the opinion of Lord President Dunedin in *Edgar* v. *Hector*, 1912, S.C. 348, 353; in the opinion of Lord Guthrie in *Boyd & Forrest* v. *Glasgow and South-Western Rly.*, 1914, S.C. 472, at p. 518 (revd. 1915, S.C. (H.L.) 20); and of Lord Atkinson in *Shankland & Co.* v. *Robinson*, 1920, S.C. (H.L.), 103, 115. The institutional writers offer no guidance on this subject. They contrast error *in essentialibus, i.e.*, error excluding consent, with *error dans locum contractui*, but without considering the effect of misrepresentation. See Erskine, iii. 1, 16; Bell, *Prin.*, secs. 11, 13. English writers on contract are practically unanimous in holding that a misrepresentation which in fact induces the contract is a ground for its reduction. Pollock, *Contract*, 9th ed., p. 599; Anson, *Contract*, 16th ed., pp. 191, 193; Leake, *Contract*, 7th ed., p. 255; Salmond, *Contract*, p. 203; Bower, *Actionable Misrepresentation*, 2nd ed., p. 239. Founding mainly on *Redgrave* v. *Hurd*, 1881, 20 Ch. D. 1 (narrated *supra*, p. 470), they treat *Kennedy* v. *Panama, etc., Mail Co.*, 1867, L.R. 2 Q.B. 580, as no longer authoritative since the fusion of law and equity. Any controversy would seem to turn on the meaning to be given to the word "essential" as applied to error induced by misrepresentation. It may mean, and in *Woods* v. *Tulloch* seems to be taken as meaning, error so material as to preclude any real consent, as in the cases considered in the preceding chapter. It may also mean, and, following the dictum of Lord Watson in *Menzies* v. *Menzies* (quoted in the text), has in most recent cases been taken to mean, error which has in fact induced the contract, whether it was so material as to preclude consent or not.

credit of a third party cannot found a reduction of a contract if it was merely verbal, in respect that, by statute,[1] such representations, unless made in writing and signed by the party making them, have no effect. So it was held that a party sued on a guarantee to a bank could not plead in defence that he had been misled by a statement by the bank agent as to the credit of the party guaranteed, in respect that the statement in question was not made in writing.[2]

Conveyance Induced by Misrepresentation.—To the principle that a misrepresentation, though not fraudulent, renders a contract voidable, there is possibly an exception in the case where the contract has been followed by a completed conveyance. In *Brownlie* v. *Miller*[3] an estate was sold on a statement that it was held of the Crown. A mid-superior established his right, and compelled the purchaser to pay a casualty. In an action against the seller the purchaser claimed the amount of the casualty, but did not ask for the rescission of the contract of sale. Fraud on the part of the agent for the seller was alleged, but was not proved. The Lord Chancellor (Selborne) laid down the rule that there can be no relief from a completed conveyance except on the ground of fraud, or of misrepresentation amounting to fraud.[4] This opinion was *obiter*, as rescission of the contract was not sued for, but it would appear to have been adopted as a definite guide in England.[5] In Scotland it has been less honoured, and in at least two cases a reduction of a completed conveyance has been successful where no fraud was established.[6] It has been held in the Outer House that the English rule forms no part of the law of Scotland.[7] Is there any reason why a man should be entitled to maintain a conveyance resulting from his own misstatement when he could not maintain the contract if challenged at an earlier stage ?

[1] Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60), sec. 6. See *supra*, p. 182.

[2] *Union Bank of Scotland* v. *Taylor*, 1925, S.C. 835

[3] *Brownlie* v. *Miller*, 1878, 5 R. 1076; affd. 1880, 7 R. (H.L.) 66 (in 5 App. Cas. 925, as *Brownlie* v. *Campbell*).

[4] 7 R. (H.L.), at p. 71. Founding on a very general dictum in Bell's *Prin.*, sec. 893, and *Wilde* v. *Gibson*, 1848, 1 H.L.C. 605.

[5] *Seddon* v. *North-Eastern Salt Co.* [1905], 1 Ch. 326; *Angel* v. *Jay* [1911], 1 K.B. 666; *Armstrong* v. *Jackson* [1917], 2 K.B. 822.

[6] *Menzies* v. *Menzies*, 20 R. (H.L.) 108; *Hart* v. *Fraser*, 1907, S.C. 50.

[7] *Straker & Sons* v. *Campbell*, 1926, S.L.T. 262 (Lord Constable).

CHAPTER XXVIII

FRAUD: FACILITY AND CIRCUMVENTION

(1) *Fraud*

FRAUD is a machination or contrivance to deceive.[1] It may consist in misrepresentation, as that term is explained in the preceding chapter, or in taking an unfair advantage in circumstances where the word misrepresentation is hardly applicable. Thus it is fraudulent for the seller at a sale by auction to bid or to employ anyone to bid for him, though no representation on the subject may have been made.[2]

Nature of Fraudulent Representation.—Where the fraud alleged consists in misrepresentation, the cardinal point in the pursuer's case is that the defender was aware that his representations were untrue, or made them recklessly, without knowing or caring whether they were true or not. If this is not established, the case may be one of misrepresentation, but not of fraud. But, as has already been noted, if one has made a statement in the belief that it is true, and afterwards discovers that it is false, it amounts to fraud to allow another party to act upon it without correcting the misapprehension which the statement in question has induced.[3] And while a statement of opinion is not a misrepresentation if made honestly, though it may convey a false impression of the facts, it is fraudulent if it is made without belief.[4] A statement may be fraudulent though literally true, if it is intended and calculated to deceive; for instance, a statement that a ship was British, when she had attained that character by concealing facts which would have precluded registration.[5] As the essence of fraud consists in the deceitful intention of the party, it is not relevant to charge a company or partnership with fraud without condescending on the particular partner, director, or agent, whose conduct is impugned.[6] The exclusion of any action based on a verbal guarantee, or representation as to credit, has been noticed already.[7]

Justification for Lie. It is not necessarily fraudulent in all cases to make a statement known to be untrue, even with the knowledge that the party to whom it is made will be deceived and will act upon it. The exceptional case is where a party asks for information which he has no right to demand or you to give, and the circumstances are such that mere silence would give him the information he desires. In *Tackey* v. *M'Bain*[8] the manager of a

[1] Bell, *Prin.*, sec. 13. As to what amounts to a misrepresentation, and the question whether concealment of material facts is fraudulent, see *supra*, Chap. XXVII.

[2] Sale of Goods Act, 1893, sec. 58; *Anderson* v. *Stewart*, 16th December 1814, F.C.; *Faulds* v. *Corbet*, 1859, 21 D. 587.

[3] *Supra*, p. 461.

[4] *Supra*, p. 462.

[5] *The "Spathari,"* 1924, S.C. 182; affd. 1925, S.C. (H.L.) 6.

[6] *Thomson* v. *Pattison, Elder & Co.*, 1895, 22 R. 432.

[7] *Supra*, p. 473.

[8] [1912], A.C. 186.

company was asked by a stockbroker whether a certain report had been received. He replied, untruly, in the negative. The stockbroker acted on this statement, incurred loss, and sued for damages. It was proved that the manager was not actuated by any desire to affect the price of the shares, that he regarded the point as confidential, and knew that if he refused to answer, his querist would draw the conclusion that the report had been received. It was held by the Judicial Committee of the Privy Council that his conduct did not amount to fraud. But the liability involved in a statement known to be false will not be excluded merely by the fact that the defender's motive was not any advantage to himself, and so damages were found to be due by a party who had given a servant a laudatory character which he knew to be untrue, and which had resulted in loss to the party who employed him on the faith of it, though a jury had found that he had no fraudulent intention, in the sense that he was not seeking to promote his private ends.[1]

Legal and Moral Fraud.- Where a misrepresentation is involved, fraud always implies moral wrong. Mere negligence is not fraud, and therefore it is not fraudulent to make an assertion which is believed honestly, but on inadequate grounds, even if the means of fuller information were easily within the party's reach. The expression "legal fraud," as opposed to moral fraud, has, it has been observed, no more meaning than legal heat or legal cold.[2] In *Derry* v. *Peek*[3] the plaintiff (Peek) had taken shares in a tramway company which had failed. He sued the directors for damages, on the allegation that he had been induced to apply for shares by a statement in the prospectus that the company had authority to run their tramways by steam power. As a matter of fact, negotiations to obtain that authority from the Board of Trade were in progress, but ultimately failed. The directors succeeded in convincing the Court that the statement in the prospectus, though untrue in fact, was honestly believed by them to be true. It was held that the plaintiff's case must fail. It could succeed only on proof of fraud on the part of the defendants, and a statement made honestly, though untrue in fact and made negligently, was not fraud, or equivalent to fraud. It was, as was pointed out, a ground on which a contract might be rescinded, but not a ground on which the maker of the statement could be subjected to damages.[4]

Negligent Statement. The principle, for which *Derry* v. *Peek* is a leading authority, is not merely that allegations of fraud are not substantiated by proof of carelessness, but that carelessness in making a statement on which

[1] *Foster* v. *Charles*, 1830, 7 Bing. 105. See *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108, per Lord Ashbourne, at p. 147.

[2] Per Bramwell, L.J., *Weir* v. *Bell*, 1878, 3 Ex. D. 238, 243.

[3] 1889, 14 App. Cas. 337.

[4] The following excerpt from the opinion of Lord Herschell in *Derry* v. *Peek* (14 App. Cas., at p. 374) has been frequently cited: "First, in order to sustain an action for deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly—careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he says. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the party guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." As to the statutory liability of directors for statements made in the prospectus, see Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), sec. 84.

others are likely to act is not what the law regards as negligence.[1] Negligence means failure in a duty, and in the ordinary case there is no duty to be careful in making a statement. Words spoken or written, though likely to cause financial injury, are not analogous to a gun or other thing likely to cause physical injury, and the speaker or writer is not subject to the duty to take reasonable care—a duty owed, not to any particular person, but to all mankind—which lies upon the user of the gun.[2] "*Derry* v. *Peek* decided two things. It decided, first, that a plaintiff cannot succeed in an action of deceit or fraud without proving that the defendant was fraudulent. . . . Then *Derry* v. *Peek* decided this further point, viz., that in cases like the present . . . there is no duty enforceable in law to be careful. Negligent misrepresentation does not amount to deceit, and negligent misrepresentation can give rise to a cause of action only if a duty lies on the defendant not to be negligent; and in that class of cases, of which *Derry* v. *Peek* was one, the House of Lords considered that the circumstances raised no such duty."[3]

The rule applies alike to the case where *A.*, by misrepresentations made carelessly, but not dishonestly, induces *B.* to contract with him, and to the case where *A.* makes statements in reliance on which *B.*, to his knowledge, is likely to act. Thus where a surveyor certified that a building had reached a certain stage, without any fraudulent intention, but without taking reasonable care to ascertain the fact, and in consequence a lender of money to the builder advanced an instalment of the loan, which was lost on the builder's bankruptcy, it was held that the surveyor owed no duty to be careful, either to the lender or to mankind at large.[4] And where a trustee was asked whether the share of a particular beneficiary was burdened, and in his reply omitted to mention a burden of which he had once known, but had forgotten, it was decided that as a trustee had no duty to answer questions in such circumstances, he incurred no liability by failure to take reasonable care to answer them correctly.[5]

Duty to Exercise Care.—But it is not an absolute rule that a man has never any duty to be careful in making statements of fact. There may be circumstances which do impose such a duty, with a corresponding liability for failure to fulfil it.[6] One case, it has been suggested, is that of a manager of a company in preparing annual reports.[7] Another, that of a doctor employed by the Procurator-fiscal to make a report.[8] But no such duty lies (apart from statute) on the directors of a company in preparing the prospectus[9] or the annual reports,[10] or in declaring a dividend;[11] on a trustee in answering inquires as to a beneficiary's share;[12] on a banker, in

[1] *Derry* v. *Peek*, 1889, 14 App. Cas. 337. The most important judicial comments on this case will be found in *Angus* v. *Clifford* [1891], 2 Ch. 449; *Le Lievre* v. *Gould* [1893], 1 Q.B. 491; *Low* v. *Bouverie* [1891], 3 Ch. 82; *Starkey* v. *Bank of England* [1903], A.C. 114; *Boyd & Forrest* v. *Glasgow and South-Western Rly. Co.*, 1911, S.C. 33; revd. 1912, S.C. (H.L.) 93; *Nocton* v. *Lord Ashburton* [1914], A.C. 932; *Robinson* v. *National Bank*, 1916, S.C. 46; affd. 1916, S.C. (H.L.) 154, narrated *infra*, p. 483.

[2] See opinion of Bowen, L.J., in *Le Lievre* v. *Gould* [1893] 1 Q.B. 491, at p. 502.

[3] Bowen, L.J., *Le Lievre* v. *Gould*, *supra*.

[4] *Le Lievre* v. *Gould* [1893], 1 Q.B. 491.

[5] *Low* v. *Bouverie* [1891], 3 Ch. 82.

[6] See opinions in *Le Lievre* v. *Gould*, *supra*.

[7] Per Lord President Inglis in *Lees* v. *Tod*, 1882, 9 R. 807.

[8] *Urquhart* v. *Grigor*, 1864, 3 M. 283.

[9] *Derry* v. *Peek*, 1889, 14 App. Cas. 337.

[10] *Lees* v. *Tod*, *supra*.

[11] *Dovey* v. *Cory* [1901] A.C. 477.

[12] *Low* v. *Bouverie* [1891], 3 Ch. 82.

answering inquiries as to the credit or solvency of his customers;[1] on a telegraph company, in transmitting a telegram;[2] on a surveyor or architect in granting certificates;[3] or on a man in preparing a statement of his business to be laid before one who proposed to become his partner.[4] Where parties are in contractual relations there are many cases in which one party is bound to take reasonable care in making statements, or in acts equivalent to statements, on which the other is likely to rely. For instance a customer, in a question with his banker, is bound to take reasonable care in drawing cheques so as not to facilitate alteration.[5] From certain cases in England it would appear that failure in this respect involves liability arising from a breach of special duty and not from breach of contract; that the action is laid on tort and not on contract. This was held where a solicitor had negligently, but not fraudulently, advised his client to release a security;[5] and where a water diviner had made confident and unfounded statements as to the presence of water.[7] But it is conceived that in such cases the liability of the party making the statement would in Scotland be regarded as arising from breach of the implied terms of his contract.[8]

The principles laid down in *Derry* v. *Peek*, though inconsistent with certain dicta, are in entire accordance with the general trend of modern decisions in Scotland.[9] In *Lees* v. *Tod*,[10] a case presenting very similar features, directors were sued for damages on the ground of false statements contained in balance-sheets issued by the company. It was proved, and ultimately conceded, that the defenders had made the statements in question on the report of the manager of the company, and had honestly believed them. It was held that there was no ground upon which the defenders could be made liable. In *Manners* v. *Whitehead*[11] the pursuer (Manners) had entered into partnership with the defender, and had been induced to do so by the results brought out in a balance-sheet of the defender's business. The business proved unprofitable. Manners sued for the return of the money he had put into the business, or alternatively, for damages. He proved that the balance-sheet was unduly favourable, and did not represent accurately the assets of the business; he failed to prove fraudulent intent. It was held that the action, on either alternative, was in substance an action for damages, which could succeed only on proof

[1] *Robinson* v. *National Bank*, 1916, S.C. 46; affd. 1916, S.C. (H.L.) 154. The question whether a banker, giving gratuitous advice as to investments, has any non-contractual duty to take reasonable care, is considered but not decided in *Banbury* v. *Bank of Montreal* [1918], A.C. 626.

[2] *Dickson* v. *Reuter's Telegram Co.*, 1877, 3 C.P.D. 1.

[3] *Le Lievre* v. *Gould*, *supra*.

[4] *Manners* v. *Whitehead*, 1898, 1 F. 171.

[5] *London Joint Stock Bank* v. *Macmillan* [1918], A.C. 777.

[6] *Nocton* v. *Lord Ashburton* [1914], A.C. 932.

[7] *Pritty* v. *Child*, 1902, 71 L.J. (K.B.) 512.

[8] See per Lord Dunedin in *Nocton* v. *Lord Ashburton*, *supra*; per Lord Dundas, *Robinson* v. *National Bank*, 1916, S.C. 46, 67. And see *supra*, p. 286, note 5.

[9] *Oliver* v. *Suttie*, 1840, 2 D. 514; *Campbell* v. *Boswall*, 1841, 3 D. 639; *Lees* v. *Tod*, 1882, 9 R. 807; *Brownlie* v. *Miller*, 1878, 5 R. 1076; affd. 1880, 7 R. (H.L.) 66; *Dunnett* v. *Mitchell*, 1887, 15 R. 131; *Manners* v. *Whitehead*, 1898, 1 F. 171; *Boyd & Forrest* v. *Glasgow and South-Western Rly.*, 1915, S.C. (H.L.) 20, per Lord Shaw, at p. 37. Certain dicta to the effect that statements made honestly but without reasonable grounds are fraudulent cannot now be supported, *e.g.*, opinion of Lord President (M'Neill) in *Cullen's Tr.* v. *Johnston*, 1865, 3 M. 935; of Lord President (M'Neill) and Lord Deas in *Western Bank* v. *Addie*, 1865, 3 M. 899; revd. 1867, 5 M. (H.L.) 80. The modern law is in accordance with the opinion of Lord Cranworth, 5 M. (H.L.), at p. 91. See opinion of Lord Herschell in *Derry* v. *Peek*, 1889, 14 App. Cas. 337, at p. 368.

[10] 1882, 9 R. 807.

[11] 1898, 1 F. 171.

of actual fraud, not on a statement which, though negligent, was honestly made.

Assertion made without Belief. But while a statement is not fraudulent merely because the person who made it had no reasonable grounds for believing it, it is recognised that a positive assertion on a point on which the true state of the speaker's mind is complete ignorance amounts to fraud from the point of view of the moralist, and involves the consequences of fraud in law. And the entire absence of any reasonable ground for belief in a statement may be evidence, to be weighed with the rest of the evidence in the case, that there was no positive and affirmative belief.[1] It may admit of the explanation that the speaker failed to appreciate the importance of what he said, or even that he honestly used words in a sense in which they would not be generally understood.[2] It comes to be a jury question, in each case, as to the honesty of the particular speaker.[3]

Remedies of Party Defrauded. When we come to the question of the remedies open to a party who has been induced to enter into a contract by fraudulent misrepresentation, it has to be kept in mind that fraud has two aspects—it is a ground for the reduction of a contract; it is also a civil wrong, for which the party aggrieved may recover damages. With the latter aspect the law of contract is not directly concerned.

The reduction of a contract which is voidable but not void is not a remedy available in all circumstances. It may be precluded, as will be shown in a later chapter,[4] by change of circumstances, by the emergence of the interests of third parties, or by undue delay.

Reduction of Contract.—If none of these difficulties intervene, it is conceived that a contract induced by fraud is always reducible. It is, however, laid down in Bell's *Commentaries*, in dealing with the law of sale, that there is a distinction between fraud "*quod causam dedit contractui*," *i.e.*, fraud in a case where, without it, the party would not have contracted at all, and fraud "*quod tantum in contractum incidit*," fraud which induced the seller to accept a lower price than he would otherwise have done.[5] Fraud of the former kind will afford ground for the reduction of the contract, in fraud of the latter kind the only remedy is an action of damages. This distinction is adversely criticised by Lord M'Laren in his notes to the passage in question, is not supported by any decision, and it is at least doubtful whether the law of Scotland admits an action for damages on a contract which remains unreduced.

Reduction of Compromise. Lord Stair is the authority for an exception to the ordinary rules in the case of a compromise, or transaction, whereby

[1] See opinion of Lord President (Inglis) in *Lees* v. *Tod*, 1882, 9 R. 807; opinion of Lord Cairns, *Reese River Silver Mining Co.* v. *Smith*, 1869, L.R. 4 H.L. 64, at p. 79.

[2] *Angus* v. *Clifford* [1891], 2 Ch. 449. A prospectus stated that reports on a property had been "prepared for the directors." As a matter of fact, they had been prepared for the vendor. The directors proved that they had inserted the phrase *per incuriam*, not appreciating the importance of the distinction. It was held that there was no proof of fraud.

[3] *Boyd & Forrest* v. *Glasgow and South-Western Rly.*, 1911, S.C. 33; revd. 1912, S.C. (H.L.) 93.

[4] *Infra*, Chap. XXXII.

[5] Bell, *Com.*, i. 262. The passage can claim the authority of writers on the civil law (Voet, *Pand.*, iv. 3, 3; Pothier, *Obligations*, sec. 31). But, especially as applied to a case of sale, the distinction seems very unreal. Can there ever be a case where a buyer or seller could truthfully aver that he would not have entered into the contract, no matter how favourable the terms offered, if he had not been deceived? The complaint, when analysed, always is that he has given too much or taken too little. *Sibbald* v. *Hill*, 1814, 2 Dow 463, seems an authority against Bell's doctrine. Certain *dicta* in *National Exchange Co.* v. *Drew*, 1855, 2 Macq. 103, may lend some support to it.

parties, to avoid litigation on some disputed point, enter into an agreement whereby each concedes part of the opposing claim. In such a case he states that fraud is not enough to avoid the contract "if it be but in the motive inducing the contract, unless it be a deception in the very substance of the act." [1]

Whole Contract must be Reduced. Where reduction is attempted, the whole contract must be reduced. A party who has been defrauded cannot affirm one part of a contract and repudiate the other, except in the case where the two parts are really separate contracts; [2] "he cannot pick out the plums of a bargain into which he has been misled, and reject the remainder." [3]

Damages Without Reduction. It is a difficult and in some respects an undecided question, whether a party who has been defrauded may sue for damages without reducing the contract. Here it will conduce to clearness to put aside for the moment the case where a shareholder has been induced to take shares by the fraud of the directors. In other cases the contract may be unreduced, either because reduction has become impossible, or because the party defrauded prefers to maintain his contract and seek relief in damages. In the former case, as where the fraud has resulted in the purchase of a thing, and the thing, by use or accident, has perished, so that it is impossible to restore it, it is conceived that an action of damages against the party guilty of the fraud is clearly competent.[4] And if *A.* has been induced to contract for work by the fraud of *B.*, and the fraud is not discovered until the work is completed, *A.* may sue *B.* for damages without going through the formality of reducing the contract.[5] Where there is no obstacle to the reduction of the contract, except that the party defrauded desires to maintain it, the question whether he can competently do so and sue for damages has been often discussed but never conclusively decided.[6] But the balance of judicial opinion is in favour of the competency, and it has been decided in the Outer House to be competent in the case of sale.[7] But, if competent, it is subject to the limitation that a party suing for damages for a wrong must aver and prove loss; and therefore if a man has been fraudulently induced to enter into a contract which has happened to turn out profitable, he cannot recover damages on the plea that, but for the fraud, the terms would have been better and the profit consequently greater.[8]

[1] Stair, i. 17, 2, citing *Code*, ii. iv. 22—"*Si major transegisti, ad rescindendam transactionem de dolo contestatio non sufficit.*" But see *supra*, p. 456.

[2] *Smyth* v. *Muir*, 1891, 19 R. 81, Lord Kinnear, at p. 89; *United Shoe Machinery Co.* v. *Brunet* [1909], A.C. 330.

[3] Per Bowen, L.J., in *David* v. *Sabin* [1893], 1 Ch. 523, 540.

[4] *Houldsworth* v. *City of Glasgow Bank*, 1879, 6 R. 1164; affd. 1880, 7 R. (H.L.) 53, per Lord Shand, 6 R. 1186.

[5] *Boyd & Forrest* v. *Glasgow and South-Western Rly. Co.*, 1915, S.C. (H.L.) 20, per Lord Atkinson, at p. 28.

[6] The competency is affirmed by Lord Kinloch in *Amaan* v. *Handyside*, 1865, 3 M. 526, and *Dobbie* v. *Duncanson*, 1872, 10 M. 810, and by Lord Curriehill in *Graham* v. *Western Bank*, 1865, 3 M. 617, 628; by Lord Cuninghame (Ordinary), in *Mackenzie* v. *Girvan*, 1840, 3 D. 318, 322. It is doubted by Lord Shand in *Houldsworth* v. *City of Glasgow Bank*, *supra*; by Lord Kinnear, *Brown* v. *Stewart*, 1898, 1 F. 316, 323. In *Brownlie* v. *Miller* (1880, 7 R. (H.L.) 66) Lord Blackburn (p. 79), remarking that it is undoubtedly competent in English law, treats its competency in Scotland as an open question. As to English law, see Pollock, *Contract*, 9th ed., 625; Leake, *Contracts*, 7th ed., 261.

[7] *Campbell* v. *Blair*, 1897, 5 S.L.T. 28 (Lord Kyllachy). The report does not give his Lordship's opinion. In *Bryson* v. *Bryson*, 1916, 1 S.L.T. 361, the Lord Ordinary (Anderson), on a review of the authorities, came to the opposite conclusion, but without adverting to the possible distinction between cases of fraud and cases of breach of contract.

[8] *Laing* v. *Nixon*, 1866, 4 M. 710; *Dobbie* v. *Duncanson*, 1872, 10 M. 810.

When the party actually responsible for the fraud is an agent, and the contract is with his principal, the competency of an action of damages, without the rescission of the contract, is very doubtful. In *Houldsworth* v. *City of Glasgow Bank* Lord President Inglis, speaking in a case of a contract to take shares in a company, but not confining his remarks to that particular case, said: "When the result of the fraud is the making of a contract between the party deceiving (not personally, but through an agent) and the party deceived, I am not aware that any remedy is open to the latter except a rescission of the contract or at least without the rescission of the contract." [1] In the House of Lords, however, this dictum was doubted by Lord Blackburn,[2] and the question must be pronounced to be open for future decision.[3]

Company Cases. —When a man takes shares in a company he is not really buying a thing, but entering into a partnership under special and statutory conditions. If he brings an action for reduction of the contract to take shares, and consequent repayment of the money he paid, or an action of damages against the company for the fraud of the directors by which he was induced to take shares, he is really suing his fellow-shareholders, out of whose pockets the repayment or damages must come. If an individual shareholder can reduce the contract to take shares (which he can do only under certain stringent conditions, and while the company is still a going concern [4]), he may recover the amount he has paid for his shares, as the means of restoring him to his prior position, and not as damages, or, alternatively, on the rule that the company cannot keep money which has been obtained through the fraud of its agents. If the circumstances of the case preclude the reduction of the agreement to take shares, there is no remedy against the company. In *Houldsworth* v. *City of Glasgow Bank* [5] a shareholder, who averred that he had been induced to take shares by the fraud of the directors, sued the company and its liquidators for the price he had paid for the shares, and for a large sum as damages for the loss he had sustained and would sustain by calls in the liquidation, or, alternatively, for a decree ordaining the defenders to relieve him of such calls. It was admitted that the rescission of the contract, after the liquidation of the company, was impossible. It was held that so long as he remained a partner in the company he could have no action of damages against it. The principle of the decision, as explained by the Lord Chancellor (Cairns), was that a party who takes shares in a company contracts with the other shareholders that the assets shall be applied to meet existing and future liabilities, and that these liabilities do not include damages due to any other shareholder for being fraudulently induced to take shares.[6] The authority of a final decision is not weakened by an entire failure to consider that the claim for damages is not based on breach of contract, but arises *ex delicto*, on the theory that the company is responsible for the wrongful acts of the directors as its agents.

The rule that a shareholder cannot remain in the company and yet sue

[1] *Houldsworth* v. *City of Glasgow Bank*, 1879, 6 R. 1164, at p. 1168 (affd. 1880, 7 R. (H.L.) 53).

[2] *Houldsworth, supra*, 7 R. (H.L.) 64.

[3] If the contract has been carried out, so that there is nothing left to reduce, the principal may be sued for damages for the fraud of the agent (*Boyd & Forrest* v. *Glasgow and South-Western Rly. Co.*, 1911, S.C. 33; revd. 1912, S.C. (H.L.) 93).

[4] As to conditions of reduction of contract to take shares, see *infra*, pp. 539, 544.

[5] 1879, 6 R. 1164; affd. 1880, 7 R. (H.L.) 53.

[6] *Houldsworth* v. *City of Glasgow Bank*, 1880, 7 R. (H.L.) 53, at p. 55.

for damages for the fraud which induced him to enter it, and that he cannot reduce the contract to take shares after the winding up of the company, does not depend merely on the interests of creditors, and was applied in a case where the assets were sufficient to meet the liabilities without exhausting the sums for which the shareholders were liable as unpaid capital.[1]

Claim for Market Price.—A party who has been induced by fraud to supply goods or render services at an inadequate price may find a remedy in a direct action for the market or other appropriate price. The law will infer an obligation to pay. So where a passenger placed luggage in the van, having, as he knew, a ticket which did not entitle him to have luggage carried without charge, he was held liable for the ordinary rate for the carriage of the luggage.[2]

Making Good Fraudulent Statements.—It has been held in England that a party who has been induced to enter into a contract by a fraudulent misrepresentation may find a remedy in insisting that the party responsible for the representation shall make good his words. Thus promoters who untruly represent that a certain amount of capital has been subscribed may be placed on the list of contributories for the amount which has not in fact been subscribed.[3] The point has not been raised in Scotland in a case of fraud, but where a law agent failed to make a search for incumbrances he was ordained to clear the record of an undisclosed bond.[4]

Right of Relief.—Where *A.*, by fraudulent statements on the part of *B.*, is induced to enter into a contract with *C.*, his remedy is to claim from *B.* the amount which he has lost on the contract with *C.* He is not entitled to insist that *B.* shall relieve him of the contract by taking his place and entering himself into contractual relations with *C.* So if *A.* is induced by the fraud of directors to take shares in a company, it is conceived that he cannot insist on the directors relieving him of the shares and placing themselves on the register in his place.[5] In *Thin & Sinclair* v. *Arrol & Sons*,[6] *A.* averred that he had been induced to lend money to *C.* by fraudulent statements made by *B.* He did not aver that he had actually sustained loss, but concluded, in an action against *B.*, for the amount he had advanced, on the theory that, as he was induced to advance it by the defender's fraud, the latter was bound to relieve him. On the facts it was held that the fraud alleged was not made out, but it was observed that in any event the pursuer was not entitled to the remedy he sought. Lord President Robertson said: "I indicated, at the outset, that a difficulty common to both grounds of action attends the remedy sought. The pursuers' counsel admitted that they have not proved damage, in the sense of actual loss resulting on their account with Mr Barber. They maintained that their true right, they having been deceived, was to have the defenders to relieve them of that account. It is, I think, impossible to sustain this contention. The pursuers cannot, and the Court cannot, create between the defenders and Barber contractual relations which do not exist. Accordingly, against a third party, a bystander, although it may be an interested bystander, by whose fraud a

[1] *Burgess's* case, 1880, 15 Ch. D. 507.

[2] *Rumsey* v. *North-Eastern Rly.*, 1863, 14 C.B. N.S. 641; *Steven* v. *Bromley* [1919], 2 K.B. 722.

[3] *Moore and De la Torre's* case, 1874, L.R. 18 Eq. 661. Cp. *Liquidator of Millen & Somerville Ltd.* v. *Millen*, 1910, S.C. 868, narrated *supra*, p. 18.

[4] *Fearn* v. *Gordon & Craig*, 1893, 20 R. 352.

[5] *Brown* v. *Stewart*, 1898, 1 F. 316, per Lord Kinnear, at p. 323.

[6] 1896, 24 R. 198. See also *Campbell* v. *Clason*, 1838, 1 D. 270.

contract has been induced, the remedy must necessarily be damages, to wit, the loss directly or naturally resulting from his fraud." [1]

Title to Sue.—It is a rule all but universal that fraudulent representations do not afford a ground of action to anyone except the person to whom they are addressed. The liar incurs no liability to the person who happens to overhear his lie and to act upon it. Thus representations as to the credit of a third party may infer liability to the person to whom they are addressed, or to a person for whom he is known to act as agent, not to others to whom they may be repeated.[2] Where a shareholder fraudulently induced a third party to accept a transfer of his shares, it was held that the liquidator of the company could not found on the fraud in order to reduce the transaction and place the original shareholder on the list of contributories.[3] Where *A.* sold a brewery to *B.*, and, by fraudulent statements regarding the output, obtained a higher price than would otherwise have been given, and *B.* resold to *C.* at a profit, but without making any representations which would have made the sale voidable as between himself and *C.*, it was held that *C.* could not reduce the sale, though the result of *A.'s* fraud was that he had paid an enhanced price for the brewery. But *A.'s* fraudulent representations were not addressed to *C.*, and he had no right to found upon them.[4] In *Macfarlane, Strang & Co.* v. *Bank of Scotland* [5] the pursuer in an action of damages averred that a bank had fraudulently secured the conversion of a private firm into a limited company, with the object and result of obtaining payment of a debt which was otherwise hopeless, and that he had in consequence been induced to supply pipes, which he had contracted to supply to the private firm, to the company which succeeded, with resultant loss. It was held, on the assumption that the statements in the prospectus were such as to give a right of action to parties who had taken shares in reliance on it, that as these statements were not addressed to the pursuer, he had no title to found upon them, and his action was, in the words of Lord Moncreiff, hopelessly irrelevant.

Title of Third Party.—There may, however, be cases in which a man may incur liability for fraud on the ground that he is bound to contemplate that his statements will be acted upon by others than the person to whom he makes them. In *Langridge* v. *Levy* [6] *A.* sold a gun to *B.*, fraudulently representing that it was made by a well-known maker and was a sound gun. *B.* lent it to his son, in whose hands it burst, causing injury. It was held that *A.* was liable in damages, because, in the circumstances, he was bound to contemplate that his statement might be acted upon by others than the person to whom he made it. A banker will be assumed to know that inquiries made by another bank as to the credit of a customer are made on behalf of some one for whom that bank is acting. In *Robinson* v. *National Bank* [7] *R.* agreed to become cautioner for a loan made to *B.* if a satisfactory report was obtained as to the credit of *C.*, a co-cautioner. On *B.'s* request

[1] *Thin & Sinclair* v. *Arrol & Sons*, 1896, 24 R. 198, at pp. 205, 206.

[2] Bell, *Com.*, i. 392; *Stewart* v. *Scott*, 1803, Hume, 91; *Hockey* v. *Clydesdale Bank*, 1898, 1 F. 119; *Salton* v. *Clydesdale Bank*, 1898, 1 F. 110.

[3] *M'Lintock* v. *Campbell*, 1916, S.C. 966; *Re Discoverer's Finance Corporation*, [1910], 1 Ch. 207, 312.

[4] *Edinburgh United Breweries* v. *Molleson*, 1893, 20 R. 581; affd. 1894, 21 R. (H.L.) 10. As to an action of reduction, in such circumstances, by the original purchaser, see *Westville Shipping Co.* v. *Abram Shipping Co.*, 1922, S.C. 571; affd. 1923, S.C. (H.L.) 68, and *supra*, p. 254.

[5] 1903, 40 S.L.R. 746; 11 S.L.T. 199.

[6] 1837, 5 M. & W. 519.

[7] *Robinson* v. *National Bank*, 1916 S.C. 46; affd. 1916, S.C. (H.L.) 154.

his banker applied to the National Bank and received a favourable report. *R.*, to whom the substance of the report was communicated, undertook the cautionary obligation, and sustained loss owing to *C.'s* insolvency. On the averment that the favourable report as to *C.'s* credit was made fraudulently, *R.* sued the National Bank. The Bank was assoilzied on the ground that there was no proof of fraud, but on the question whether *R.* was entitled to found on the report the opinions in the House of Lords were that a report given in such circumstances was addressed to, and could therefore be founded on by, anyone interested in the transaction which induced the inquiry.

Prospectus, to Whom Addressed. A representation may be addressed to a particular person, or to the general public, and if the latter is the case, the fact that it is fraudulent will give a right of action to anyone who is misled by it and incurs loss. Thus the prospectus of a company is addressed to anyone who may choose to apply for shares, and the same rule applies to the annual reports.[1] But the prospectus is addressed only to those who may take shares originally, not to persons who afterwards buy them on the Stock Exchange, and such persons have therefore no action against the directors for any fraudulent misrepresentations the prospectus may contain.[2] But where a person who was not an original allottee could point not only to fraudulent statements in the prospectus, but to a bogus telegram communicated to the newspapers in order to keep up the price of the shares, it was held that the case was not ruled by *Peek* v. *Gurney*, and that he was entitled to damages.[3]

(2) *Facility and Circumvention*

Facility and circumvention is recognised as a ground for the reduction of a contract or of a will, distinguishable from actual fraud. Stair does not draw the distinction, using circumvention as a synonym for fraud,[4] but it seems to be noticed, though not very distinctly, by Erskine[5] and Bell.[6] In modern cases circumvention has been described as "legal or constructive fraud,"[7] and as "a course of deception which is fraud in grain, but not fraud perpetrated by a single specific act;"[8] and it has been laid down that it is not necessary to prove specific instances of deception in order to establish a case of circumvention.[9]

Form of Issue. - The established form of issue puts to the jury the question whether the pursuer was weak and facile in mind and easily imposed upon, and whether the defender (or some person on his behalf), taking advantage of the said weakness and facility, did, by fraud or circumvention, impetrate and obtain from the pursuer the deed, will, or contract in question; and this form will not readily be altered.[10] But when the pursuer's averments included the use of threats as well as imposition, an issue of "fraud or circumvention and intimidation" was allowed.[11]

[1] *Lees* v. *Tod*, 1882, 9 R. 807.
[2] *Peek* v. *Gurney*, 1873, L.R. 6 H.L. 377.
[3] *Andrews* v. *Mockford* [1896], 1 Q.B. 372.
[4] Stair, i. 9, 9.
[5] Ersk. iv. 1, 27.
[6] Bell, *Prin.*, secs. 13, 14.
[7] *M'Kellar* v. *M'Kellar*, 1861, 24 D. 143, per Lord President M'Neill.
[8] *Love* v. *Marshall*, 1870, 9 M. 291, per Lord Kinloch, at p. 297.
[9] See opinion of Lord Justice-Clerk (Hope), *Clunie* v. *Stirling*, 1854, 17 D. 15, at p. 17. In addition to cases cited below, the following cases may be consulted as illustrations of the nature of the facts which amount to circumvention:—*Maitland* v. *Ferguson*, 1729, M. 4956; affd. 1732, 1 Paton, 73; *Sutherland* v. *Low*, 1901, 3 F. 972; *M'Callum* v. *Graham*, 1894, 21 R. 824; *Gibson's Exr.* v. *Anderson*, 1925, S.C. 774.
[10] See *Stewart* v. *Kennedy*, 1889, 16 R. 857, 861; *M'Culloch* v. *M'Cracken*, 1857, 20 D. 206; *Mann* v. *Smith*, 1861, 23 D. 435.
[11] *Love* v. *Marshall*, 1870, 9 M. 291.

Facility.—The necessary foundation for the plea of circumvention, in so far as distinguishable from fraud, is that the party misled was in the state known as facility.[1] Beyond the statement that a person may be in a state of facility when neither an alienist nor a jury would pronounce him insane, facility is a term no more susceptible of exact definition than circumvention. It includes the weakening of faculties due to old age or severe illness. An issue of facility through intoxication has been allowed.[2] In *Gray* v. *Binny*[3] Lord Deas expressed the opinion that where a young man had consented to a disentail under the influence of his mother, an issue of facility, had the case been sent to a jury, would have been appropriate. Lord Shand, however, held that where no weakening of the mental faculties was averred, facility was not an appropriate term. The question of facility "does not depend altogether on the state of the mind in respect of mere intellect or understanding. It rather regards the state of the mind morally and constitutionally, whereby it may be liable either to undue influence induced by fraudulent pretences or to intimidation under peculiar relations between the parties."[4]

Facility and Insanity.—An issue of facility and circumvention is commonly taken as a subordinate ground where the main issue is the insanity of the granter of the deed or will. It has been explained that in the case of a contract an affirmative verdict on an issue of insanity implies that the contract is absolutely void: whereas in a reduction on the ground of facility and circumvention the principle is that the contract is voidable.[5]

Facility without Circumvention.—It is not a relevant ground of reduction of a contract merely to aver that the granter was facile, and that the contract was to his lesion. It must also be averred that his consent was improperly obtained.[6] So a new trial was granted where a jury had reduced a will which was challenged on the ground that the granter was facile, and that the will had been obtained by fraud or circumvention on the part of his housekeeper, the Court holding that no evidence of any improper practices on the part of the housekeeper had been given.[7] In *Liston* v. *Cowan*[8] the pursuer averred that his mental faculties had become impaired, and that the defender had obtained a bond from him to secure the return of certain compromising letters which he had written to her, and which she threatened to publish. It was held that the averments were irrelevant, as they merely amounted to a statement that a bargain had been entered into while the pursuer was in a state of facility, without alleging any unfair practices on the part of the defender.

Impetration.—It is probably impossible to make any definite statement as to the degree of pressure which may be brought to bear on a person who is in a state of facility without exposing the resulting deed to reduction on the ground of circumvention. A distinction, it is conceived, may be drawn between cases where a person whose faculties are weakened by illness is induced to make a will or dispose of his property gratuitously, and cases where he has entered into onerous contracts. In the former case it is relevant to aver that the will or gift has been obtained by repeated solicitation usually characterised as impetration—and specific averments of deception

[1] See *Horsburgh* v. *Thomson's Trs.*, 1912, S.C. 267.
[2] *Jackson* v. *Pollok*, 1900, 8 S.L.T. 267.
[3] 1879, 7 R. 332.
[4] *Cairns* v. *Marianski*, 1850, 12 D. 1286, per Lord Moncreiff, at p. 1290.
[5] *Gall* v. *Bird*, 1855, 17 D. 1027.
[6] Ersk. iv. 1, 27; *Gordon* v. *Ross*, 1729, M. 4956; *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625; *Liston* v. *Cowan*, 1865, 3 M. 1041.
[7] *Morrison* v. *Maclean's Trs.*, *supra*.
[8] 1865, 3 M. 1041.

are not required,[1] and it is conceived that a verdict for the pursuer would not be set aside merely on the ground that the proof disclosed nothing more than continued solicitation.[2] And while in the great majority of cases in which a main point in the proof of circumvention has been the exertion of influence, that influence has been used by a party, such as a law agent, near relation, or confidential servant, who lay under an obligation not to exert it, it is conceived that that is not an essential feature of the case, and that, given facility, the exertion of influence by anybody, if it amounts to undue pressure, would be considered as circumvention, though the party exercising the influence would have been quite entitled to do so while the other retained his normal faculties.[3] But the law does not deprive a person who is ill, or suffering from the effects of an accident, of the power to contract, and it has been repeatedly held that a compromise of a claim for damages for injury caused by an accident may be made while the injured party is still suffering from its effects.[4]

Circumvention by a Third Party.—On the principle that no one is entitled to profit gratuitously by another's fraudulent act, a will is reducible on the ground of facility and circumvention even although the party whose acts have amounted to circumvention is not benefited thereby.[5] And the same rule would apply to a gift. But for the reduction of an onerous contract it is necessary to prove that the acts of circumvention were those of the other party to the contract, or of an agent for him.[6]

Rectification of Contract.—In an early case, where the report leaves it doubtful whether any acts of circumvention were proved, but the bargain was disadvantageous, and the party was described as a "simple young man," the Court remitted to two judges to adjust the bargain fairly without reduction;[7] but in *M'Kirdy* v. *Anstruther*[8] all the judges were of opinion that this form of the *actio quanti minoris* was not recognised by the law of Scotland.

Marriage Contracts.—From a decision of the House of Lords, in 1753, it would appear that where provisions are made in a marriage contract and marriage has followed, the contract cannot be set aside on proof that the party who granted the provisions was in a state of facility, and that his consent was obtained by fraud or circumvention.[9]

Fiduciary Relationships.—There are certain relationships—such as those of trustee and beneficiaries, partners, agent and client, parent and child—where the law holds either that no binding contract can be permitted, or that contracts must be submitted to a judicial scrutiny not observed in other cases; and, where these relationships exist, the plea that the contract has been obtained by the use of undue influence by the one over the other may be a relevant ground of reduction. But as the degree of contractual incapacity in these various cases differs, it has been thought desirable to consider them in a separate chapter.[10]

Influence. Again, where a party is in a state of facility, it has already been submitted that a contract detrimental to him may be reducible on the

[1] *Williams* v. *Philip*, 1907, 15 S.L.T. 396; *Horsburgh* v. *Thomson's Trs.*, 1912, S.C. 267.
[2] See *Galloway* v. *Duff*, 1672, M. 4959.
[3] The distinction between influence exercised during health and during facility is drawn in *M'Kechnie* v. *M'Kechnie's Trs.* (1908, S.C. 93)—the reduction of a will.
[4] *North British Rly. Co.* v. *Wood*, 1891, 18 R. (H.L.) 27; *Mackie* v. *Strachan, Kinmond & Co.*, 1896, 23 R. 1030; *Mathieson* v. *Hawthorns & Co.*, 1899, 1 F. 468.
[5] *Taylor* v. *Tweedie*, 1865, 3 M. 928.
[6] *Supra*, p. 483.
[7] *Alison* v. *Bothwell*, 1696, M. 4954.
[8] 1839, 1 D. 855.
[9] *Irvine* v. *Irvine*, 1753, 1 Paton, 547.
[10] *Infra*, Chap. XXXI.

ground that he has been induced to grant it by the exertion of another's influence.[1]

Apart from these special cases, it is conceived that it is no ground for the reduction of a contract that the one party possessed influence over the other, and used it—in other words, that such influence is only undue if the parties stood in a confidential relationship, or if the mind of the party on whom the influence operated was in the condition regarded by law as facile.

Authority on this point with regard to contracts *inter vivos* would seem to be lacking, but the law is well settled with regard to wills.[2]

[1] *Supra*, p. 485.

[2] *Weir* v. *Grace*, 1898, 1 F. 253; 1899, 2 F. (H.L.) 30; *M'Kechnie* v. *M'Kechnie's Trs.*, 1908, S.C. 93. See also *Forrests* v. *Low's Trs.*, 1907, S.C. 1240; affd. 1909, S.C. (H.L.) 16. See opinion of Lord Kinnear (1907, S.C., at p. 1256) citing opinion of Lord Cranworth in *Boyce* v. *Rossborough*, 1857, 6 H.L.C. 2, at p. 47.

CHAPTER XXIX

FORCE AND FEAR, EXTORTION

Contracts Void or Voidable.—It has been laid down with much consistency in the law of Scotland that an obligation or contract induced by force and fear, *i.e.*, by threats of an injury by one party, apprehension of it by the other, is not merely voidable but void. Thus Stair, founding on the civil law,[1] says, "such deeds and obligations as are by force and fear, are made utterly void"; [2] Erskine explains that violence, or the menace of violence, excludes consent; [3] Bell, that force and fear annul engagement; [4] and it has twice been held that a bill, induced by threats, could not be enforced by a holder in due course.[5] On the other hand, it has been decided, somewhat inconsistently, that partial payment, after the apprehension had ceased, amounted to homologation; [6] and it may perhaps still be open to the Courts to consider whether a disposition of property, granted under the apprehension of inconvenient consequences not amounting to physical violence, would be reducible in a question with an onerous and *bona fide* third party.[7]

Meaning of Force and Fear.—The nature of the fear which will affect the validity of a contract has been defined only in general terms: but it would appear, according to the authorities in Scotland, that proof of actual fear in the mind of the individual concerned would not be enough if the threats used would not have affected the mind of a reasonable person. Thus Stair, while pointing out that the degree of apprehension varies according as the granter of the obligation is a man or a woman, and according as the obligation is onerous or gratuitous, lays down generally that it must not be "vain or foolish fear." [8] And Lord Deas, dealing with a case of a reduction of a deed by a married woman, alleged to have been granted through fear of proceedings threatened against her husband, said: "It would be very difficult, and it is

[1] *Dig.*, iv. 2 (*quod metus causa*); *Code*, ii. 20. But see Pothier, *Obligations*, sec. 21.

[2] Stair, i. 9, 8.

[3] Ersk. iii. 1, 16.

[4] Bell, *Prin.*, sec. 12. See also *Com.*, i. 314.

[5] *Willocks* v. *Callender*, 1776, M. 1519; *Wightman* v. *Graham*, 1787, M. 1521. But this was held a doubtful point in *Gelot* v. *Stewart* (1870, 8 M. 649 (sequel, 1871, 9 M. 957)). And by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), a holder in due course, or one who derives his title from a holder in due course, as defined in sec. 29, holds the bill free from any defect of title of prior parties (sec. 38), and among defects of title are included, *inter alia*, "duress, or force and fear" (sec. 29). But where "in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation is affected with" ". . ." force or fear," the onus lies on the holder to prove that value has been given for the bill in good faith subsequent to the illegality (sec. 30).

[6] *Thomson* v. *Annandale*, 1829, 7 S. 305.

[7] In English law an obligation induced by duress is merely voidable (Pollock, *Contract*, 9th ed., 644, where it is suggested that the rule might be different in the case of actual physical violence). See *Dickie* v. *Gutzmer* (1829, 8 S. 147), where it was held that the objection to an obligation that it was granted under apprehension of irregular diligence might be a ground of reduction, but could not be pleaded by way of exception.

[8] Stair, i. 9, 8. See also Gaius, *Dig.*, iv. 2, 6—"*Metum autem non vani hominis, sed qui merito et in homine constantissimo cadat, ad hoc edictum pertinere dicemus.*"

not here at all necessary, either by definition or description, to point out all the means by which, and which alone, such fear may be induced on the part of a married woman, as the law will recognise as sufficient to void her solemn deed. Certain it is, on the one hand, that it is not every sort of fear—or rather it is not the fear of consequences of every sort—which will void such a deed: and, on the other hand, that fear of particular consequences may be sufficient in the case of a married woman, though of full capacity, which would not be sufficient in the case of a man of full capacity."[1]

Violence.—There is no doubt that an obligation cannot be sustained if proved to have been granted under threats of serious physical violence,[2] or under illegal and arbitrary imprisonment,[3] or under imprisonment effected by the irregular use of diligence.[4] And where a workman, suing on behalf of his pupil son, who had met with an accident, had settled his claim for damages, it was held relevant to aver, as a ground for setting the settlement aside, that the workman had been induced to grant it by threats of loss of employment if he refused.[5] And it would appear that if a party's goods are seized unwarrantably, any obligation he may undertake in order to secure their restoration will be reducible.[6]

Violence to Relatives.—There is no distinction in legal effect between threats used to the granter of a bond, and threats or violence to a near relation, husband or wife, parent or child.[7]

Threats of Diligence, Bankruptcy.—Fear, to affect the validity of a contract, must be fear of some illegal or unwarrantable action. A creditor is entitled to use the ordinary methods of diligence or proceedings in bankruptcy, and if the debtor is induced to grant a bond or security for the debt, it is not reducible on the ground that it was granted under apprehension of legal proceedings. So, while imprisonment for debt was lawful, securities for the debt granted while in prison have been sustained. In *Ker* v. *Edgar* a debtor who was threatened with imprisonment in virtue of a decree in absence had granted a bond of corroboration. In a suspension of a charge on that bond the suspender stated objections to the decree, and, with regard to the bond, averred that it had been granted under force and fear. It was found that "*metus carceris*, by a legal execution which could have been prevented, or liberty obtained by suspension, was no *justus metus*," and, consequently, that as the bond of corroboration stood unreduced, the creditor was not bound to enter into the question of the validity of the prior decree.[8] So where a married woman has granted an obligation for a debt due by her husband, it is no relevant ground for its reduction that it was granted to avert diligence threatened against him, provided that no objection to the legality of the diligence can be stated.[9] And Lord Ardwall

[1] *Priestnell* v. *Hutcheson*, 1857, 19 D. 495, at p. 499.

[2] *Earl of Orkney* v. *Vinfra*, 1606, M. 16481; *Tenants of Winton* v. *Bakers of Canongate*, 1748, M. 16514; *Gelot* v. *Stewart*, 1870, 8 M. 649; 1871, 9 M. 957.

[3] See *Stuart* v. *Whitefoord*, 1677, M. 16489, and other cases in Morison, *voce Vis et metus*, p. 16479 *et seq.*; *Cumming* v. *Ince*, 1848, 11 Q.B. 112; and *Biffin* v. *Bignold*, 1862, 7 H. & N. 877—confinement in lunatic asylum.

[4] *M'Intosh* v. *Chalmers*, 1883, 11 R. 8, narrated *infra*, p. 490.

[5] *Gow* v. *Henry*, 1899, 2 F. 48. Cp. *Gray* v. *Earl of Lauderdale*, 1685, M. 16497.

[6] *Wiseman* v. *Logie*, 1700, M. 16505.

[7] Bell, *Prin.*, sec. 12; *Com.*, i. 315; *Priestnell* v. *Hutcheson*, 1857, 19 D. 495 (threats of injury to husband); *M'Intosh* v. *Farquharson*, 1671, M. 16485 (ransom of parent); *Canison* v. *Marshall*, 1764, 6 Paton, 759 (charge of forgery against father); *Williams* v. *Bayley*, 1866, L.R. 1 H.L. 200 (threatened prosecution of son).

[8] *Ker* v. *Edgar*, 1698, M. 16503; see also *Murray* v. *Spalding*, 1672, M. 16487.

[9] *Priestnell* v. *Hutcheson*, 1857, 19 D. 495; *Craig* v. *Paton*, 1865, 4 M. 192.

has expressed the opinion that it is entirely within the rights of a creditor to execute diligence in the particular case, a warrant to imprison on a decree *ad factum præstandum* when he knows that the debtor has no possible means of complying, in the hope that his friends may be induced to intervene: from which it may be inferred that if friends in such a case do intervene and grant a security, that security will not be open to objection on the ground of force and fear.[1]

But while a creditor is within his rights in using diligence, or the threat of it, to obtain a security from the debtor, or, probably, from a third party, he is not entitled to use such threats as a means of extorting assent to some separate and independent obligation.[2] So where during the course of an action of declarator of trust the defender imprisoned the pursuer under diligence, and then obtained from him a renunciation of all claim of trust and a disclaimer of the action, the deed was reducible on the plea of *vis et metus*.[3] In *Nisbet* v. *Stewart*[4] a creditor who had apprehended the debtor under a charge for payment obtained from him a bond for the debt and also a discharge of a claim held by the debtor against the creditor's tenants. The bond, it was held, was good, the discharge "utterly unwarrantable and reducible *ob vim et metum*." In *Fraser* v. *Black*[5] a debtor while imprisoned under diligence disponed a house to the creditor by an *ex facie* absolute disposition. The Court sustained the disposition "as a security to the defenders for any debt which they can instruct to be justly due to them."

In one case[6] it was held that where the owner of cattle which had trespassed on a farm granted a bill for the damages which were claimed by the farmer, under threats of legal proceedings, the bill might be reduced, and a proof of the actual damage sustained allowed. But the report bears that the party was "intimidated by the high language of the owner of the field, who was backed by his neighbouring farmers"; and it cannot be regarded as an authority against a compromise induced by threats of legal proceedings.[7]

Irregular Diligence.—If a party is imprisoned under irregular diligence, any obligation granted by him with a view to obtaining his release will be open to reduction. "There is a fundamental difference between persons under legal restraint and under illegal restraint, and no transaction between the author and victim of illegal restraint can receive effect."[8] In *M'Intosh* v. *Chalmers*[9] *A.* was imprisoned on a charge given on a bill. He brought a suspension, which was ultimately successful. But while still in prison *A.* had granted to the charger's agent a letter of indemnity against any claim for damages for wrongful use of diligence, on condition of his immediate liberation. He brought an action of damages against the charger, containing conclusions for the reduction of the letter of indemnity. It was proved that the diligence was used for the purpose of procuring *A.'s* assent to a separate transaction, and in the knowledge that it was unwarranted. It was held that the letter of indemnity might be set aside without reduction, and that *A.* was entitled to damages. The Lord Justice-Clerk and Lord Young held

[1] *Rudman* v. *Jay & Co.*, 1908, S.C. 552 action of damages for wrongful use of diligence.
[2] *Nisbet* v. *Stewart*, 1708, M. 16512; *Arratt* v. *Wilson*, 1718, Robertson, App. 234; *Fraser* v. *Black*, 13th December 1810, F.C.; *M'Intosh* v. *Chalmers*, 1883, 11 R. 8.
[3] *Arratt* v. *Wilson*, *supra*.
[4] 1708, M. 16512.
[5] 13th December 1810, F.C.
[6] *Foreman* v. *Sheriff*, 1791, M. 16515.
[7] See Stair, i. 17, 2.
[8] Per Lord Young, *M'Intosh* v. *Chalmers*, 1883, 11 R. 8, at p. 14.
[9] *Supra*.

that it was enough for the pursuer to prove that the diligence was irregular; Lord Rutherfurd Clark, however, doubted whether this would have been sufficient in the case of an honest mistake. Earlier authority seems to support the opinion of the majority.[1]

Stifling Prosecution. In *Canison* v. *Marshall*[2] it was held in the House of Lords, affirming the judgment of the Court of Session, that a disposition of property was reducible on the ground that it had been induced by threats of prosecuting the granter's father for forgery. And this is in accordance with more recent authority in England, where, moreover, any agreement to compound a felony is void as a *pactum illicitum*.[3] But in Scotland the Court has shewn itself unwilling to hold that an arrangement by which money which has been stolen is replaced by a friend or relation of the thief, or an obligation by the thief himself, is null either as an illegal contract or as induced by fear of prosecution. In *Ferrier* v. *Mackenzie*[4] the action was laid on a promissory note, and was defended on the ground that it had been given to save a brother from a criminal prosecution for embezzlement. A proof disclosed that it had been granted after the granter knew that all thoughts of a prosecution had been given up, and the defence was therefore repelled. The judges expressed doubts on the question, which it was not necessary to decide, whether proof that threats of prosecution had induced the note would have been sufficient, and were of opinion that in a case where overt threats were not proved, it was not sufficient to make a contract illegal that its object was to avert a prosecution, whatever might be the law with regard to an express bargain to that effect. In *Lamson Paragon Supply Co.* v. *Macphail*[5] a commercial traveller had granted a letter admitting that he had used money belonging to his employers without their authority, and a promissory note for the deficiency. He refused payment, on the ground that he was prepared to justify his conduct; and, in defence to an action, averred that the letter and promissory note had been induced by threats of prosecution. He did not aver any bargain not to prosecute. It was held there was no relevant defence, on the ground that a document admitting a debt was not invalid because it was granted under a threat of prosecution, or in hopes of averting it. The question as to the legal effect of a bill or other security given on an express bargain not to prosecute was again reserved, but Lord Salvesen indicated the opinion that such a bargain would involve no illegality in Scotland so long as it merely involved repayment of money misappropriated, and did not amount to an attempt to obtain some separate advantage by threats of prosecution.

Payments to Avert Penalties. It would appear, on English authority, that in cases which do not involve the element of stifling a prosecution, and therefore do not involve the interests of the State, a party is within his rights in demanding a payment as the price of abstaining from a certain course of action, provided that the course was one which he could lawfully take. So where a trade association, which could lawfully have placed a manufacturer on a stop list, demanded and received a payment instead, it was held that there was no legal objection.[6]

[1] *Wiseman* v. *Logie*, 1700, M. 16505.

[2] 1764, 6 Paton, 759. Cp. *Kennedy* v. *Cameron*, 1823, 2 S. 192; *Macleod* v. *Fraser*, 1758, M. 9563; *Smith & Sons* v. *Buchanan*, 1910, 2 S.L.T. 387.

[3] *Williams* v. *Bayley*, 1866, L.R. 1 H.L. 200; *Scott* v. *Scott*, 1847, 11 Irish Eq. Rep. 74; *Kaufman* v. *Gerson* [1904], 1 K.B. 591 (but see 20 Law Qu. Rev. 227). See Leake, *Contracts*, 7th ed., 536.

[4] 1899, 1 F. 597. [5] 1914, S.C. 73. [6] *Hardie & Lane* v. *Chilton* [1928], 2 K.B. 306.

Obligations by Married Women.—Where a deed has been granted by a married woman, and the allegation is that she was induced to grant it in fear of her husband, a case of threats sufficient to induce fear in a woman of ordinary capacity must be made out.[1] And judicial ratification of the wife's deed is not necessary, "though those act more cautiously who take their judicial ratification."[1] It is not a ground of reduction that a deed was granted by a wife through affection or respect (*reverentia maritalis*) for her husband or from concern for his interests.[2] In *Priestnell* v. *Hutcheson*[3] the wife's averments were that her husband came to her when she was unwell, told her that he was threatened with diligence and ruin, and, on her refusing to sign the deed in question, said he would be obliged to fly the country. It was held that no relevant grounds had been stated for the reduction of the deed. If founded on the acts of the creditor, the averments came to nothing more than a threat to use lawful diligence: if on the actings of the husband, they only amounted to a statement that the wife had been influenced by her affection for him.

Questions with Third Parties.—On the theory that a contract induced by force and fear is void and not merely voidable,[4] it ought to be ineffectual even in a question with a party who is not responsible for, nor cognisant of, the force which has been used. And it was so held in a case where a wife had been forced by violence on the part of her husband to sign a deed in favour of a third party.[5] But where a woman had settled a claim of damages against her employers, and attempted to set aside the settlement on the ground that she had made it under threats by a man with whom she lived, the Second Division held it to be a clear point that as there was no averment that the employers had been in any way implicated in the threats alleged, in a question with them it was immaterial whether the settlement had been induced by fear of another person, or of the pursuer's own free will.[6]

Extortion

Common Law.—There is a certain amount of authority to lend support to the argument that a contract, where it is clear that a gift was not intended, may be so inequitable in its terms as to be reducible, though the relationship of the parties may not be such as to involve any fiduciary duty by the one to the other, and although neither improper practice by the party who gains, nor defect in legal capacity in the party who loses, can be established. Thus Stair observes that a sale may be reduced or, it would appear, adjusted on equitable terms, if the seller has kept up the article so as to cause a dearth, or if some special necessity of the buyer has placed him at the seller's mercy.[7] And opinions have been given that while inadequacy of consideration is not, *per se*, a ground of reduction, there might be cases of inadequacy of consideration so gross as to amount to proof of fraud.[8] A more definite authority may be found in the case of *Young* v. *Gordon*.[9] There a moneylender had charged

[1] *Hay* v. *Cumming*, 1706, M. 16506; *Buchan* v. *Risk*, 1834, 12 S. 511.

[2] *Hepburn* v. *Nasmyth*, 1613, M. 16482; *Hay* v. *Cumming*, 1706, M. 16506; *Cranstoun* v. *Scott*, 1777, 2 Paton, 425, as explained by Lord Curriehill (Ordinary) in *Standard Property Investment Co.* v. *Cowe*, *infra*; *Priestnell* v. *Hutcheson*, 1857, 19 D. 495; *Standard Property Investment Co.* v. *Cowe*, 1877, 4 R. 695; *Boyd* v. *Shaw*, 1927, S.C. 414.

[3] 1857, 19 D. 495.

[4] *Supra*, p. 488.

[5] *Cassie* v. *Fleming*, 1632, M. 10279.

[6] *Stewart Brothers* v. *Kiddie*, 1897, 7 S.L.T. 92.

[7] Stair, i. 10, 15.

[8] See opinion of Lord Westbury in *Tennent* v. *Tennent's Trs.*, 1870, 8 M. (H.L.) 10; of Lord Gillies in *M'Kirdy* v. *Anstruther*, 1839, 1 D. 855.

[9] 1896, 23 R. 419.

upon certain promissory notes, which had been protested for non-payment. In a note of suspension it appeared that the amount claimed was more than three times the sum advanced, and in a letter granted by the borrower (an unmarried woman), and dictated to her by the lender, it was stated that the new bills had been granted in consideration of twenty-four hours' delay. The Court suspended the charge, found the borrower entitled to recover the bills so far as exceeding the original advance and the interest she had agreed to pay, and found the moneylender liable in expenses. It does not appear from the opinions on what legal ground the decision was rested – presumably on the ground that the terms of the transaction were such as necessarily to infer fraud. The case was followed in the Outer House as establishing the principle that the Court would not lend its aid to a demand which was manifestly and grossly extortionate.[1]

But while it would appear that there may be cases where the Court will interfere on the sole ground of gross unfairness, the general rule undoubtedly is that parties who are *sui juris* and dealing with each other at arm's length are bound by their contracts whether they are fair or not.[2] This has been laid down in very general terms. In *A. B.* v. *Joel*[3] a party who was charged on a bill brought a suspension, on the ground that it had been granted for a loan of money, and that he had not received more than half of what he had agreed to repay. The Lord Ordinary passed the note; in the Inner House it was held that there was no substance in the reasons for suspension. "It is no ground for passing a bill of suspension, that a party may have paid smartly for his money, and is very much in the hands of his creditor; and such a notion cannot be sanctioned by a Court of Justice."[4] Again, Lord Blackburn, referring to the opinion of one of the judges in the Court below, objected to the use of the word "inequitable" as applied to a contract between parties who stood on equal terms. "I am inclined to agree with what the learned counsel for the appellants said, that this last is not a correct phrase: a bargain is a bargain. If a man chooses to bargain that he will pay ten times the value of a thing, I do not think you have, in the absence of undue influence, any right to cut down the price to a tenth part of what was agreed upon."[5] And where a cautioner, undertaking a liability for £4,500, stipulated (in a contract drawn up under legal advice) for a bonus of £600 a year, and obtained promissory notes for that amount, the Court, holding that the parties had contracted on equal terms, decided that the notes were enforceable against the debtor's executry.[6]

Bargains with Expectant Heirs.—It has been definitely decided, in spite of a dictum of Erskine, that the English law as to catching bargains with expectant heirs has no place in Scottish jurisprudence.[7] In the case referred to, an heir presumptive to an entailed estate (the heir in possession being his nephew, then a child) had sold his chance of succession for a sum amounting to one year's rental of the estate. He had previously advertised it for sale

[1] *Gordon* v. *Stephen*, 1902, 9 S.L.T. 397.

[2] The law of Diocletian, under which a sale was reducible if the price was less than the half of the true value (*justum pretium*), *Code*, iv. 44, 2, was rejected at an early period in the law of Scotland. *Fairie* v. *Inglis*, 1669, M. 14231, Ersk. iii. 3, 4; *Latta* v. *Park*, 1865, 3 M. 508, opinion of Lord Cowan, p. 512.

[3] 1849, 12 D. 188.

[4] Per Lord Justice-Clerk Hope, 12 D., at p. 189.

[5] *Caledonian Rly. Co.* v. *North British Rly. Co.*, 1881, 8 R. (H.L.) 23, at p. 31.

[6] *M'Lachlan* v. *Watson*, 1874, 11 S.L.R. 549.

[7] *M'Kirdy* v. *Anstruther*, 1839, 1 D. 855. See *contra*, Ersk. iii. 1, 16; *Stewart* v. *Earl of Dundonald*, M. 9514, 16431, explained in *M'Kirdy* as a case of a bet. For English law, see Pollock, *Contract*, 9th ed., 675.

at that price, and received no offers. He was in serious financial difficulties. Eleven years afterwards the succession opened to him, and the purchaser brought an action of adjudication in implement. Besides other grounds of defence, all of which failed on the facts, the heir, relying on the law of England, argued that the sale of a reversion for an inadequate price was a contract which the law would not enforce. This argument the Court rejected, holding that there was no reason or authority for the extension of the English law on the subject to Scotland.

Usury Laws. It is not now necessary to enter into any discussion of the usury laws, which were finally repealed in 1854.[1] From that date till the end of the century any objection to a contract on the ground of the unfairness of its terms had to be based upon the principles of common law. In 1900 contracts with moneylenders were placed in an exceptional position by the Moneylenders Act of that year.[2]

Moneylenders Acts.—These Acts, in addition to provisions as to the registration and licensing of moneylenders, and restriction as to the methods by which their business may be carried on, confer upon the Court the power to reopen a transaction which is substantially one of moneylending by a moneylender, as defined in the Act. This may be done, either in proceedings by the moneylender for the recovery of the loan (sec. 1 (1)), or at the instance of the borrower (sec. 1 (2)), or in proceedings in the bankruptcy of the borrower (sec. 1 (3)), where "there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief."[3] By sec. 10 of the Moneylenders Act, 1927, the interest is to be deemed excessive, and the transaction harsh and unconscionable, unless the contrary is proved, if the rate exceeds 48 per cent. The Court may, in such cases, relieve the debtor from liability for any sum more than the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; may order repayment of any amount paid in excess of such sum; may set aside, wholly or in part, or revise, or alter, any security given or agreement made; and if the moneylender has parted with a security, may order him to indemnify the borrower. It is expressly provided (sec. 1 (4)) that nothing in these provisions shall affect the rights of any *bona-fide* assignee or holder for value without notice, provided (1927 Act, sec. 17) that the assignee is not himself a moneylender.

Moneylenders Act, 1927.—This Act limits the rate of interest which may be ranked for in the bankruptcy of the borrower to five per cent. (sec. 9); makes any charge for expenses in the negotiation of the loan illegal (sec. 12); limits the period within which proceedings may be brought for the recovery of the loan or interest (sec. 13); makes it competent for the Court to order payment of any sum found due by instalments (sec. 17 (*f*)); and precludes summary diligence on any bill, promissory note, or bond (sec. 17 (*h*)).

Construction of Term "Harsh and Unconscionable."—In the application of these provisions it has been held that the rate of interest charged is

[1] 17 & 18 Vict. c. 90. Prior to this Act, exceptions, amounting to practical repeal, had been made by 3 & 4 Will. IV. c. 98, sec. 7, and 2 & 3 Vict. c. 37. As to the prior law, see Bell, *Com.*, i. 327.

[2] 63 & 64 Vict. c. 51, amended by the Moneylenders Act, 1911 (1 & 2 Geo. V. c. 38). The latter Act is now repealed by the Moneylenders Act, 1927 (17 & 18 Geo. V. c. 21).

[3] In the application of the Act to Scotland these last words are to be omitted (sec. 1 (7)).

(except where, as above stated, it exceeds 48 per cent.) to be regarded as one element only in the question whether the transaction, taken as a whole, is harsh and unconscionable. The most important element is the nature of the risk which the moneylender runs in the particular case.[1] It is obvious that if a loan is applied for by a person of no means, with no tangible expectations, and unable to offer caution or any security, it would be difficult to suggest terms which would make the transaction favourable to the moneylender. And Lord M'Laren has expressed the opinion that to bring a loan within the purview of the Act of 1900, there must be "some fault on the part of the moneylender, some want of fairness in the transaction for which he may justly be held responsible."[2] It may be questioned whether the general risk of bad debts in a moneylender's business is an element which the Court is entitled to consider in judging of the terms of a particular case.[3]

It has been held in the Outer House to be within the discretion of the Court, where relief is asked on a particular loan, to reopen prior transactions between the same parties, and credit the borrower with extortionate charges paid by him on such prior transactions.[4]

[1] *Davis* v. *M'Nally*, 1904, 12 S.L.T. 234; *Midland Discount Co.* v. *Macdonald*, 1909, S.C. 477; *Howard & Cope* v. *Leckie*, 1909, 2 S.L.T. 444; *Debenham* v. *M'Call*, 1923, S.L.T. 365. English cases are collected in Chitty, *Contracts*, 17th ed., 703.

[2] *Midland Discount Co.* v. *Macdonald*, *supra*, 1909, S.C., at p. 484. A clause providing that the whole sum shall become due on failure to pay any instalment is *primâ facie* unfair (*Harris* v. *Clarson*, 1910, 27 T.L.R. 30).

[3] This consideration is suggested by Sheriff Johnston in *Midland Discount Co.*, *supra*. But it would defeat the Act.

[4] *Blumberg* v. *Shand-Harvey*, 1908, 16 S.L.T. 4.

CHAPTER XXX

CONTRACTS *UBERRIMÆ FIDEI*

The question of the effect of misrepresentation and concealment upon the validity of a contract has been considered in a prior chapter as a general problem apart from any specialty in the contract in question, or any particular relationship between the parties to it.[1] What, it was asked, is the effect of misrepresentation or concealment in an ordinary contract between two parties who are dealing with each other at arm's length? The same question has now to be considered in relation to certain special contracts, and to contract in general when the parties stand to each other in some special relationship. The general rules are then modified by the recognition of the principle that each party is entitled to repose confidence in the other, and the law endeavours to secure that such confidence should not be abused. The extent to which the general law of contract is affected by the existence of a fiduciary element depends on the nature of the particular contract or the particular relationship; all such cases have the common characteristic that one or both of the parties is bound to disclose all material facts known to him, and that failure in disclosure is a ground for the reduction of the contract. Concealment or non-disclosure, in the contracts now to be considered, has the same effect as innocent misrepresentation in contracts where there is no fiduciary element. In English law, on the theory that there is a general presumption in favour of the validity of a contract, the onus of proof of non-disclosure lies on the party alleging it,[2] and the law of Scotland is probably the same. As the fiduciary obligation varies in different contracts, and in different degrees of fiduciary relationship, it is proposed, in the present chapter, to consider separately those contracts which are commonly spoken of as involving *uberrima fides*, in the next, the effect of certain particular relationships.

The contracts which it is proposed to consider are (1) insurance; (2) cautionary obligations; (3) sale of heritage; (4) invitations to take shares in a company; and (5) proposals to enter into partnership.[3]

(1) *Insurance*

Disclosure in Insurance.—The principle that a contract of insurance involves a special obligation of disclosure is not referred to by the earlier institutional writers, but was adopted in Scotland from the law of England

[1] Chap. XXVII.

[2] *Cavendish-Bentinck* v. *Fenn*, 1887, 12 App. Cas. 652.

[3] Other cases where disclosure of material facts is required are an agreement to marry, which has been held voidable where the woman concealed the fact that she had had an illegitimate child—*Fletcher* v. *Grant*, 1878, 6 R. 59; an order to a stockbroker to sell shares, where the client failed to inform the broker that the shares were not saleable on the stock exchange—*Mackenzie* v. *Blakeney*, 1879, 6 R. 1329; a contract for work by tender, where the employer, in inviting tenders, is bound to reveal any exceptional difficulty of which he is aware —*Mackay* v. *Lord Advocate*, 1914, 1 S.L.T. 33, per Lord Ordinary Dewar, at pp. 37-38. It has been observed that the element of fiduciary relationship in contract is not a closed chapter of the law. *Nocton* v. *Lord Ashburton* [1914] A.C. 932, per Lord Chancellor Haldane.

and the general mercantile law in the latter half of the eighteenth century,[1] and is stated as established law by Professor Bell.[2] It is a principle which may be stated generally in the words of Lord President Inglis: "Concealment or non-disclosure of material facts is, generally speaking, either fraudulent or innocent, and in the case of most contracts where parties are dealing at arm's length, that which is not fraudulent is innocent. But contracts of insurance are in this, among other particulars, exceptional, that they require on both sides *uberrima fides*. Here, without any fraudulent intent, and even *in optima fide*, the insured may fail in the duty of disclosure. His duty is carefully and diligently to review all the facts known to himself bearing on the risk proposed to the insurers, and to state any circumstance which any reasonable man might suppose could in any way influence the insurers in considering and deciding whether they will enter into the contract."[3] Though the majority of the cases have related to the obligation of the insured to disclose material facts, the same obligation rests upon the insurer.[4] *A fortiori* an actual misrepresentation, though not made fraudulently, if it is a statement of fact and not of opinion, will entitle the other party to rescind the contract.[5]

Effect of Non-Disclosure. The general result of proof of concealment of facts which are material to the risk, or of misrepresentation of material facts, is that the contract is voidable at the option of the insurer. But if there be no fraud, and the ground of avoidance be merely failure to fulfil the general duty of disclosure, it is a condition of avoidance that the premium must be returned.[6] The policy may be avoided, on the ground of concealment, after a loss has occurred, or, in the case of life insurance, after the death of the insured. The general obligation to disclose all material facts may be, and in practice usually is, supplemented by specific questions put to the insured in a proposal form. But the fact that answers to the questions in the proposal form have been made conditions of the validity of the policy does not displace the obligation of disclosure which at common law is inferred.[7]

The obligation to disclose material facts extends to every contract which is in substance a contract of insurance.[8] In *Seaton* v. *Burnand*[9] *A.* borrowed money, *B.* became surety, and *C.* issued a policy insuring *B.'s* solvency. It was held that *C.'s* obligation was in substance that of an insurer, and not that of a surety or cautioner, and therefore that all material facts must be disclosed to him. And where an insurance company re-insured their risk on an accident policy, it was decided that they were bound to reveal all the material information which they had obtained from the insurer, and that the policy was voidable if they had not done so.[10]

Materiality. Whether a particular point is material is a question of fact.

[1] See argument in *Stewart* v. *Morison*, 1779, M. 7080; *Watt* v. *Ritchie*, 1782, M. 7074.

[2] *Prin.*, secs. 474, 522; *Com.* i. 665.

[3] *Life Association* v. *Foster*, 1872, 11 M. 351, 359.

[4] Marine Insurance Act, 1906 (6 Edw. VII. c. 41), sec. 17.

[5] *Ibid.*, sec. 20; Bell, *Com.*, i. 666.

[6] *Anderson* v. *Fitzgerald*, 1853, 4 H.L.C. 484, per Lord St Leonards, at p. 507; *Joel* v. *Law Union, etc., Co.* [1908], 2 K.B. 431, 863, per Lord Alverstone, at p. 440.

[7] Cases cited *infra*, p. 499, note 2.

[8] Per Lord Blackburn, *Standard Life Assurance Co.* v. *Weems*, 1884, 11 R. (H.L.) 48, at p. 51. Per Jessel, M.R., *London Assurance Co.* v. *Mansel*, 1879, 11 Ch. D. 363 (both cases of life insurance).

[9] [1899], 1 Q.B. 782; revd. on another ground [1900], A.C. 135.

[10] *Equitable Life Assurance Society* v. *General Accident Assurance Corporation*, 1904, 12 S.L.T. 348.

The obligation is to disclose every circumstance which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he would take the risk.[1] It is no defence that the insured did not regard the fact which he failed to disclose as material.[2] But non-disclosure implies knowledge of the facts unrevealed, and knowledge not only of the particular fact but of the circumstances which may give it materiality. So in life insurance, it is not concealment to fail to mention disturbances to health, apparently trivial, and believed by the insured to be so, though it may turn out that they were in reality symptoms of a serious disease.[3] In a question of materiality the evidence of persons engaged in the particular business is admissible ;[4] though if the point in question appears to the judicial mind to be clearly material, it would not be conclusive that the evidence of the trade was to the effect that it was a point on which information was not expected.[5] If no questions are asked on an obvious point, the Court may draw the conclusion that the information which a question might have disclosed was not regarded as material.[6] The fact that the risk has been rejected by other offices would appear to be material in all cases.[7]

Statements in Proposal Form.—Policies of life, fire, and accident insurance are usually preceded by a proposal, containing written answers to questions put by the insurance company, and a declaration by the insured that the answers are true. There is commonly a provision that the untruth of any of the answers will avoid the policy. Such a provision may be framed in terms so stringent as to make the truth of the answers a condition of the company's liability, even in respect to matters (*e.g.*, freedom from latent disease) on which the insured can have no actual knowledge.[8] And a statement that the proposal shall be the basis of the contract, and incorporated in the policy, makes the validity of the policy conditional on the truthfulness of the statements in the proposal, whether the statement in question is material or not, and although there is no express warranty of its truthfulness.[9] But the terms of the proposal are read in the sense least favourable to the company, and statements which do not relate to actual facts within the knowledge, or means of knowledge, of the insured, will generally be interpreted as meaning that they are true to the best of his knowledge and belief.[10] "If there is the slightest doubt that the insurers have failed to make clear to the man on whom they have exercised their right of requiring full information, we ought to refuse to regard the correctness of the answers given as being a condition of the validity of the policy."[11] But it is a question of construc-

[1] Marine Insurance Act. 1906 (6 Edw. VII. c. 41, secs. 18, 20) ; *Ionides* v. *Pender*, 1874, L.R. 9 Q.B. 531.

[2] *Life Association* v. *Foster*, 1873, 11 M. 351, per Lord President Inglis.

[3] *Life Association* v. *Foster*, *supra* ; *Joel* v. *Law Union, etc., Co.* [1908], 2 K.B. 863, per Fletcher-Moulton, L.J., at p. 884.

[4] *Hutchinson* v. *Aberdeen Sea Insurance Co.*, 1876, 3 R. 682 ; *London Assurance Co.* v. *Mansel*, 1879, 11 Ch. D. 363.

[5] *Gunford Ship Co.* v. *Thames and Mersey Marine Insurance Co.*, 1910, S.C. 1072 ; revd. 1911, S.C. (H.L.) 84 ; see opinion of Lord Alverstone, at p. 90.

[6] *Seaton* v. *Burnand* [1900], A.C. 135.

[7] *Sibbald* v. *Hill*, 1814, 2 Dow, 263 (marine) ; *London Assurance Co.* v. *Mansel*, 1879, 11 Ch. D. 363 (life) ; *Yager* v. *Guardian Assurance Co.*, 1913, 29 T.L.R. 53 (fire).

[8] *Standard Life Assurance Co.* v. *Weems*, 1884, 11 R. (H.L.) 48, per Lord Blackburn, at p. 51 ; Lord Watson, at p. 53.

[9] *Dawsons Ltd.* v. *Bonnin*, 1921, S.C. 511 ; affd. 1922, S.C. (H.L.) 156.

[10] *Life Association* v. *Foster*, 1873, 11 M. 351 ; *Cruikshank* v. *Northern Accident Insurance Co.*, 1895, 23 R. 147 ; *Hutchison* v. *National Loan Assurance Society*, 1845, 7 D. 467 ; *Joel* v. *Law Union, etc., Co.* [1908], 2 K.B. 863 ; *Bradley* v. *Essex, etc., Indemnity Society* [1912], 1 K.B. 415.

[11] Per Fletcher-Moulton, L.J., *Joel* v. *Law Union, etc., Co.*, *supra* [1908], 2 K.B., at p. 886.

tion; a contract providing that the liability under the policy is to depend on the truth of a statement entirely outwith the knowledge of the insured is not a *pactum illicitum*.[1]

The fact that answers to the questions in the proposal form have been made conditions of the validity of the policy does not displace the general obligation, resting on the insured at common law, to disclose all material facts.[2] So where an ill-framed question as to applications to other offices made it possible for the insured to answer it without positive untruth, but without revealing the fact that his life had been refused, it was held that his concealment of this fact made the policy voidable.[3] But in life assurance, where the insured answers questions in writing which are put by a doctor on behalf of the company, it rests on the company to prove that a particular fact has not been disclosed; and where they failed to call the doctor as a witness, it was held they had not established their defence.[4]

Facts Known to Agent of Insured. The assured is assumed to be aware of material facts which are within the knowledge of his agents, if it was the duty of the agent to communicate the fact in question to his employer, though in point of fact he has not done so. So where the agent at a foreign port became aware that a ship had been lost, and abstained from communicating the fact by telegraph, in order that his principal might have time to insure, it was held that an insurance effected by the principal before he was aware of the loss, but at a time when he would have known it if his agent had sent a telegram, was voidable on the ground of concealment of a material fact.[5] But in life insurance, where one man insures the life of another, neither the party whose life is insured nor the referees are the agents of the party effecting the insurance, and, in the absence of any express provision on the subject, he is not responsible for their concealment of material facts, or even for their fraudulent misstatements.[6]

Non-Disclosure by Agent of Insured.—If the policy is effected by an agent on behalf of the insured, any concealment by the agent of a material fact known to him, though not known to the insured, will render the policy voidable.[7] But where *A.* employed *B.* to effect a policy of re-insurance on a ship which was overdue, and subsequently effected a further re-insurance through the agency of *C.*, it was held that the validity of the policy effected through *C.'s* agency was not impaired by the fact that *B.* was aware of the fact that the ship was lost, and had failed to communicate the fact to anyone concerned.[8] In such cases the test is whether the negotiations under which the policy is taken form in substance one transaction; and therefore, in a case relating to the same matter, where *A.* in Glasgow employed *B.* to effect insurance, and *B.*, becoming aware that the ship was lost, and feeling bound not to disclose the information (which he had received confidentially),

[1] *Standard Life Assurance Co.* v. *Weems*, 1884, 11 R. (H.L.) 48, per Lord Watson, commenting on opinions in *Hutchison* v. *National Loan Assurance Society*, 1845, 7 D. 467.

[2] *Life Association* v. *Foster*, 1873, 11 M. 351; *London Assurance Co.* v. *Mansel*, 1879, 11 Ch. D. 363; *Joel* v. *Law Union, etc., Co.* [1908], 2 K.B. 863.

[3] *London Assurance Co.* v. *Mansel*, *supra*.

[4] *Joel* v. *Law Union, etc., Co.*, *supra*.

[5] *Proudfoot* v. *Montefiore*, 1867, L.R. 2 Q.B. 511; approved in *Blackburn, Low & Co.* v. *Vigors*, 1887, 12 App. Cas. 531, at p. 537; Marine Insurance Act, 1906, sec. 18. See comments by Lord President Dunedin on the doctrine of constructive notice through agents in *Muir's Exrs.* v. *Craig's Trs.*, 1913, S.C. 349. *Gunford Ship Co.* v. *Thames and Mersey Insurance Co.*, 1910, S.C. 1072; revd. 1911, S.C. (H.L.) 84, narrated *infra*, p. 501.

[6] *Wheelton* v. *Hardisty*, 1857, 8 E. & B. 232.

[7] Marine Insurance Act, 1906, sec. 19. Cases in following notes.

[8] *Blackburn, Low & Co.* v. *Vigors*, 1887, 12 App. Cas. 531.

placed *A.* in direct communication with his London broker, it was held that the policy effected by the London broker was voidable on the ground of the material information possessed by *B.* and not disclosed by him.[1]

Knowledge of Insurer's Agent. When the policy is negotiated by an agent for the insurer, it is probably the law that while his knowledge is no answer to an attack on the policy based on the untruth of one of the statements warranted by the insured,[2] yet it is a sufficient defence to a charge of concealment that the fact which was not revealed was known to the agent. There is no reason why a man should disclose a fact when he is dealing with an agent to whom the fact is well known.[3] But in a very special case, closely bordering on fraud, it was held by the Lord Ordinary that the knowledge possessed by a broker, who acted for both parties in effecting re-insurance, could not be ascribed to the insurer, and did not exempt the party seeking re-insurance from the obligation to disclose the information which he had received from the party who had taken out the policy.[4] And it has been held in Ireland that, assuming the law to be as stated in this paragraph, it applies only to knowledge acquired by the agent in the insurer's employment, not to knowledge which he had acquired before he entered into that employment and while he was acting as agent for a different insurance company.[5]

Subsequent Knowledge.—The validity of a policy of insurance is not affected by the non-disclosure of information received by the insured after the contract is concluded. The following section of the Marine Insurance Act, 1906, is probably applicable, *mutatis mutandis*, to other forms of insurance: "A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of shewing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped."[6]

Marine Insurance Act.—The law as to disclosure of material facts in the contract of marine insurance now primarily rests on the Marine Insurance Act, 1906 (6 Edw. VII. c. 41). The material sections are as follows: "(Sec. 17) A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party. (Sec. 18) (1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which in the ordinary course of business ought to be known by him.[7] If the assured fails to make such disclosure, the insurer may avoid the contract.

[1] *Blackburn, Low & Co.* v. *Haslam*, 1888, 21 Q.B.D. 144.

[2] *Life and Health Association* v. *Yule*, 1904, 6 F. 437; *Macmillan* v. *Accident Insurance Co.*, 1907, S.C. 484; *Dawsons Ltd.* v. *Bonnin*, 1921, S.C. 511; affd. 1922, S.C. (H.L.) 156, where this point was not disputed.

[3] *Cruikshank* v. *Northern Accident Insurance Co.*, 1895, 23 R. 147; *Bawden* v. *London, Edinburgh, etc., Co.* [1892], 2 Q.B. 534; *Joel* v. *Law Union, etc., Co.* [1908], 2 K.B. 863; *Taylor* v. *Yorkshire Insurance Co.* [1913], 2 Ir R. 1.

[4] *Equitable Life Assurance Society* v. *General Accident Assurance Corporation*, 1904, 12 S.L.T. 348.

[5] *Taylor* v. *Yorkshire Insurance Co.* [1913], 2 Ir. R. 1. The fact in question was the refusal of the risk by the other company.

[6] 6 Edw. VII. c. 41, sec. 21.

[7] In *London General Insurance Co.* v. *Guarantee, etc., Association* [1921], 1 K.B. 104, re-insurance was effected on a ship. At the time the re-insurer had received a casualty slip, shewing that the ship had been damaged. He had not in fact read the casualty slip, but on a proper business system should have done so. The policy of re-insurance was avoided.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. (3) In the absence of inquiry, the following circumstances need not be disclosed, namely: (*a*) Any circumstance which diminishes the risk. (*b*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know. (*c*) Any circumstance as to which information is waived by the insurer. (*d*) Any circumstance which is superfluous to disclose by reason of any express or implied warranty. (4) Whether any particular circumstance which is not disclosed be material or not is, in each case, a question of fact.[1] (5) The term 'circumstance' includes any communication made to, or information received by, the assured. (Sec. 19) Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—(*a*) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and, (*b*) Every material circumstance which the assured is bound to disclose, unless it came to his knowledge too late to communicate it to the agent."

Cases Decided on the Act.—The effect of these sections, which, it is conceived, merely reproduce the common law on the subject, was fully considered in *Ganford Ship Co. Ltd.* v. *Thames and Mersey Marine Insurance Co.*[2] There a ship which had been lost had been insured, on hull, and by a valued policy, for a sum considerably above her value. There were separate policies on freight and on disbursements for a sum largely exceeding the amount at stake. The managing owner had taken out policies which, as he had no insurable interest, were honour or p.p.i. policies. The master had at one time had his certificate suspended and had not been at sea for twenty-two years. The underwriters in the policy on hull resisted payment on the ground of concealment of material facts. It was held throughout the Courts that as the policy on hull was a valued one, the value as stated was conclusive, and therefore that there was no obligation to disclose the fact that the selling value of the ship was less than the value stated—a fact, in any event, within the knowledge of the underwriters; and also that it was not necessary to disclose any particulars regarding the master, in respect that underwriters in practice did not inquire, or desire, information as to the master of the ships they insured.[3] In the Court of Session it was further held that there was no obligation to disclose the policies taken on freight and on disbursements, or the policies taken out by the managing owner on his own behalf, in respect that the evidence of underwriters shewed that these particulars were not generally regarded as material. On this point the judgment was reversed in the House of Lords. It was there held that the insured were bound to disclose the policies on freight and disbursements, and, as the managing owner was their agent, the honour policies which he

[1] See *The "Spathari,"* 1924, S.C. 182; affd. 1925, S.C. (H.L.) 6; *Cantiere Meccanico Brindisino* v. *Janson* [1912], 3 K.B. 452; *Mann, Macneal & Stearer* v. *Capital, etc., Insurance Co.* [1921], 2 K.B. 300.

[2] 1910, S.C. 1072; revd. 1911, S.C. (H.L.) 84.

[3] *Separatim* (per Lord President Dunedin, 1910, S.C., at p. 1084) that since a selection of a master unfit for his duties would render the ship unseaworthy, information as to him was superfluous by reason of implied warranty.

had taken for his own benefit. On a construction of the evidence their Lordships held that it had not been proved that underwriters regarded over-insurance by honour policies as immaterial, and, in regard to the evidence to the opposite effect, pointed out that though some underwriters might be prepared to take a gambling risk, that did not really affect the question of what it was material for a prudent underwriter to know.

For the English cases before the Act, and for American decisions, reference must be made to the works noted below.[1] A summary of the decisions in Scotland may be given.[2]

(2) *Cautionary Obligations*

In cautionary obligations a distinction must be drawn, in a question as to the duty of disclosing material facts, between a cautionary obligation for a debt, incurred or to be incurred, and a guarantee of the conduct of a servant or official.

No Duty of Disclosure in Guarantee for Debt. In cautionary obligations for a debt the general law of contract applies, and there is no obligation to disclose material facts as to which no information is directly asked. Thus the creditor who takes a guarantee or cash credit bond is under no obligation to volunteer information as to the state of the account of the party guaranteed.[3] "Nothing is better settled than this, that a bank agent is entitled to assume that the cautioner has informed himself upon the various matters material to the obligation he is about to undertake. The agent is not bound to volunteer any information or statement as to the accounts, although if information is asked he is bound to give it, and to give it truthfully."[4]

Exceptional Cases.—But while there is no general obligation of disclosure in taking a guarantee for a debt, it has been laid down that this rule suffers exceptions in cases where "there is a contract between the debtor and the

[1] Arnould, *Marine Insurance*, 11th ed.; Smith, *Mercantile Law*, 12th ed., p. 468.

[2] *Facts held material*: Letter from captain stating ship to be overloaded—*Campbell* v. *Russell*, 1794, 3 Paton, 340; doubts intimated by agent as to seaworthiness—*Smith* v. *Bogle*, 1809, 5 Paton, 248; report by agent that ship's fate was almost certain—*Allan* v. *Young, Ross & Co.*, 1803, M. 7092; see also *Bowker* v. *Smith*, 9th February 1810, F.C.; receipt of report (on which further insurance was at once effected) that certain ships had been burned or captured—*Morison* v. *Gibbon*, 18th January 1811, F.C.; *Kinlock* v. *Campbell*, 14th June 1815, F.C.; that ship had sailed on a date showing her to be overdue—*Gillespie* v. *Douglas*, 1803, M. 7095; that ship was acting in concert with another, involving her prolonged stay on a dangerous coast—*Henderson* v. *Fettes*, 1813, 1 Dow, 324; that ship was a prize, and was to sail without convoy—*Reid* v. *Harvey*, 1816, 4 Dow, 97; that ship had ceased to be a British ship—*Hutchinson* v. *Aberdeen Sea Insurance Co.*, 1876, 3 R. 682; that other underwriters had refused the risk, except on special terms—*Sibbald* v. *Hill*, 1814, 2 Dow, 263; that the substantial interest in a ship, registered as British, was in a Greek, at a time when Greek ships were practically uninsurable—*The "Spathari,"* 1924, S.C. 182; affd. 1925, S.C. (H.L.) 6. *Facts held not material*: Letter from captain stating when he expected to arrive—*Smith* v. *Allan*, 1808, 5 Paton, 229; letter stating danger of capture by privateers, that danger being common knowledge—*Thomson* v. *Buchanan*, 1782, 2 Paton, 592; fact that ship unseaworthy (seaworthiness being impliedly guaranteed) *Baker* v. *Scottish Sea Insurance Co.*, 1856, 18 D. 691; that a particular port in a time policy was the port of destination, unless, probably, the shipowner knew the port to be exceptionally dangerous, and that fact was not generally known *Harvey* v. *Seligmann*, 1883, 10 R. 680; that wooden ship carried cargo of iron, in absence of proof that this generally regarded as dangerous—*Harvey* v. *Seligmann*, *supra*.

[3] *Hamilton* v. *Watson*, 1843, 5 D. 280; affd. 1845, 4 Bell's App. 67; *Broatch* v. *Jenkins*, 1866, 4 M. 1030; *Young* v. *Clydesdale Bank*, 1889, 17 R. 231; *Royal Bank* v. *Greenshields*, 1914, S.C. 259. See also *Sutherland* v. *Low & Co.*, 1901, 3 F. 972, where the creditor was responsible for the statements made by the party whose debt was guaranteed.

[4] Per Lord Shand in *Young* v. *Clydesdale Bank*, *supra*, 17 R., at p. 244.

creditor to the effect that his position shall be different from that which the surety might naturally expect." [1] Thus where, on a sale of goods, it was arranged that the price should cover a debt due by the buyer, it was held that non disclosure of this arrangement liberated the cautioner; [2] and where friends of *A.* proposed to guarantee his debt in order to avert a criminal prosecution by *A.'s* employer, it was held that the employer was not entitled to accept their guarantee without disclosing that he had now been advised that there were no grounds for a prosecution.[3]

The principle that when a point is mentioned at all it must be fully stated has been already considered with reference to cautionary obligations and other contracts.[4]

Fidelity Guarantees. The obligation to disclose material facts is much wider in the case of a guarantee for the intromissions of a servant, agent, or official. There the party who takes the guarantee is bound to inform the guarantor of any facts which should lead to the inference that the party whose conduct is guaranteed is unworthy of credit, *e.g.*, any prior defalcations or irregularities of which he has been guilty.[5] It would appear to be an anomaly that a bank should be entitled to accept a guarantee of a customer's account without disclosing the state of that account, while it cannot accept a guarantee for the conduct of one of its agents without disclosing facts which should lead to doubts as to that agent's honesty. Lord Eldon, to whom the latter rule owes its place in Scottish jurisprudence, gives no more definite reason than "the doctrines of equity." [6] It is left to a modern judge to suggest a possible ground of distinction—that a guarantee for the actings of an agent or official is in substance a contract of insurance, and therefore that the rules applicable to it are those of the law of insurance and not of cautionary obligations.[7] So the reasons for the failure to disclose material facts regarding the prior conduct of the party guaranteed do not affect the question. Where the cautioner for the intromissions of a mercantile agent refused payment on the ground that prior irregularities of the agent had not been disclosed to him, and the case was tried by jury on an issue of undue concealment, it was held, on a bill of exceptions, that the ruling of the judge who presided at the trial that the concealment must be proved to be "wilful and intentional, with a view to the advantage they (the defenders) were thereby to receive," amounted to a misdirection, on the ground that mere non-disclosure, whatever the motive for it might be, was sufficient to invalidate the obligation of the cautioner.[8] So where a firm had reason to doubt the honesty of their commercial traveller, and refused to continue him in his employment unless he found security for his intromissions, it was held that they were not entitled to accept the obligation of a cautioner without informing him of the facts which raised their suspicions.[9] In a

[1] Per Lord Campbell in *Hamilton* v. *Watson*, 1845, 4 Bell's App. 67, at p. 103.

[2] *Pidcock* v. *Bishop*, 1825, 3 B. & C. 605.

[3] *Davies* v. *London and Provincial Marine Insurance Co.*, 1878, 9 Ch. D. 469.

[4] *Supra*, p. 460.

[5] *Smith* v. *Bank of Scotland*, 1813, 1 Dow, 272, per Lord Eldon, at p. 294 (sequel in 7 S. 244 (1829)); *Railton* v. *Mathews*, 1844, 6 D. 536; revd. 1844, 3 Bell's App. 56; *French* v. *Cameron*, 1893, 20 R. 966; *Aitken* v. *Pyper*, 1900, 38 S.L.R. 74; *Bank of Scotland* v. *Morrison*, 1911, S.C. 593. For English law, see Pollock, *Contract*, 9th ed., 580; De Colyar, *Guarantees*, 3rd ed., 366.

[6] *Smith* v. *Bank of Scotland*, *supra*.

[7] *Wallace's Factor* v. *M'Kissock*, 1898, 25 R. 642, per Lord M'Laren, at p. 653. See *Seaton* v. *Burnand* [1899], 1 Q.B. 782; revd. on another ground [1900], A.C. 135.

[8] *Railton* v. *Mathews*, 1844, 6 D. 536; revd. 1844, 3 Bell's App. 56.

[9] *French* v. *Cameron*, 1893, 20 R. 966.

somewhat exceptional case [1] it was held that the liability of a cautioner for the judicial factor on a trust was not affected by the failure of the agent for the beneficiaries to disclose the fact that the judicial factor, in his reports to the Accountant of Court, had stated untruly that his former cautioner was still alive. That statement, though a breach of the factor's statutory duty, was not a material fact, in respect that it did not necessarily lead to the conclusion that he was untrustworthy. It was questioned, though not decided, whether the obligation of disclosure applied to the beneficiaries under a trust, or their law agent, when the trust was under the management of a judicial factor, considering that the interposition of the cautioner was not demanded by the beneficiaries, but required by law.

A similar obligation of disclosure rests on the creditor during the subsistence of the cautionary obligation. He is bound to inform the cautioner of any facts which come to his knowledge materially affecting the trustworthiness of the person whose conduct is guaranteed, and therefore affecting the risk undertaken by the cautioner. So an employer, if he chooses to condone irregularities or dishonesty on the part of his servant or agent, is bound to inform the cautioner, and his failure to do so will preclude him from enforcing the guarantee in the event of subsequent defalcations.[2]

Dishonesty on Part of Debtor.—There is probably no similar obligation on a creditor, for whom a cautioner has undertaken liability, to inform the cautioner of acts of dishonesty on the part of the debtor.[3] The distinction here is fairly clear; the liability of a cautioner for a debt is not affected by any subsequent acts of the debtor, whereas a fidelity guarantee for a man who has proved himself to be dishonest is a very different thing from one for a man presumably honest. In *Bank of Scotland* v. *Morrison* the bank had advanced money to *A.*, for whom Morrison was cautioner. The manager of the bank obtained information which led him to have a strong suspicion, though not an absolute certainty, that *A.* had committed forgery. He did not disclose to Morrison the information he had received. Subsequently *A.* absconded, and the bank sued Morrison as cautioner. No further advances had been made to *A.* after the suspicious circumstances had come under the notice of the manager. Morrison attempted to repudiate liability on the ground that he had not been informed of *A.'s* conduct. It was held that the manager of the bank was under no obligation to communicate mere suspicions, and opinions were given that even if the information of the bank had amounted to proof of *A.'s* forgery, there would have been no obligation to communicate it to the cautioner, provided that no further advances were made to *A.*

(3) *Sale of Heritage*

Objections to Title.- There is probably an obligation on the seller of heritage to disclose to the purchaser material facts relating to the title to the subjects, but the authorities are by no means conclusive as to the nature and extent of that obligation. Where the contract rests on missives of sale, and there is some restriction or infirmity which an examination of the titles would disclose, the case admits of being decided in favour of the purchaser's

[1] *Wallace's Factor* v. *M'Kissock*, 1898, 25 R. 642.

[2] *Leith Bank* v. *Bell*, 1830, 8 S. 721; affd. 1831, 5 W. & S. 703; *Thomson* v. *Bank of Scotland*, 1824, 2 Shaw's App. 316; *Thistle Friendly Society of Aberdeen* v. *Garden*, 1834, 12 S. 745; *Snaddon* v. *London, Edinburgh, and Glasgow Assurance Co.*, 1902, 5 F. 182.

[3] *Bank of Scotland* v. *Morrison*, 1911, S.C. 593; *National Provincial Bank* v. *Glenusk* [1913], 3 K.B. 335.

right to resile, without resort to the principle of the necessity of disclosure, on the ground that a seller of land is bound to give a good title, and fails to perform his contract if the title is subject to limitations which he is unable to remove. This principle was applied in cases where in the titles of the seller there was a reservation of minerals,[1] and where the feu-duty had not been allocated. It was held that a contract to sell a house subject to a given feu-duty was not implemented by the tender of a house subject to a larger feu-duty, though with a right of relief against a co-vassal.[2] And the same rule applies where the titles disclose restrictions on the use of the property, such as a restriction as to the character of the buildings to be erected.[3]

Servitudes.—Where the seller is able to furnish a title *ex facie* complete and unburdened, but the property sold is subject to a servitude, positive or negative, which does not appear from the titles, the modern authorities are to the effect that such a burden is covered by the clause of warrandice, if that clause is not expressly limited.[4] The servitude constitutes partial eviction. But where in cases of merely partial eviction the seller's obligation of warrandice is relied on, the purchaser is entitled only to damages, he cannot insist on resiling from the contract.[5] But that remedy may be open to him where the objection is taken before any disposition has been granted, on the plea that the seller was aware of the servitude and had failed to disclose it, a plea which may offer a remedy in cases where no warrandice has been given. In *Urquhart* v. *Halden* [6] the proprietor of lands had entered into a contract with a neighbour by which he bound himself and his successor in the lands not to carry on certain trades there. He subsequently sold the lands without disclosing the existence of this contract to the purchaser. On examining the title the purchaser took the objection, and it was held that he was entitled to resile if the seller failed to purge the restriction within a reasonable time. And in a later case Lord Johnston intimated an opinion that if lands which were sub-feued were subject to a substantial over-feu-duty, the mid-superior was bound to inform the feuar of the fact.[7] But there is no obligation to disclose to a purchaser the fact that adverse claims, believed to be unfounded, have been advanced by third parties.[8] And if the contract amounts to an agreement to take the title as it stands, the purchaser cannot resile on the ground of burdens which were undisclosed.[9]

It is conceived that the English authorities on the duty of disclosure on a sale of land, proceeding, as they do, on a different system of conveyancing, have no application to Scotland.

(4) *Invitations to take Shares in a Company*

Material Facts in Prospectus.—An agreement to take shares in a company is a contract which demands *uberrima fides* on the part of those responsible

[1] *Robertson* v. *Rutherfurd*, 1841, 4 D. 121; *Whyte* v. *Lee*, 1879, 6 R. 699; *Crofts* v. *Stewart's Trs.*, 1926, S.C. 891; revd. 1927, S.C. (H.L.) 65.

[2] *Bremner* v. *Dick*, 1911, S.C. 887. And see *supra*, p. 314.

[3] *Smith* v. *Soeder*, 1895, 23 R. 60; *Loutit's Tr.* v. *Highland Rly. Co.*, 1892, 19 R. 791.

[4] Ersk. ii. 3, 31; *Welsh* v. *Russell*, 1894, 21 R. 769, per Lord Stormonth Darling (Ordinary), reviewing early authorities; *Dougall* v. *Magistrates of Dunfermline*, 1908, S.C. 151.

[5] *Welsh* v. *Russell*, *supra*.

[6] 1835, 13 S. 844.

[7] *Bremner* v. *Dick*, 1911, S.C. 887.

[8] *Brownlie* v. *Miller*, 1880, 7 R. (H.L.) 66, per Lord Hatherley, at p. 75.

[9] *Davidson* v. *Dalziel*, 1881, 8 R. 990; *Wood* v. *Magistrates of Edinburgh*, 1886, 13 R. 1006. An agreement to take the title as it stands does not justify the seller in failing to reveal a bond affecting the property—*Fearn* v. *Gordon & Craig*, 1893, 20 R. 352.

for the prospectus. A misrepresentation of a material fact, though not with fraudulent intent, will entitle the party who has agreed to take shares to resile.[1] And even where no actual misrepresentation can be proved, it is established that mere concealment will suffice to render the contract reducible. In a case which was really one of fraud the law was laid down generally by Lord Chancellor Chelmsford: "The public, who are invited by a prospectus to join in any new venture, ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterise their published statements."[2]

Legislative Provisions. – The Legislature has supplemented the judicial doctrines as to the necessity of disclosure in a prospectus by detailed rules as to the points which must be stated. But it is expressly provided in the section by which this matter is regulated that nothing therein "shall limit or diminish any liability which any person may incur under the general law or under this Act apart from this section."[3] So cases may still occur in which a party who has agreed to take shares may reduce the contract on the ground of concealment in the prospectus, even although he cannot bring his case directly under any of the statutory provisions. In such a case the pursuer's averment and evidence must be that he was misled, *i.e.*, that he would not have agreed to take shares if the facts suppressed had been brought to his knowledge.[4] He must, it is conceived, also establish that the fact not disclosed would have influenced the judgment of a reasonable man. So, in *Central Rly. Co. of Venezuela* v. *Kisch*,[5] where the company was established to work a concession for building a railway in Venezuela, it was held to be immaterial that the prospectus omitted to state that £20,000 had been deposited, and was liable to forfeiture if the railway was not commenced by a certain date; whereas the concealment of the fact that £50,000 had been paid for the concession, thereby reducing the available sum for working capital from £500,000 to £450,000, was an omission which would justify a rescission of an agreement to take shares.

Section 81 of Companies Act, 1908. – The Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), as amended by secs. 33-35 of the Companies Act, 1928, (18 & 19 Geo. V. c. 45), specifies (sec. 81) certain particulars which must be stated in a prospectus. For the decisions on these, and analogous provisions of prior Acts, works devoted to Company law must be referred to.

The Act does not contain any general provision as to the legal effect of

[1] *Blakiston* v. *London and Scottish Banking Corporation*, 1894, 21 R. 417; *Lagunas Nitrate Co.* v. *Lagunas Syndicate* [1899], 2 Ch. 392. As to conditions of rescission of an agreement to take shares, see *infra*, pp. 539, 544. As to procedure, see *Sleigh* v. *Glasgow and Transvaal Options*, 1904, 6 F. 420; *Gowans* v. *Dundee Steam Navigation Co.*, 1904, 6 F. 613; *Kinghorn* v. *Glenyards Fireclay Co.*, 1907, 14 S.L.T. 683.

[2] *Central Rly. Co. of Venezuela* v. *Kisch*, 1867, L.R. 2 H.L. 99, at p. 113. Cp. *Aaron's Reefs* v. *Twiss* [1896], A.C. 273. From recent decisions in the English Courts, it would appear that these general words should be qualified by adding that non-disclosure (apart from the specific provisions of sec. 81 of the Companies Act, 1908), has no legal effect unless the omission makes what is actually disclosed misleading (see Buckley, *Companies Acts*, 10th ed., 92; *In re Christineville Rubber Estates*, 1911, 28 T.L.R. 38).

[3] Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), sec. 81 (9).

[4] *Nash* v. *Calthorpe* [1905], 2 Ch. 237. And see p. 469.

[5] 1867, L.R. 2 H.L. 99. Cp. *Gowans* v. *Dundee Steam Navigation Co.*, 1904, 12 S.L.T. 137.

failure to comply with the provisions of sec. 81, nor as to the remedy which such failure may offer to an applicant for shares or debentures. It is provided (sec. 81 (6)) that a director or other person responsible for the prospectus shall not incur any liability by reason of non-compliance if he proves that as regards any matter not disclosed he was not cognisant thereof, or that the non-compliance arose from an honest mistake on his part.

Removal of Name from Register. It has been decided by judges of first instance in England that the Act neither enacts nor implies that a shareholder is entitled to have his name removed from the register merely on the ground that the prospectus omits information required by sec. 81, unless the information so withheld was sufficiently material to justify rescission of the contract on the general law apart from the Act.[1]

Damages from Those Responsible for Prospectus. The provision above stated, that in certain circumstances no liability is incurred by those responsible for the prospectus, seems to imply that they would be liable in damages in cases where that provision does not apply. But it is conceived that the Act does not imply any absolute or final liability; and that a shareholder suing for damages, if the omissions are not, in the opinion of the Court, material, must establish affirmatively that he would not have taken the shares if the facts withheld had been disclosed, and in any event is out of Court if he has to admit in evidence that the omission, if supplied, would not have precluded his application.[2]

(5) *Proposals to Enter into Partnership*

There is an obvious analogy between the issue of the prospectus of a company and an invitation by a private trader to join him in partnership. And it is probably the law that the latter case also involves *uberrima fides*. It is decided that where a new partner is taken into a business, any misrepresentation as to the nature and resources of the business, though not made fraudulently, will entitle the new partner to reduce the contract and recover the capital he has contributed:[3] but these decisions proceeded on general principles of law, without laying any stress on the nature of the particular contract. It has not been definitely decided whether in such a case the existing partner has also a duty of disclosing all material facts; but as such a duty lies on the party who invites the public to join him in a company, it must almost necessarily be held that it lies equally on one who invites an individual to join him in partnership. The law as to contracts between partners during the existence of the partnership is considered in the next chapter.

[1] *Wimbledon Olympia Ltd., In re* [1910], 1 Ch. 630; *South of England, etc., Petroleum Co.* [1911], 1 Ch. 573.

[2] *Nash* v. *Calthorpe* [1905], 2 Ch. 237; decided on sec. 38 of the Companies Act, 1867. Cp. *Gowans* v. *Dundee Steam Navigation Co.*, 1904, 12 S.L.T. 137.

[3] *Ferguson* v. *Wilson*, 1904, 6 F. 779; *Adam* v. *Newbigging*, 1888, 13 App. Cas. 308; *Manners* v. *Whitehead*, 1898, 1 F. 171.

CHAPTER XXXI

CONTRACTS BY PARTIES IN FIDUCIARY POSITIONS

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(1) *Trustee and Trust Estate*

Trustee must not be *auctor in rem suam*.—Founding mainly on the theory that trust is *sua natura* a gratuitous office, and on the principle that persons in a fiduciary position ought not to be allowed to enter into contracts where their personal interests conflict, or may conflict, with their fiduciary duties, the Courts have established the rules that a contract is voidable if the parties to it are in substance a trustee on the one side and the trust estate on the other; that when the contract cannot be avoided, the trustee must account to the trust estate for any profits which have resulted; and that any advantage which the trustee may owe to his position as trustee, though it may not result from a contract with the trust estate, must be held by him under a constructive trust for the beneficiaries. In a convenient and comprehensive phrase, a trustee cannot be *auctor in rem suam*.[1]

Fiduciary Positions.—These rules apply, though with modifications, to all persons holding a fiduciary position. Thus, in addition to the case of an ordinary trust, they have been applied to a judicial factor or *curator bonis*,[2] to trustees and commissioners in bankruptcy,[3] to a trustee in a private trust for the benefit of creditors,[4] to the common agent appointed by the Court in a judicial sale,[5] to the director of a company, and, in certain respects, to partners, agents, and promoters of companies.[6] But a debtor who has undertaken to grant a security is in no sense a trustee for the creditor.[7]

Trustee and Trust Estate.—A contract between a trustee and the trust estate is not, it is conceived, to be regarded as a *pactum illicitum*. "It is clear law that the common law prohibition against a trustee acting as remunerated agent of the trust does not rest upon its being a thing *malum*

[1] *Dig.*, xviii. 1, 34; M'Laren, *Wills and Succession*, 3rd ed., ii. 884, 988; Menzies, *Trustees*, 2nd ed., 238; Lewin, *Trusts*, 13th ed., 1106. The subject belongs rather to the law of trust than of contract; only a statement of the leading principles is attempted.

[2] *Lord Gray and Others*, 1856, 19 D. 1; *Mitchell* v. *Burness*, 1878, 5 R. 1124; *Dunn* v. *Chambers*, 1897, 25 R. 247; *A. B.'s Curator Bonis*, 1927, S.C. 902.

[3] *Maben* V. *Perkins*, 1837, 15 S. 1087. By sec. 116 of the Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. v. c. 20), a creditor may purchase at a public sale, but the trustee, the commissioners, the law agent employed by the trustee, or a partner of his, may not. A member of an advisory committee, in a private trust deed for creditors, is not absolutely barred from purchasing subjects forming part of the trust estate, but is bound to shew that the bargain was a fair one (*Campbell* v. *Cullen*, 1911, 1 S.L.T. 258 (O.H., Lord Dunedin)).

[4] *Hamilton* v. *Wright's Trs.*, 1842, 1 Bell's App. 574.

[5] *York Buildings Co.* v. *Mackenzie*, 1793, M. 13367; revd. 1795, 3 Paton, 378.

[6] These cases are considered *infra*, pp. 517, 518, 520.

[7] *Bank of Scotland* v. *Hutchison, Main & Co.*, 1913, S.C. 255; affd. 1914, S.C. (H.L.).

in se." [1] Thus in a leading case,[2] where the purchase of an estate by one who was held to be in the position of a trustee was reduced, after an interval of thirteen years, but there was no proof of any fraudulent conduct on his part, it was held that while he must restore the estate and account for the rents, he was entitled to recover the price, with interest, and to take credit for the expense of making up his title, the expense of planting, and of building a mansion-house and offices.

A contract between trustee and trust estate, though not illegal, is voidable even although no advantage may have been taken by the trustee, and though the transaction is perfectly fair. The principle is that a trustee must not enter into any transaction where his duties as a trustee and his interests as an individual may come into conflict.[3]

Firm of which Trustee Partner. In cases where a transaction is obnoxious to the rule that a trustee cannot be *auctor in rem suam*, no general distinction can be drawn between the individual trustee and a firm of which he is a partner. The firm cannot enter into contracts with the trust estate, and must account for any profit obtained at the expense of the trust. Thus the law is now settled that if a trust deed does not sanction the appointment of one of the trustees as law agent, and if a firm of which one of the trustees is a partner acts in that capacity, no professional charges can be made.[4] Where a partner in a firm was a director in a company, and therefore in a fiduciary position towards it, the firm could not enforce a contract for the supply of goods to the company.[5] And in the analogous case of the promoter of a company it was held that where a promoter arranged for a secret payment to be made to his firm, they could not retain it in a question with the company. "When parties in the position of a company are implicated in a breach of trust by one of its partners, and take the benefit of that breach of trust, they are just as much bound to repay any sum they may have got in that way as the individual partner whose active agency procured this money." [6]

Contracts held Voidable. The result of the rule thus illustrated is that any contract between a trustee and the trust estate may, if the circumstances admit of it, be reduced. The rule has been applied in the case of a purchase by the trustee of trust property ; [7] of a sale by him to the trust estate ; [8] of a loan of trust funds to a trustee, with or without security ; [9] of a lease of trust property ; [10] of an application for shares in a company formed by

[1] Per Lord Stormonth Darling (Ordinary) in *Brown's Tr.* v. *Horne*, 1905, 12 S.L.T. 614.

[2] *York Buildings Co.* v. *Mackenzie*, 1793, M. 13367 ; revd. 1795, 3 Paton, 378 (sequel, 1797, 3 Paton, 579). See explanation of this case by Lord Young, *Liquidator of West Lothian Oil Co.* v. *Mair*, 1892, 20 R. 64. See also *Douglas* v. *Douglas's Trs.*, 1864, 2 M. 1379.

[3] For judicial expositions of the law, see Lord Brougham in *Hamilton* v. *Wright's Trs.*, 1842, 1 Bell's App. 574, 590 ; Lord Cranworth in *Aberdeen Rly. Co.* v. *Blaikie*, 1854, 1 Macq. 461, 471.

[4] See *infra*, p. 510.

[5] *Aberdeen Rly. Co.* v. Blaikie, 1851, 14 D. 66 ; revd. 1854, 1 Macq. 461 ; see also *Dunn* v. *Chambers*, 1897, 25 R. 247.

[6] *Scottish Pacific Coast Mining Co.* v. *Falkner, Bell & Co.*, 1888, 15 R. 290, per Lord Adam, at p. 306.

[7] *York Buildings Co.* v. *Mackenzie*, 1793, M. 13367 ; revd. 1795, 3 Paton, 378 ; *Dunn* v. *Chambers*, 1897, 25 R. 247 ; *Davis* v. *Davis*, 1908, 16 S.L.T. 380 ; *Thorburn* v. *Martin*, 1853, 15 D. 845 (director). The Court will not authorise a trustee to buy the trust estate, or authorise a sale by public auction, with leave to the trustee to bid—*Hall's Trs.* v. *M'Arthur*, 1918, S.C. 646, distinguishing *Coats' Trs.*, 1914, S.C. 723.

[8] *Aberdeen Rly. Co.* v. *Blaikie*, 1851, 14 D. 66 ; revd. 1854, 1 Macq. 461.

[9] *Perston* v. *Perston's Trs.*, 1863, 1 M. 245 ; *Ritchie* v. *Ritchie's Trs.*, 1888, 15 R. 1086 ; *Templeton* v. *Burgh of Ayr*, 1912, 1 S.L.T. 421.

[10] *Montgomerie* v. *Vernon*, 1895, 22 R. 465.

the trustees to carry on the business which formed part of the trust estate ;[1] of a purchase, by a trustee, for his own benefit, of debts due by the truster.[2]

While the honesty and fairness of such transactions is no defence, some possible conflict of interest and duty must be shewn. Thus where, by marriage contract, the *spes successionis* of the wife in an entailed estate was conveyed to trustees, it was held that a lease by the heir in possession to one of the trustees was not open to the objection that the trustee was acting as *auctor in rem suam*.[3]

Contracts after Resignation. It is somewhat doubtful whether a trustee who has resigned may deal with the estate formerly under his charge. In an English case it was held that if it were proved that the trustee resigned office for the purpose of purchasing the trust estate, the sale would be reducible ; but that where there was no such proof, and an interval of ten years had elapsed, no objection could be taken.[4] It was suggested by Lord Chancellor Cranworth, in argument in *Aberdeen Rly. Co.* v. *Blaikie*, that while dealings by a trustee in office could not stand, whether fair or not, dealings after he had resigned left it open to him to shew the fairness of the transaction.[5]

Services to Trust Estate.—There are many cases where the circumstances do not admit of the reduction of a contract between a trustee and the trust estate. The most familiar is the case where the trustee has done work for, or supplied goods to, the estate under his charge. Then it is an established rule that the trustee cannot charge for his services, or make any profit on the goods he supplies, unless he has authority to do so in the trust deed, or unless he has been authorised by all the beneficiaries. In such cases a statement of the general rule by an English judge has often been quoted : " The rule applicable to the subject has been treated at the bar as if one sufficiently enunciated it by saying that a trustee shall not be able to make a profit of his trust ; but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty ; and a case for the application of that rule is that of a trustee doing acts which he might employ others to perform, and taking payment in some way for doing them." [6]

Law Agent to Trust.—The rule has been often before the Courts in cases in which law agents have conducted legal business on behalf of the trust. Prior to the decision of the House of Lords in *Home* v. *Pringle*, the law of Scotland probably was to the effect that though a sole trustee could not charge for such services, a body of trustees might appoint one of their number to act on the usual professional remuneration.[7] But in *Home* v. *Pringle*,

[1] *Taylor* v. *Hillhouse's Trs.*, 1901, 9 S.L.T. 31.

[2] *Hamilton* v. *Wright's Trs.*, 1839, 1 D. 668 ; revd. 1842, 1 Bell's App. 574.

[3] *Montgomerie* v. *Vernon*, 1895, 22 R. 465.

[4] *In re Boles* [1902], 1 Ch. 244.

[5] *Aberdeen Rly. Co.* v. Blaikie, 1854, 1 Macq. 461, 464.

[6] *Broughton* v. *Broughton*, 1855, 5 De G. M. & G. 160, per Lord Chancellor Cranworth, quoted in *Lord Gray and Others*, 19 D. 1, per Lord Justice-Clerk Hope, at p. 5 ; in *Sleigh's Judicial Factor* v. *Sleigh*, 1908, S.C. 1112, per Lord Guthrie (Ordinary). But this principle, if it is carried to a logical conclusion, should make it illegal to appoint a trustee as the paid law agent of the trust—an everyday practice. For the general principle, see *Mackie's Trs.* v. *Mackie*, 1875, 2 R. 312, and cases in following notes.

[7] *Home* v. *Pringle*, 1841, 2 Robinson, 384. See opinions in *Miller's Trs.* v. *Miller*, 1848, 10 D. 765, and *Aitken* v. *Hunter*, 1871, 9 M. 756. In English law a trustee who is a solicitor, and acts as such in a litigation on behalf of the trust, may recover his costs from the trust, though he cannot do so if he is sole trustee (*Cradock* v. *Piper*, 1 MacN. & G. 664). There is no authority for this exception to the general rule in Scotland (see *Lord Gray and Others*, *infra*), and it has been regretted in England (*In re Corsellis*, 1887, 34 Ch. D. 675).

where a body of trustees had appointed one of their number to be cashier, another to be law agent, for the trust, and the Court of Session had sanctioned charges made by them in those capacities, the Lord Chancellor (Cottenham) expressed the opinion that such charges were not permissible, and the case has been accepted as settling the law. Nor can the rule be evaded by appointing a partner of the trustee or a firm of which he is a partner as law agents for the trust. The partner or firm are then bound to act gratuitously.[1] In a case reported as *Lord Gray and Others*,[2] a body of trustees had obtained a private Act of Parliament on behalf of the trust. One of the trustees was a partner in the firm which acted as law agents in procuring the Act. By a clause in the Act the trustees were empowered to take credit for "the amount of the expenses of applying, obtaining, and passing the Act." A majority of the whole Court held that the charges of the firm of law agents must be limited to actual outlays. And in the same report the charges of firms acting for a partner who was in one case a factor *loco tutoris*, in another a *curator bonis*, were disallowed.

It would appear to be doubtful whether a law agent who is the holder of a heritable security constituted by an *ex facie* absolute disposition may charge professional fees for his services in the management or realisation of the subject. His right to do so was sustained in the Outer House in *Morton's Tr.* v. *Kirkhope*,[3] and seems to be recognised in the opinions given in *Brown's Trs.* v. *Horne*.[4] But in *Liquidator of Muirhead's Trawlers Ltd.* v. *Constant*,[5] where a creditor who was in possession of certain boats sold them under the powers contained in his bond, and attempted to take credit for commission on the sales, Lord Salvesen held that the case fell under the general rule that a trustee acting professionally on behalf of the trust must do so gratuitously, and disallowed any charge beyond actual expenses incurred in the sale.

Payment Authorised. There has never been any doubt expressed as to the right of a law agent to charge for his services on behalf of a trust estate on which he is a trustee, if the trust deed contains a clause authorising the trustees to appoint one of their number to be law agent for the trust, and to pay him a suitable remuneration.[6] And it has been held that a clause authorising the appointment of a trustee as law agent implied the power to appoint him on the ordinary professional terms.[7]

Consent of Beneficiaries. There is no doubt that the beneficiaries under a trust, if they are all *sui juris* and capable of acting, may sanction the remuneration of the law agent or other officer of the trust, or may directly appoint the firm of which the trustee is a member to act on their behalf in receiving and transmitting payments due by the trustee.[8] And on proof that the beneficiaries were fully aware that the law agent was acting on

[1] *Lord Gray and Others*, 1856, 19 D. 1; *Mitchell* v. *Burness*, 1878, 5 R. 1124.

[2] 1856, 19 D. 1 (three cases reported together).

[3] 1907, 15 S.L.T. 203 (Lord Johnston).

[4] 1907, 15 S.L.T. 145. See opinion of Lord Stormonth Darling (Ordinary), reported 12 S.L.T. 614.

[5] 1907, 15 S.L.T. 131.

[6] As to acting without direct appointment, see *Lewis's Trs.* v. *Pirie*, 1912, S.C. 574. In *Stewart* v. *Chalmers* (1904, 7 F. 163) the trustees were reduced to two, both law agents. *A.* had been appointed law agent of the trust, under a power in the trust deed. *B.* claimed half-fees, and refused to concur in the business of the trust unless his claim were conceded. It was held his action was an attempt to make a profit out of his office, justifying his removal.

[7] *Goodsir* v. *Carruthers*, 1858, 20 D. 1411; *Cameron's Trs.* v. *Cameron*, 1864, 3 M. 200 (manager of a business). And see *Lawrie* v. *Lawrie's Trs.*, 1892, 19 R. 675.

[8] *Sleigh's Judicial Factor* v. *Sleigh*, 1908, S.C. 1112.

the footing of obtaining professional remuneration, and have taken no objection, they may be held to have impliedly sanctioned that arrangement.[1] But the mere fact that the truster and ultimate beneficiary in an *inter vivos* trust had docqueted as correct the accounts of the trust, including the professional charges of a trustee who acted as law agent—it not being shewn that the truster was aware of the rule of law precluding professional charges in these circumstances—was held to be no bar to a subsequent objection at his instance.[2] In *Lord Gray and Others*[3] it was argued that all the beneficiaries under the trust were willing that the professional charges of a firm of law agents (of which a trustee was a partner) should be allowed. It was held that the consent of all persons who might be interested as beneficiaries had not been established, but opinions were expressed that, even if no objection were taken by beneficiaries, yet, as the matter was before the Court, it was *pars judicis* to take the objection.

Commission Obtained by Law Agent. In spite of one decision it is probably the law that a trustee who also acts as law agent for the trust is precluded from making a profit incidentally arising out of the trust business. In the decision in question, where a firm, of which a judicial factor on a trust estate was a member, lent the trust funds on heritable security to another client, it was held that the beneficiaries under the trust could found no claim to the fee received for carrying through the transaction, which, in accordance with professional rules, was paid wholly by the borrowers, and in no sense formed a charge on the trust estate. It was pointed out that as it was the interest of the borrower and not of the lender to see that no improper charges were made, there was no conflict between the trustee's duty and his interest.[4] In *A.B.'s Curator Bonis*,[5] the Lord Ordinary (Moncreiff) held that a *curator bonis* (who was a law agent) was bound to credit the trust with a commission which he had received from a corporation in respect of an investment of the curatory funds in corporation mortgages. He applied the same rule to the case where the curator had employed a separate firm of law agents (of which he was not a partner) to purchase the mortgages, and the commission had been received by them. He pointed out that the decision in *Sleigh's Judicial Factor* was contrary to English authority,[6] which was not cited.

Trustee Managing a Trust Business.—Similar rules apply in the case where a business is carried on under trust, and one of the trustees supplies goods to that business. It has never been held that he is precluded by his fiduciary position from recovering the value of the goods supplied, but it is established that he must make no profit. Thus where a public-house was carried on under trust management, and one of the trustees supplied beer and whisky at a price which left him a profit, it was held that, even on the assumption that his prices were as low as those of any other dealer, he must account to the trust for the profit which he made. Nor was he entitled to take anything beyond his actual expenses for acting as manager of the public-house business.[7]

[1] *Ommaney* v. *Smith*, 1854, 16 D. 721; *Dixon* v. *Rutherford*, 1863, 2 M. 61; *Scott* v. *Handasyde's Trs.*, 1868, 6 M. 753.

[2] *Lauder* v. *Millar*, 1859, 21 D. 1353. [3] 1856, 19 D. 1.

[4] *Sleigh's Judicial Factor* v. *Sleigh*, 1908, S.C. 1112; see *Whitney* v. *Smith*, 1869, L.R. 4 Ch. 513.

[5] 1927, S.C. 902.

[6] *In re Corsellis*, 1887, 34 Ch. D. 675. See also *Williams* v. *Barton* [1927], 2 Ch. 9.

[7] *Cherry's Trs.* v. *Patrick*, 1911, 2 S.L.T. 313; *Neilson* v. *Stewart's Trs.*, 1905, 42 S.L.R. 434.

It is no justification for a trustee making a profit from his position that the trust estate is in substance a continuation of the estate of the truster, for whom he had formerly acted. Thus in *Lauder* v. *Millar*,[1] a law agent who had acted for *A.* continued to act as agent for an *inter vivos* trust (of which he was a member) to which *A.* had conveyed his property; in *Cherry's Trs.* v. *Patrick*,[2] a party who had supplied beer to a publican continued to supply it to the trust under which the public-house was carried on: in each case it was held that the circumstances were changed, and that if professional fees were to be charged, or trade profits to be made, the authority of the truster or of the beneficiaries was necessary.

Constructive Trust. The doctrine of constructive trust, under which a trustee who has derived an advantage from his position is deemed to hold it in trust for the beneficiaries, is so remote from contract, and so fully dealt with in works relating to the law of trust, that it has not been thought necessary to attempt it here.[3]

Acquiescence by Beneficiaries. In any case in which it is alleged that a trustee has taken advantage of his position, it may be a good defence to him that all the beneficiaries have acquiesced in his actings, or are barred by their own actings in the matter. Subject to the remark that a plea of acquiescence is unavailing unless it can be shewn that the party alleged to have acquiesced was aware that the trustee's acts were open to challenge at law,[4] every case depends on its own circumstances.[5]

***Ashburton* v. *Escombe*.**—If a party creates a trust in which he alone is interested (or if the interests of other parties originally concerned are satisfied), and enters into a contract with the trustee, he cannot refuse to perform his obligations on the ground that the contract confers an advantage on the trustee at his expense. But such a contract is one *uberrimæ fidei*, and the trustee must disclose all material facts. These seem to be the rules deducible from the case of *Ashburton* v. *Escombe*.[6] There *A.* conveyed his whole estates to trustees, of whom *B.* was one, in trust for the payment of certain debts specified in a schedule. At the same date he borrowed £20,000 from *B.*, and entered into an agreement by which he deprived himself of the right to redeem the debt (which bore a high rate of interest) for ten years. Subsequently *A.* borrowed money from other parties, paid off the debts mentioned in the schedule to the trust deed, and tendered payment to *B.* of the £20,000 borrowed from him. This *B.* refused to accept, on the ground that the period of ten years had not expired. It was argued that as *B.* was a trustee in a trust in which *A.* was a beneficiary, any contract between them was voidable. It was held that as no one was interested in the trust except *A.*, and as *A.* had entered into the arrangement under which the period of payment of the loan was postponed in full knowledge of all material facts, the contract was not voidable in a question with him.

(2) *Trustee and Beneficiary*

Duty of Disclosure. The principles which regulate transactions between a trustee and the trust estate have not been applied to the case where a

[1] 1859, 21 D. 1353. [2] 1911, 2 S.L.T. 313.

[3] M'Laren, *Wills and Succession*, 3rd ed., ii. 1045; Menzies, *Trustees*, 2nd ed., 240; Lewin, *Trusts*, 13th ed., 975.

[4] *Lauder* v. *Millar*, 1859, 21 D. 1353; *Taylor* v. *Hillhouse's Trs.*, 1901, 9 S.L.T. 31.

[5] See cases cited *supra*, p. 512, note 1. *Fraser* v. *Hankey*, 1847, 9 D. 415; *Aitken* v. *Hunter* 1871, 9 M. 956; *Buckner* v. *Jopp's Trs.*, 1887, 14 R. 1006.

[6] 1892, 20 R. 187.

trustee has purchased the interest of a beneficiary. The transaction is not necessarily voidable, but the trustee, if challenged, must shew that he disclosed all material facts, and that the bargain was reasonably fair.[1] The following passage from the opinion of an English judge has been recognised as expressing also the law of Scotland: "There is no rule of law which says that a trustee shall not buy trust property from a *cestui que trust*; but it is a well-known doctrine of equity that if a transaction of that kind is challenged in proper time, a Court of Equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the *cestui que trust* when it was sold." [2] In *Dougan* v. *Macpherson* [3] a trustee had purchased his brother's beneficiary interest in the trust estate. He had in his possession a valuation of the brother's interest, which he did not disclose. His brother was pressed by his creditors, and anxious for ready money. The price allowed a profit. It was held, in a question raised on the bankruptcy of the brother, that the transaction could not be maintained unless the trustee could prove affirmatively that he disclosed all the material information he possessed, and gave an adequate price.

Purchase under Power of Appointment.—Where a party has a right to apportion a fund among the members of a particular class, he cannot purchase the share of a member of that class while the power is still unexercised. Such a purchase was construed as involving a constructive trust for the beneficiary.[4]

(3) *Director and Company*

Fiduciary Position of Director. A director is in some respects a trustee for the company, and in many of the cases no distinction is drawn between his position and that of an ordinary trustee. But it is submitted that it is misleading to treat an office invariably undertaken as a means of earning money as in all respects the same as one *primâ facie* gratuitous. In this respect the words of an English judge are worthy of consideration: "When persons who are directors of a company are from time to time spoken of by judges as agents, trustees, or managing partners of the company, it is essential to recollect that such expressions are used not as exhaustive of the powers and responsibilities of these persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered." [5]

Contracts with Company.– A director is so far a trustee that if in his private capacity he enters into contracts with the company he cannot enforce them, even although no unfairness or concealment is alleged, and the position of the particular director is known to the board. This was decided in *Aberdeen Rly. Co.* v. *Blaikie*.[6] There *B.* was the director of a

[1] *Dougan* v. *Macpherson*, 1901, 3 F. 553; affd. 1902, 4 F. (H.L.) 7. See *Buckner* v. *Jopp's Trs.*, 1887, 14 R. 1006, where it was held that the beneficiary's action was barred by *mora*.

[2] Per Lord Cairns, *Thomson* v. *Eastwood*, 1877, 2 App. Cas. 215; cited by Lord Macnaghten in *Dougan* v. *Macpherson*, 1902, 4 R. (H.L.) 7, at p. 9.

[3] 1901, 3 F. 553; affd. 1902, 4 F. (H.L.) 7.

[4] *M'Donald* v. *M'Grigor*, 1874, 1 R. 817. See also *Smith Cuninghame* v. *Anstruther's Trs.*, 1869, 7 M. 689; 1870, 8 M. 1013; 1871, 9 M. 618; revd. 1872, 10 M. (H.L.) 39. In *Wright and Ritchie* v. *Murray* (1746, M. 4952) the exercise of a power of appointment was sustained, though it was understood, if not agreed, that the appointee should share the benefit with the appointer's husband, who was not an object of the power.

[5] Per Bowen, L.J., *Imperial Hydropathic Co.* v. *Hampson*, 1882, 23 Ch. D. 1, at p. 12.

[6] 1851, 14 D. 66; revd. 1854, 1 Macq. 461.

company, and also a partner in an engineering firm. The firm contracted with the company for the supply of a large number of iron chairs. They sued the company for failure to take delivery, and it was held that in respect of *B.'s* position the contract would not be enforced. The case was decided on principles of trust law. It was pointed out that the interests of *B.*, in his fiduciary position as director, were in conflict with his interests as an individual; as a director his duty was to make the price as low as possible, as an individual his interest was the reverse.[1]

The authority of this case is of course beyond question, but it may probably be said that its principle will not be extended. So the Court refused to hold that a contract between a public body and a company was voidable merely on the ground that some of the directors of the company were members of the public body.[2] It has, however, been decided in England that, in the absence of any provision in the articles, no binding contract could be made with another company in which the majority of the directors held shares.[3]

Contracts Sanctioned in Articles. If the articles of the company provide (as they usually do) that a director shall not be disqualified from entering into contracts with the company, then the objection founded on his fiduciary position is obviated, and the contract (assuming that there is no fraud, and no concealment of material facts)[4] cannot be challenged by the company or by its liquidator.[5] A director may use his voting power to ratify a contract with the company to which he is a party[6]—not to ratify a transaction by which, in substance, he obtains a benefit at the company's expense.[7]

Charges for Work Done. On fiduciary principles, again, it is the law that a director who does work for the company cannot charge for it unless he can point to some provision in the articles of association under which payment is authorised. "It is a clear principle of law that a trustee or director of a company cannot do work for that company which he can employ anyone else to do."[8] So where a director, under authority from a meeting of shareholders, had carried on a mill belonging to the company with a view to its realisation, it was held that he could make no charge for his services.[9] "It is clearly the law that where a party holds a fiduciary position, whether as a director of a company or one of a body of trustees, no matter how he is appointed, unless there is some express provision in the contract under which he acts that he shall receive remuneration, he must do the work gratuitously."[10] And the express provision must be found in the articles, or in a resolution at a meeting of the company; a board of directors, as such, has no implied power to sanction payments to any of its members.[11]

Incidental Profits of Director. Again, if a director, from the time he

[1] *Aberdeen Rly. Co.* v. *Blaikie*, 1854, 1 Macq. 461. See opinion of Lord Chancellor Cranworth, at p. 473.

[2] *Paterson* v. *Portobello Town Hall Co.*, 1866, 4 M. 726.

[3] *Transvaal Lands Co.* v. *New Belgium, etc., Co.* [1914], 2 Ch. 488.

[4] *Imperial Mercantile Credit Association* v. *Coleman*, 1873, L.R. 6 H.L. 189, where it was held that a promise in the articles that a director should "disclose his interest" was not satisfied by a statement by the director that he was personally interested; it demanded an explanation of what his interest was.

[5] *Liquidator of West Lothian Oil Co.* v. *Mair*, 1892, 20 R. 64. See Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), Table A. sec. 77; Buckley, *Companies Acts*, 10th ed., 646.

[6] *North-Western Transportation Co.* v. *Beatty*, 1887, 12 App. Cas. 589.

[7] *Cook* v. *Deeks* [1916], A.C. 554.

[8] Per Lord O'Hagan, *Henderson* v. *Huntington Copper, etc., Co.*, 1877, 5 R. (H.L.) 1, at p. 7.

[9] *M'Naughtan* v. *Brunton*, 1882, 10 R. 111.

[10] Per Lord President Inglis in *M'Naughtan, supra*, 10 R., at p. 113.

[11] *Marmor Ltd.* v. *Alexander*, 1908, S.C. 78 (travelling expenses of director).

agrees to accept office, and so long as he is acting, makes any profit from his position which is not sanctioned by the company, he must account for that profit to the company, for which he holds it under a constructive trust.[1] So where a party had received £10,000 from a promoter in consideration of his agreement to act as one of the original directors, it was held that he could not retain it in a question with the company.[2] Where one company takes over the business of another an undisclosed payment to the directors of the latter cannot be justified.[3] A slightly more complicated case is *Scottish Pacific Coast Mining Co.* v. *Falkner, Bell & Co.*[4] There *A.*, being anxious to dispose of certain mines, arranged with *F., B. & Co.* that *W.*, one of their partners, should assist him in the matter. It was arranged that if the mines were sold at a sum exceeding the existing bonds, half the profit should belong to *F., B. & Co.* The mines were sold to a company. *W.* took an active part in the promotion of the company, and was appointed as one of the original directors. After the company was formed it was arranged that the share of the profits promised to *F., B. & Co.* should be paid in the form of shares fully paid up. It was held they could not retain these in a question with the company; *W.* was both a promoter and director, and in both capacities disqualified from making a secret profit; *F., B. & Co.*, as his partners, and as in knowledge of his position and actings, were in no better position than he was.

It has further been held in England that if a director earns a profit through his dealings with the company's property, that profit is held by him in trust, even if, in the circumstances, the company could not have earned it, and cannot be shewn to have paid for it, directly or indirectly. *A.* was the managing director of the *X.* company; he was also a shareholder in the *Y.* company. It was a rule in the *Y.* company to pay a commission on business, but only if introduced by one of its shareholders. *A.* transacted the business of the *X.* company through the *Y.* company, and, as a shareholder in the latter, received a commission. It was held that he must account for it to the *X.* company.[5] In *Jubilee Cotton Mills* v. *Lewis*[6] a director, who was also a promoter, had received from the vendor debentures in the company, which, in respect that the provisions of sec. 82 of the Companies Act, 1908, had not been complied with, were invalid, and intrinsically worthless. By fraudulent devices he managed to dispose of them to a third party. It was held that he was bound to account for what he had received to the liquidator of the company, although the company, as the debentures were invalid, had sustained no loss, and could not have earned the sum demanded from the director except by committing some similar fraud.

Director and Shareholder. It has been held by Swinfen Eady, J., that a director stands in no fiduciary relation to the individual shareholders; and therefore that where a shareholder wrote to the secretary asking if he knew of a market for shares, a director was entitled to buy without disclosing private information (pending negotiations for the sale of the business) which was likely to add materially to the value of the shares.[7] And as a director is not in the position of a trustee with regard to his own holding in the

[1] Cases, *infra*. For English cases, see Buckley, *Companies Acts*, 10th ed., 646.
[2] *Henderson* v. *Huntington Copper, etc., Co.*, 1877, 4 R. 294; affd. 1877, 5 R. (H.L.) 1.
[3] *Clarkson* v. *Davies* [1923], A.C. 100; *Laughland* v. *Millar, Laughland & Co.*, 1904, 6 F. 413.
[4] 1888, 15 R. 290.
[5] *Boston Deep Sea Fishing Co.* v. *Ansell*, 1888, 39 Ch. D. 339. Cp. *Ronaldson* v. *Drummond & Reid*, 1881, 8 R. 956.
[6] [1924], A.C. 958.
[7] *Percival* v. *Wright* [1902], 2 Ch. 421.

company, he was held to be within his rights in transferring his shares to a party of no means, in the knowledge that disaster was impending, and, as one of the Board, in passing the transfer.[1]

(4) *Promoter and Company*

Meaning of "Promoter."—A promoter is defined in the Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), though only for the purposes of the particular section (84) by which his liability for untruthful statements in a prospectus is regulated. "The expression 'promoter' means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company." Judicial definitions have given the term a wider meaning. It is "a short and convenient way of describing those who set in motion the machinery by which the Act enables them to create an incorporated company"; [2] it is "a term not of law, but of business, usefully summing up in a single word a number of business operations by which a company is generally brought into existence.[3]

Promoter not a Trustee.—The promoter of a company is in a somewhat exceptional position. He is not an agent, there being as yet no principal. Nor is he properly a trustee for the company which he is about to bring into existence. "It is only in a very remote and unreal sense that the language of trust law can be used with reference to the relation of a company to its promoters." [4] But the Legislature has placed confidence in the promoter for the company, and the promoter must shew that he has not abused that confidence.[5]

Payment for Services.—In contrast with the position of a trustee, the promoter may claim payment for professional services rendered prior to the inception of the company, provided the company have power to pay the expenses incidental to its formation. So where the company was formed by a private Act of Parliament, which contained a clause providing that the company should pay all costs, charges, and expenses incident to the obtaining of the Act, it was held to be no objection to the charges of an engineer and a law agent that they were among the promoters of the company.[6]

Sales to Company. There is nothing illegal in the sale of property to a company by one who has been engaged in its promotion.[7] And the fact that property has been purchased with a view to its resale to a company to be promoted by the purchaser does not make him a trustee, or entitle the company when formed to maintain that the property was acquired under a constructive trust.[8]

Duty of Disclosure. But a sale of property by a promoter to a company

[1] *M'Lintock* v. *Campbell*, 1916, S.C. 966.

[2] Per Lord Blackburn, *Erlanger* v. *New Sombrero Phosphate Co.*, 1878, 3 App. Cas. 1218, at p. 1268.

[3] Per Bowen, L.J., *Whaley Bridge Calico Printing Co.* v. *Green*, 1879, 5 Q.B.D. 109, at p. 111. For other definitions, see Buckley, *Companies Acts*, 10th ed., 194.

[4] Per Lord M'Laren, *Edinburgh Northern Tramways Co.* v. *Mann*, 1896, 23 R. 1056, at p. 1066.

[5] See Lord Blackburn's opinion in *Erlanger* v. *New Sombrero Phosphate Co.*, 1878, 3 App. Cas. 1218.

[6] *Edinburgh Northern Tramways Co.* v. *Mann*, 1896, 23 R. 1056.

[7] *Lagunas Nitrate Co.* v. *Lagunas Syndicate* [1899], 2 Ch. 392; *In re Blair Open Hearth Furnace Co.* [1914], 1 Ch. 390.

[8] *In re Leeds and Hanley Theatre of Varieties* [1902], 2 Ch. 809.

is a contract *uberrimæ fidei*, and cannot be maintained unless the promoter has disclosed all material facts. "There is no doubt that a promoter cannot make secret profits, and that all promotion money is illegal."[1] Thus it has been uniformly held that any payment by the vendor of the company's property to a promoter is a payment which the company may recover from the promoter,[2] or, if it has not been actually paid, from the vendor.[3] It is no defence that the promoter was acting as agent for the vendor, and paid exclusively by him. The payment, it is held, forms part of the price of the property, and is really met out of the company's funds.[4] And where a company, formed under a private Act of Parliament to construct a tramway, entered into an agreement with contractors for the construction of the line, and for the payment of the expenses of obtaining the Act, and the contractors, by a separate contract, undertook to pay £17,000 to the promoters nominally in consideration of their undertaking payment of these expenses, it was held that the promoters had no answer to an action of accounting at the instance of the company, and must account for so much of the £17,000 as was not actually expended in the expenses of procuring the Act.[5] Lord Blackburn has pointed out that while a man may buy a property for £5,000, and sell it next day to an independent third party for £10,000, without disclosing what he paid for it, such a sale by a promoter to a company would be reducible.[6]

The disclosure must be made to the allottees of the shares, not merely to the directors, who may be merely the nominees of the promoter.[7] And it is at least doubtful whether, if the fact that the promoter was obtaining a profit was not disclosed in the prospectus, but was known to all the original allottees of the shares, the promoter could maintain it when the shares had passed into the hands of transferees.[8]

While it is not sufficient to state one source of profit to the promoter, concealing another,[9] yet where the prospectus stated that the syndicate who were promoting the company were selling to it at a profit, and that the directors of the syndicate were also the directors of the company, it was held that it was not necessary to disclose also the price which the syndicate had paid for the property.[10]

(5) *Partners*

Fiduciary Duties *inter se*.– It has always been recognised as a principle of law that the relations between partners are those of exuberant trust, and

[1] Per Lord Kincairney (Ordinary), in *Edinburgh Northern Tramways Co.* v. *Mann*, 1896, 23 R. 1056, at p. 1060.

[2] *Henderson* v. *Huntington Copper, etc., Co.*, 1877, 4 R. 294; affd. 1877, 5 R. (H.L.) 1; *Scottish Pacific Coast Mining Co.* v. *Fulkner, Bell & Co.*, 1888, 15 R. 290 (narrated *supra*, p. 516); *Mann* v. *Edinburgh Northern Tramways Co.*, *infra*; *Erlanger* v. *New Sombrero Phosphate Co.*, 1878, 3 App. Cas. 1218; *Lagunas Nitrate Co.* v. *Lagunas Syndicate* [1899], 2 Ch. 392; *Whaley Bridge Calico Printing Co.* v. *Green*, 1879, 5 Q.B.D. 109; *Jubilee Cotton Mills* v. *Lewis* [1924], A.C. 958, narrated *supra*, p. 516.

[3] *Grant* v. *Gold Exploration, etc., Syndicate* [1900], 1 Q.B. 233.

[4] *Lydney, etc., Iron Ore Co.* v. *Bird*, 1886, 33 Ch. D. 85.

[5] *Mann* v. *Edinburgh Northern Tramways Co.*, 1891, 18 R. 1140; affd. chiefly on the ground that the contract was not within the powers conferred by the Act, 1892, 20 R. (H.L.) 7.

[6] *Erlanger* v. *New Sombrero Phosphate Co.*, 1878, 3 App. Cas. 1218, at p. 1267.

[7] *Erlanger*, *supra*; *In re Leeds and Hanley Theatre of Varieties* [1902], 2 Ch. 809.

[8] See opinion of Lord Kinnear, *Mann* v. *Edinburgh Northern Tramways Co.*, 1891, 18 R. 1140, at p. 1151; affd. 20 R. (H.L.) 7; *In re Leeds and Hanley Theatre of Varieties*, *supra*. But see *Salomon* v. *Salomon & Co.* [1897], A.C. 22 (private company).

[9] *Gluckstein* v. *Barnes* [1900], A.C. 240.

[10] *Lagunas Nitrate Co.* v. *Lagunas Syndicate* [1899], 2 Ch. 392.

therefore that a partner is not entitled to make a secret profit out of his position, and in dealing with his co-partner must generally disclose all material facts.[1]

In their dealings with third parties on behalf of the firm, partners are in the position of agents for the firm,[2] and the equitable rules which apply to agents apply to them, and have largely been illustrated in partnership cases. These rules will be dealt with in a later page,[3] and it may be sufficient to quote here the relative sections of the Partnership Act, 1890, with a note of the cases on which these sections are founded, and which have since been decided.

Partnership Act, 1890.—Subject to any provision to the contrary in the partnership deed it is provided by sec. 29 "(1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection. (2) This section applies also to transactions undertaken after a partnership had been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner."[4]

Sec. 30. "If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business."[5]

Lender with Share of Profits.—This last section states a rule which is not extended to the analogous case of a lender of money on condition of receiving a share in the profits.[6] In *Teacher* v. *Calder*, *A.* lent money to *B.*, who was carrying on the business of a timber-merchant, on condition that he should receive a share in the profits, and that *B.* should keep a certain fixed amount of capital in the business. *B.* withdrew his capital, employing it in a distillery, in which he was separately interested. It was an admitted fact that in doing so he committed a breach of contract. *A.* maintained that he was entitled,

[1] *Code*, iv. 37, 3 (*In societatis contractibus fides exuberet*); Ersk. iii. 3, 20; Bell, *Prin.*, sec. 358; Clark on *Partnership*, i. 182; *Inglis* v. *Austine*, 1624, M. 14562. For English law, see Lindley, *Partnership*, 8th ed., 364.

[2] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 5.

[3] *Infra*, p. 520.

[4] A partner employed in the business of the firm can never keep a secret commission (*Pender* v. *Henderson*, 1864, 2 M. 1429). If employed by the firm to buy and he sells his own goods, though at ordinary market price, he is liable for the difference between the price charged and the cost to him (*Bentley* v. *Craven*, 1853, 18 Beav. 75). Disclosure that he is making a profit is not sufficient unless the nature of the profit is also disclosed (*Dunne* v. *English*, 1874, L.R. 18 Eq. 524). If he obtains a lease of the partnership premises on the dissolution of the firm, he holds it in trust for his former partners (*M'Niven* v. *Peffers*, 1868, 7 M. 181; *Anderson* v. *Anderson*, 1869, 8 M. 157; *Featherstonehaugh* v. *Fenwick*, 1810, 17 Vesey, 298. Cp. *Marshall* v. *Marshall*, 16th January 1815, F.C., and 23rd February 1816, F.C.), even although there is no concealment, the other partners protesting (*Clegg* v. *Edmondson*, 1857, 8 De G. M. & G. 787), and although the firm could not have obtained a new lease (*Featherstonehaugh*, *supra*). The same principles apply where a partner obtains from the Crown a grant of an escheated estate, in which the firm are interested as creditors (*Inglis* v. *Austine*, 1624, M. 14562). As to facts shewing that property has been acquired through the use of partnership property, name, or business connection, see *Aitchison* v. *Aitchison*, 1877, 4 R. 899; *Darie* v. *Buchanan*, 1880, 8 R. 319; *Pillans Brothers* v. *Pillans*, 1908, 16 S.L.T. 611; *Aas* v. *Benham* [1891], 2 Ch. 244; *Trimble* v. *Goldberg* [1906], A.C. 494. A "transaction concerning the partnership" does not include the acquisition, by one of a firm of three partners, of the beneficial interest of one of the others. No trust for the remaining partner is thereby inferred (*Cassels* v. *Stewart*, 1879, 6 R. 936; affd. 1881, 8 R. (H.L.) 1).

[5] *Stewart* v. *North*, 1893, 20 R. 260; *Pillans Brothers* v. *Pillans*, 1908, 16 S.L.T. 611; *Trimble* v. *Goldberg* [1906], A.C. 494.

[6] *Teacher* v. *Calder*, 1898, 25 R. 661; affd. on this point, 1899, 1 F. (H.L.) 39.

on principles of trust as applicable to partnership, to a share of the profits earned in the distillery business. It was held that as he was not a partner, but merely a creditor, those principles were inapplicable: that his right was to damages for the loss he had sustained by the wrongful withdrawal of capital; and that the damages were to be measured by the probable additional profits of the timber business had the capital not been withdrawn, not by the profits which *B.* had in fact earned by using his capital in the more profitable business of the distillery.

Work done for Firm. In questions between the partners themselves it is a general rule that no partner is entitled to remuneration for acting in the partnership business, except under an agreement, express or implied.[1] The rule applies to the case where the partner acts in winding up the affairs of the firm, after dissolution:[2] and is not elided by the argument that services were performed in a *casus improvisus*, and an appeal to the principle of recompense.[3] But in a very special case, where *A.* had managed a farm in the *bona fide* belief that he was sole tenant, and it was found that he was in fact a partner with three others on a verbal contract of partnership, it was held that he was entitled to a reasonable remuneration for his trouble.[4]

Acquisition by Partner of Share of Another. There is no general principle of law prohibiting the acquisition by one partner of the share of one of the others. Thus where the contract of co-partnery provided that no partner should assign his interest without the consent of the others, so as to introduce the assignee as a partner, but did not forbid the assignation by a partner of his beneficial interest, it was held that where *A.*, *B.*, and *C.* were partners, *A.* might acquire *B.'s* beneficial interest without informing *C.*, and that there was no ground in law for a claim by *C.* for a share in the benefit *A.* had thereby acquired.[5] But where a partner proposes to acquire the interest of another, he is bound to put before him any information he may have as to the value of the partnership assets.[6] From the case of *Lonsdale Hematite Iron Co.* v. *Barclay*[7] this would seem to be the limit of his obligation. A contract of co-partnery provided that a partner might assign his share if he first offered it to the firm and to the individual partners. He might ask any price he pleased, but was not afterwards to assign at a price lower than his offer. It was held that a partner had sufficiently complied with the provisions of the contract of co-partnery when he had in fact offered his shares in terms thereof, and that he was not bound to disclose that he had already received an offer from a prospective assignee. But the circumstances of the case were very special.

(6) *Agent and Principal*

Fiduciary Position of Agent. The primary rule resulting from the element of confidentiality which colours the relations of principal and agent has been expressed in Story on *Agency*, in terms which have received judicial approval in Scotland: "In all cases where a person is either actually or constructively

[1] Partnership Act, 1890, sec. 24 (6); *Brock* v. *Brown*, 1696, M. 14563. As to directors, see *ante*, p. 514.

[2] *Berry* v. *Lamb*, 1832, 10 S. 792.

[3] *Campbell, Rivers & Co.* v. *Beath*, 1824, 3 S. 353; revd. 1826, 2 W. & S. 25.

[4] *Anderson* v. *Anderson*, 1869, 8 M. 157. The opinions were that no such claim could be advanced where the contract of partnership was in writing, and specified the interests of partners.

[5] *Cassels* v. *Stewart*, 1879, 6 R. 936; affd. 1881, 8 R. (H.L.) 1.

[6] *Law* v. *Law* [1905], 1 Ch. 140.

[7] 1874, 1 R. 417.

an agent for other persons, all profits or advantages made by him in the business, beyond his ordinary remuneration, are to be for the benefit of the employer." [1]

The rule involves principles both of trust and of contract. The particular act of the agent which is impugned, such as taking a secret commission or selling to the principal goods belonging to himself, may be a breach of an express or implied term of the contract between them, but the liability of the agent is not measured by the loss which the principal has sustained, but by the gain which the agent has made.[2] On the other hand, the principal cannot follow the money which the agent has received, so as to assert any right to the property in which that money is invested; and, in the bankruptcy of the agent, ranks merely as a creditor, not as a beneficiary.[3]

Secret Commissions.—From the general rule it clearly follows that if an agent is employed to deal on behalf of his principal with third parties, and is paid in some way or other by the principal, the agent is not entitled, without the principal's consent, to keep any commission which he may receive from the third parties with whom he deals.[4] A custom of trade is no defence.[5] And it does not matter whether the secret payment takes the form of a commission or of a discount. So it was held that a ship's husband and part owner, in accounting with his co-owner, could take credit only for the amount he had actually paid for ship's furnishings, not for the amount of the bill he had rendered and on which he had received a discount.[6]

But where an agent is employed to do work which is not, in the ordinary course of business, done gratuitously, *e.g.*, to effect insurance, and the principal pays nothing for his services, the law will presume that he assents to the agent receiving a commission from the third party, and he can have no claim to recover it from the agent. His implied assent is to the agent receiving the commission usual in the particular trade, and therefore covers the case where the agent received two separate commissions, of only one of which was the principal aware.[7]

Where the commission paid to the agent cannot be defended on the ground of the principal's express or implied assent, it is no defence to shew that the charge to the principal would have been the same whether a commission to the agent had been allowed or not. The principle has been very happily expressed by Lord Young:[8] "It seems only reasonable to assume that the vendor will not subsidise a buyer's agent for merely performing faithfully his duty as such. But if not, what is the conclusion when such a subsidy is given? Simply, that which every man forms who hears of it—that the interest of the buyer has by his own agent been sacrificed to that of the seller, and that this is precisely what the seller has paid for."

Rights of Principal.—Where a secret commission has been paid to an agent, the remedy of the principal is not confined to recovering its amount

[1] Story, *Agency*, sec. 211. Approved by Lord Young in *Neilson* v. *Skinner & Co.*, 1890, 17 R. 1243, at p. 1251.

[2] *Ronaldson* v. *Drummond & Reid*, 1881, 8 R. 956.

[3] *Lister* v. *Stubbs*, 1890, 45 Ch. D. 1.

[4] Bell, *Com.*, i. 533, Lord M'Laren's note; *Pender* v. *Henderson*, 1864, 2 M. 1429; and see cases of payments to directors, *supra*, p. 514. As to criminal responsibility, see Prevention of Corruption Act, 1906 (6 Edw. VII. c. 34; *ibid.* 1916 (6 & 7 Geo. V. c. 64)).

[5] *Ronaldson* v. *Drummond & Reid*, 1881, 8 R. 956.

[6] *Robertson* v. *Dennistoun*, 1865, 3 M. 829.

[7] *Great Western Insurance Co.* v. *Cunliffe*, 1874, L.R. 9 Ch. 525; *Baring* v. *Stanton*, 1876, 3 Ch. D. 502. Cp. *Norreys* (*Lord*) v. *Hodgson*, 1897, 13 T.L.R. 421 (commission paid both by principal and third party).

[8] *Henderson* v. *Huntington Copper Co.*, 1877, 4 R. 294, at p. 301; affd. 1877, 5 R. (H.L.) 1.

from the agent. Where a contract has been thus induced, he is entitled to rescind it,[1] and, in the case of sale, may recover any deposit he has made.[2] And to give a commission to an agent, in the knowledge that he is taking it without the principal's consent, amounts to a fraud on the part of the person who gives it—a fraud for which he is liable in damages. In such a case "the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of entering into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third party first."[3] But if the party who gives the commission is honestly but mistakenly under the impression that the principal was fully aware of the facts, it is probably the law that the principal's remedies are limited to the reduction of the contract and recovery from the agent.[4] Where an agent, during part of a prolonged period of agency, had, in breach of his contract, been acting as agent for another dealer, it was held that he had forfeited all claim to commission during the period of his delinquency, but not the commission due for the period during which he had observed the conditions of his contract.[5]

An agreement to bribe an agent is a *pactum illicitum*, and therefore the agent cannot recover the promised bribe.[6] But it may be recovered by the principal from the party who has promised to give it.[7]

Incidental Profits by Agent. An agent, again, is not entitled to take advantage of the information which he has obtained in his employment, so as to secure for himself some profit which he ought to secure for his principal. Thus an agent is not entitled to buy a property which he knows the principal is likely to want, with a view to reselling it to him at an enhanced price.[8] And where an agent in Japan was employed to sell a ship, not under a certain price, and bought it on his own account at that price, having at the time an offer (of which he ultimately availed himself) from a third party at a higher price, it was held that he was bound to account to the principal for the difference between the price he had paid and the price he had received.[9]

Duty of Disclosure. An agent is not a trustee for his principal so as to render voidable any purchase by him of the principal's property. But he is in a position which requires him to exhibit *uberrima fides*. In the case of a law agent it has been held that in order to uphold a purchase of his client's property he must shew that the transaction was a fair one, and that concealment of the fact that he was the purchaser will make the sale reducible whether it was fair or not.[10] But the relationship of law agent and client is a

[1] Per Lord Young (Ordinary), in *Henderson* v. *Huntington Copper Co.*, 1877, 4 R. 294, at p. 301; affd. 5 R. (H.L.) 1; *Grant* v. *Gold Exploration, etc., Syndicate* [1900], 1 Q.B. 233; *Shipway* v. *Broadwood* [1899], 1 Q.B. 369.

[2] *Alexander* v. *Webber* [1922], 1 K.B. 642.

[3] Per A. L. Smith, L.J., *Grant* v. *Gold Exploration Syndicate* [1900], 1 Q.B. 233, at p. 244; *Mayor of Salford* v. *Lever* [1891], 1 Q.B. 168.

[4] See opinion of Bowen, L.J., in *Grant* v. *Gold Exploration Syndicate, supra.*

[5] *Graham* v. *United Turkey Red Co.*, 1922, S.C. 533; *Andrews* v. *Ramsay* [1903], 2 K.B. 635, a case of a secret commission.

[6] *Laughland* v. *Millar, Laughland & Co.*, 1904, 6 F. 413.

[7] *Whaley Bridge Calico Printing Co.* v. *Green*, 1879, L.R. 5 Q.B.D. 109.

[8] *Great North of Scotland Rly.* v. *Urquhart*, 1884, 21 S.L.R. 377; *Kimber* v. *Barber*, 1873, L.R. 8 Ch. 56; *Graham* v. *Paton*, 1917, S.C. 203.

[9] *De Bussche* v. *Alt*, 1878, 8 Ch. D. 286.

[10] *M'Pherson's Trs.* v. *Watt*, 1877, 4 R. 601; revd. 1877, 5 R. (H.L.) 9.

very special one, and it is by no means clear that a purchase by a mercantile agent would be reducible unless it could be shewn that he had concealed any material facts.

Sale or Purchase of Agent's Property. When employed to buy, an agent is not entitled, without the definite consent of his principal, to sell his own property; employed to sell, he is not entitled to purchase on his own account. In *Cunningham* v. *Lee*,[1] *A.*, who was not a stockbroker, was employed by *B.* in a speculative purchase of shares. The quantity he bought included those ordered by *B.*, and some bought on his own account. On the approach of settling day, *B.*, though asked, failed to give any instructions as to selling or carrying over the shares. *A.* intimated to him that in the absence of instructions he had sold. A sale at that date would have resulted in a loss. In fact, however, *A.* carried over the whole block of shares, and ultimately sold them at a profit. He claimed to rank in *B.'s* bankruptcy for the loss which would have resulted if he had sold on the date when he intimated to *B.* that he had done so. His claim was rejected on the ground that, in substance, it involved the purchase by *A.* of shares which he was employed to buy, and that this was not admissible without the definite instruction of his principal. In *Bentley* v. *Craven* the partner of a firm was employed by his co-partners to purchase sugar, and, without their knowledge, supplied sugar belonging to himself. He was found liable for the difference between the price at which he supplied it and the price at which he obtained it, although it was not averred that the former was more than the current market price.[2] These decisions rest on two principles: (1) that an agent must not act so as to bring his duties as agent into conflict with his interests as an individual: (2) that in buying or selling his own property he does not fulfil his obligation to bring the principal into contractual relations with third parties.

Broker Combining Orders.—Both principles of trust and principles of contract seem to be involved in the case where a broker, employed to purchase goods or shares on a particular exchange, has carried out the transaction by combining the various orders he has received for that particular commodity or share, purchasing from a dealer or jobber sufficient to meet all these orders, and apportioning his purchase among his various clients, according to their orders, at an average price. It is established by the highest authority, both in England[3] and Scotland,[4] that by adopting this procedure the broker is virtually selling his own property instead of acting as an intermediary between purchaser and seller, with the result that though the injury to the client may be inappreciable, the latter has the right to repudiate the contract, leaving the broker, if the transaction turns out unfavourably, to bear the loss himself. That this question is an extremely narrow one is shewn by the great difference of opinion on the bench in both cases, and by the difficulty of discovering, from the opinions of the majority, whether they rest their judgment on principles of trust or on principles of contract. In the English case referred to it was held that the result was not affected by proof that the broker was acting in accordance with the custom of the Exchange,[5] there being no proof that his client was aware of that

[1] 1874, 2 R. 83.

[2] *Bentley* v. *Craven*, 1853, 18 Beav. 75. See also *Cavendish-Bentinck* v. *Fenn*, 1887, 12 App. Cas. 652.

[3] *Robinson* v. *Mollett*, 1875, L.R. 7 H.L. 802; *Armstrong* v. *Jackson* [1917], 2 K.B. 822.

[4] *Maffett* v. *Stewart*, 1887, 14 R. 506.

[5] *Robinson* v. *Mollett*, *supra*.

custom; in the subsequent case in Scotland [1] no proof as to the custom of the Exchange was offered, and the judges expressly reserved their opinions as to the application to Scotland, in this respect, of the judgment in *Robinson* v. *Mollett*.

Where a provincial stockbroker employs a London stockbroker to purchase stock from him on behalf of a client, the primary duty of the London stockbroker is to purchase from a jobber, not to supply shares which he already holds. Where he purchases from a jobber, but sends a "net" price, *i.e.*, a price including his own commission, and this "net" price is transmitted, with a note of the provincial stockbroker's own commission, to the client, it would seem to be a question of the circumstances of each case whether this amounts to a sale by the broker of his own shares, entitling the client to repudiate liability.[2]

(7) *Law Agent and Client*

Fiduciary Position.—A law agent stands in a fiduciary position towards his client, not only in his professional relations, but also in contracts where he ostensibly deals with the client as an independent third party.[3]

Purchase from Client. Where the law agent purchases property from his client, whether he has been employed to sell it or not, without disclosing the fact that he is the purchaser, it is established law that the sale is voidable.[4] In *Macpherson's Trs.* v. *Watt*,[5] *A.*, who was acting on behalf of his sisters as beneficiaries in a trust, consulted *B.*, a law agent, as to the best method of selling certain houses which formed part of the trust estate. He did not employ *B.* as an agent to sell them. *B.* bought them ostensibly on behalf of his brother, in reality, however, partly on his own account. He did not disclose to *A.* that he had an interest in the purchase. In an action of reduction of the sale it was held in the Court of Session that it had not been proved that *B.* was the agent for the trust, and therefore that there were no grounds for reduction. On appeal, the House of Lords, taking a different view of the evidence, held that *B.* was the agent for the trust, and that consequently a purchase by him, without disclosing the fact that he was the purchaser, was necessarily reducible, apart from any question as to the fairness of the price. In *Cleland* v. *Morrison* [6] a law agent, ostensibly on behalf of a client, obtained a feu from an heir of entail in possession. The latter had no other professional assistance, and, in the opinion of the Court, employed the law agent in question as his own adviser. The law agent was interested in the matter, as the feu was a joint adventure between him and the client for whom he ostensibly acted. This interest was not disclosed. It was held that a subsequent heir of entail was entitled to reduce the feu-contract, even on the assumptions that it was within the powers of the heir

[1] *Maffett* v. *Stewart*, *supra*.

[2] *Johnson* v. *Kearley* [1908], 2 K.B. 514; *Aston* v. *Kelsey* [1913], 3 K.B. 314. The distinction between these cases is very difficult to appreciate. A Scottish Court, not being bound by *Johnson* v. *Kearley*, as the judges in *Aston* v. *Kelsey* were, might find it more easy to resist this method of escaping from an unsuccessful speculation.

[3] *Aitken* v. *Campbell's Trs.*, 1909, S.C. 1217. "The law . . . is that a contract of any sort between a client and his agent must be scrutinised in a way which a contract between two third parties would not be"—Lord President Dunedin, at p. 1225. See also *Harris* v. *Robertson*, 1864, 2 M. 664. For circumstances shewing that the relationship of agent and client had ceased, see *Mackay* v. *Macarthur*, 1899, 36 S.L.R. 662.

[4] *Macpherson's Trs.* v. *Watt*, 1877, 4 R. 601; revd. 1877, 5 R. (H.L.) 9; *Cleland* v. *Morrison*, 1878, 6 R. 156; *Lewis* v. *Hillman*, 1852, 3 H.L.C. 607.

[5] *Supra*.

[6] *Supra*.

of entail in possession, and that the terms were not unfair, on the ground that a law agent could never maintain the validity of a purchase from his client where he had concealed the fact that he was an interested party. The same necessity for full disclosure arises where the client purchases property which the agent holds as a trustee.[1]

Test of Validity of Contract. Where the question relates to an onerous contract, and the fact that the law agent is personally interested is fully known to the client, the test applicable has been stated by Lord President Dunedin: "Would another law agent have advised it, or, if the proposition had been made by a third party, would this same law agent have advised it to his own client?"[2] In the application of this test the circumstances existing at the date of the transaction have to be considered, and therefore it is not necessarily reducible because it has resulted in a profit to the law agent. It will be sustained if, all circumstances being considered, it was originally a fair one. So where builders, who were possessed of no capital, entered into a building speculation by which land was bought by their law agent and ultimately conveyed to them under burden of a ground annual in the law agent's favour, it was held that the mere fact that the law agent had been able to sell the ground annual, after buildings had been erected, for more than the amount he had expended in purchasing the land did not entitle the builders to challenge the transaction. There had to be taken into consideration the fact that they were not in a position to obtain capital without security, and the possibility that the buildings might have proved unsuitable and the ground annual therefore unremunerative.[3]

Gifts to Law Agent.—It is settled that a gift by a client to his law agent is always revocable.[4] This holds whether the agent's accounts are still outstanding and the gift is in effect an addition to his professional remuneration,[5] or whether it is a separate and independent transaction. Thus where the client, in selling a theatre, reserved the right to two private boxes, and disponed one of them to his law agent, it was held that the disposition might be reduced at the instance of the client's representatives.[6] Such a gift, it has been pointed out,[7] presented no true analogy to a purchase by the law agent of his client's property—the purchase, though advantageous to the agent, might also in the circumstances be the best possible course for the client: the gift could never be otherwise than disadvantageous to him. So in such cases it is not necessary for the client to prove any undue influence, or even solicitation, on the part of the agent; the gift is reducible on the principle that an agent cannot maintain contracts with his client unless they are such as an independent agent would have advised.

In *Logan's Trs.* v. *Reid*[8] it was recognised that there was no legal objection to a gift by a client to a person who had acted as his law agent,

[1] *Moody* v. *Cox* [1917], 2 Ch. 71.

[2] *Aitken* v. *Campbell's Trs.*, 1909, S.C. 1217, at p. 1227. See also *Harris* v. *Robertson*, 1864, 2 M. 664; *Gillespie & Sons* v. *Gardner*, 1909, S.C. 1053; *Bank of Montreal* v. *Stuart* [1911], A.C. 120; *Dick* v. *Alston*, 1911, S.C. 1248; affd. 1913, S.C. (H.L.) 57; *Dominion Bauxite Co.* v. *Hubbard* [1923], A.C. 673.

[3] *Gillespie & Sons* v. *Gardner*, 1909, S.C. 1053.

[4] *Anstruther* v. *Wilkie*, 1856, 18 D. 405; *Anderson* v. *Turner*, 1884, 12 R. 1097, note; *Logan's Trs.* v. *Reid*, 1885, 12 R. 1094; *Lobo* v. *Terry* [1895], 2 Q.B. 679 (gift to agent's wife). There is no such rule with regard to a legacy (*Weir* v. *Grace*, 1898, 1 F. 253; affd. 1899, 2 F. (H.L.) 30; *Forrests* v. *Low's Trs.*, 1907, S.C. 1240; affd. 1909, S.C. (H.L.) 16).

[5] *Anstruther* v. *Wilkie*, *supra*.

[6] *Logan's Trs.* v. *Reid*, *supra*.

[7] Per Lord Ordinary (M'Laren), *Anderson* v. *Turner*, 1884, 12 R. 1097, note.

[8] 1885, 12 R. 1094.

but who had ceased to act in that capacity. And circumstances might be proved which would infer that a gift made during the existence of the agency had been confirmed after it had come to an end. But the mere fact that the agent had, to the client's knowledge, made use of the thing given after he had ceased to be agent, was not sufficient to infer confirmation.

Third Parties Deriving Right from Agent. In spite of certain dicta to the effect that transactions which infringe the rules above stated are absolutely void,[1] it is conceived that the true principle is that they are voidable, to the same extent as if they had been induced by fraud on the part of the agent, and therefore that third parties taking from the agent may acquire an unchallengeable title.[2] But where the objection to a sale is that, while the purchase is nominally by a third party, the seller's law agent is partly, and secretly, interested, the whole transaction will be open to reduction.[3]

Professional Dealings.—In his professional dealings with his client a law agent is in some respects in an exceptional position. His accounts, though acknowledged as correct, or discharged, may be opened up and remitted for taxation on relevant averments of any error or overcharge, although no case of misrepresentation or fraud may be stated against him.[4] In cases where his work is within the Table of Fees [5] for legal business any bargain for an additional payment is unenforceable. So where £300 was promised in the event of success a solicitor was not justified in retaining that sum out of the amount recovered.[6] In *Moss* v. *Robertson*,[7] where a client had paid a considerable sum to his law agent for his services in settling an action which had not been brought into Court, it was held that it could be recovered by the client's executrix.

(8) *Confidential Relationships*

Where the parties to a contract stand to each other in a relation which might enable the one to exert a dominant influence over the other, the contract will be reducible if it is proved that any material facts were concealed, or if the result is that a gratuitous advantage has been obtained by the exercise of that influence. Apart from the case of law agent and client, which has already been considered, the authorities refer to contracts between parties nearly related to each other, and to dispositions in favour of persons, such as doctors or clergymen, who are in a position to exercise a controlling influence.

Relationship not Necessarily Material. The mere fact that the two parties to a contract were closely related to each other is not necessarily material, unless one of them was in a position to exercise an influence over the mind of the other. In *Irvine* v. *Kirkpatrick* [8] the contract in question was between

[1] See opinions in *Anstruther* v. *Wilkie*, 1856, 18 D. 405.

[2] *Logan's Trs.* v. *Reid*, 1885, 12 R. 1094, opinion of Lord Kinnear.

[3] *Macpherson's Trs.* v. *Watt*, 1877, 4 R. 601; revd. 1877, 5 R. (H.L.) 9.

[4] *Cockburn* v. *Clark*, 1885, 12 R. 707; *M'Farlane* v. *M'Farlane's Trs.*, 1897, 24 R. 574; *Moir* v. *Robertson*, 1924, S.L.T. 436 (O.H., Lord Ashmore); *Cheese* v. *Keen* [1908], 1 Ch. 245. Where certain items of an account were barred by statute, it was held that a solicitor could not found on a written acknowledgment, eliding the statute, which he had obtained without explaining to the client the legal position (*Lloyd* v. *Coote* [1915], 1 K.B. 242). An account subject to triennial prescription would be an analogous case in Scotland.

[5] As to exceptional work, *e.g.*, flotation of a company, see *Welsh & Forbes* v. *Johnston*, 1906, 8 F. 453; *Brownlie, Watson & Beckett* v. *Caledonian Rly.*, 1907, S.C. 617.

[6] *O'Brien* v. *Lewis*, 1862, 4 Giff. 221.

[7] 1924, S.L.T. 436.

[8] 1850, 7 Bell's App. 186.

a brother and his sisters; the point in dispute was whether it was reducible on the ground that the brother had failed to disclose all the material facts. At the date of the contract the parties saw little of each other, and were not on good terms, and it was held that the case was to be considered as one between parties who were dealing at arm's length. And a contract is not reducible merely on the ground that the parties to it were father and son; that the son entered into it reluctantly, and was induced to consent because the only alternative was his bankruptcy; that it was to his disadvantage; and that he had no independent legal advice. These circumstances were present in *Tennent* v. *Tennent's Trs.*,[1] in which a son unsuccessfully attempted to reduce a transaction with his father, under which he had renounced a share in a partnership. They were sufficiently met by proof that the pursuer was fully informed of all the facts, that he was a man of forty years of age and accustomed to business, and that he had thoroughly understood the transaction to which he assented. Nothing was left but inadequacy of consideration, and that, disputable on the particular facts, was not a sufficient ground for the reduction of the transaction. Inadequacy of consideration, as was pointed out by Lord Westbury, was not a ground for the interference of the Court unless the inadequacy was such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition. So in *Menzies* v. *Menzies*,[2] a case presenting features somewhat similar, where a son had been induced to consent to a disentail under disadvantageous circumstances, the Court of Session held the transaction to be binding, and the reversal of their judgment was based on the ground that the son's consent had been obtained by misrepresentation.

But while contracts between near relations may be binding, it is not in all cases enough to sustain them to prove that all material facts were disclosed. That leaves open the argument that the circumstances were such, and the influence exercised by one party so dominant, as to deprive the other of the power of apprehending the considerations applicable to the case. If so, the transaction may be reducible, though the pursuer's case falls short of any proof of actual concealment.[3]

Parent and Child. On these principles a contract between parent and child may be set aside if the circumstances are such that the child was entitled to rely on the parent's protection, and if in fact the child's interests have been sacrificed. In *Smith Cuninghame* v. *Anstruther's Trs.*[4] a daughter, who had a *spes successionis* under her parent's marriage contract, subject to a power of appointment by either parent, or the survivor, executed, in consideration of a provision of £5,000, a general discharge in her own marriage contract, to which her father and mother were parties. In an action of reduction of this discharge, brought by the daughter after the death of both her parents, it was held in the Court of Session that the pursuer had failed to prove averments of fraud or essential error, and that a parent was entitled to bargain with his children for their renunciation of the rights provided by marriage contract. In the House of Lords it was held that the true construction of the daughter's marriage contract was that she

[1] 1868, 6 M. 840; affd. 1870, 8 M. (H.L.) 10.

[2] 1893, 20 R. (H.L.) 108.

[3] *Gray* v. *Binny*, 1879, 7 R. 332. See opinion of Lord President Inglis, at p. 342.

[4] 1869, 7 M. 689; 1870, 8 M. 1013; 1871, 9 M. 618; revd. 1872, 10 M. (H.L.) 39. See also *Graham* v. *Ewen's Trs.*, 1828, 6 S. 479; revd. 1830, 4 W. & S. 346; *Woodward* v. *Woodward*, 1910, 2 S.L.T. 163, both cases of misrepresentation; *Fraser* v. *Fraser's Trs.*, 1834, 13 S. 703.

accepted £5,000 as an interim or partial apportionment of the fund subject to her parent's power of appointment, and not that she finally discharged her rights. But the theory of the Court below that a transaction between parent and child was only challengeable on the ground of fraud or essential error—was expressly negatived. In reference to that conclusion the Lord Chancellor (Hatherley) put the law as follows:[1] "In the first place, the very notion of a parent bargaining with a child in the language used by the learned judges in Scotland entering into a transaction with his child for the purpose of purchasing her share in this species of expectancy—would be a notion inconsistent with the law which has prevailed, I apprehend, in every country as to the protection of a child's interest that is to be expected on the part of a parent; such a protection as makes it very difficult indeed for a parent under any circumstances to deal with a child, and certainly does not render it possible for him to deal with a child without the child being fully protected and fully informed of all the rights vested in him."

In *Gray* v. *Binny*[2] there was proof of concealment of material facts. A young man, aged twenty-three, who was heir-apparent to an entailed estate of which his mother was heir in possession, gave his consent to a disentail. The amount he received was greatly less than the actuarial value of his expectancy; he was not informed as to that value; he was not aware that his mother could not disappoint his interest; he had no independent legal advice; and the family solicitor, who carried through the transaction, was proved to have been acting entirely in the interests of the mother, and, as a creditor of hers, to have a personal interest in the disentail. In these circumstances it was held that the disentail must be reduced. It was argued that it was necessary to prove fraudulent misrepresentation or concealment, or, alternatively, facility on the part of the person whose interests were affected, but held that it was enough to prove that the mother had a dominant influence over the son, that he acted in reliance on her judgment, that the result involved a material and gratuitous benefit to her, and that the son had no independent legal advice.

Gifts to Relatives.—In cases of pure gifts in favour of a relation in a position to exercise influence over the donor the law of Scotland is probably in accordance with the law as laid down in England by Lord Lindley: "The question is not whether the donor knew what he was doing, had done, or proposed to do, but how the intention was produced—whether all that care and providence was placed round him, as against those who advised him, which, from their situation and relation with respect to the donor, they were bound to exercise on his behalf."[3] So where a son on attaining majority assigned his liferent in an estate to his mother, without any consideration, and with no other advice than that of his mother and stepfather, it was held that the onus of proof that he fully understood what he was doing lay upon the recipient of the gift.[4]

Clergyman, Doctor, etc.—The same rules hold where influence is obtained not from near relationship but from some position which involves a moral duty not to take advantage of that influence. Such relationships are those of a clergyman and a person over whom he exercises spiritual influence,[5] of

[1] 10 M. (H.L.), at p. 47.
[2] 1879, 7 R. 332.
[3] *Allcard* v. *Skinner*, 1887, 36 Ch. D. 145.
[4] *Carmichael* v. *Baird*, 1899, 6 S.L.T. 369.
[5] *Munro* v. *Strain*, 1874, 1 R. 522. See opinion of Lord Shand in *Gray* v. *Binny*, 1879, 7 R. 332, 350; *Nottidge* v. *Prince*, 1860, 2 Giff. 246; *Allcard* v. *Skinner*, 1887, 36 Ch. D. 145; *Morley* v. *Loughnan* [1893], 1 Ch. 736; *Inche Noriah* v. *Shaik Allie* [1929], A.C. 127.

a doctor and his patient,[1] of a nurse and the person under her charge,[2] of a guardian and his ward, after the guardianship has expired.[3]

(9) *Educated and Uneducated Persons*

Discharges by Workmen. It is conceived that there is no general rule in the law of Scotland that an educated man, or one accustomed to business, in dealing with one who has not these advantages, is bound to regard himself as in a *quasi*-fiduciary position, and to disclose all material facts. The cases with regard to dealings by moneylenders, already referred to, were treated as exceptional.[4] Most of the other cases have related to discharges, obtained by an employer or railway company from a person who has put forward a claim for damages for physical injuries. In *M'Donagh* v. *Maclellan*,[5] a case where a workman had signed a discharge in the absence of his law agent, it was held that the discharge was not binding upon him, and the opinion of the Lord Justice-Clerk goes the length of holding that where an educated man obtains such a discharge from a workman without the intervention of the workman's law agent, the onus lies on him to prove that the terms of the discharge were fully understood by the workman, and that all material facts were adequately explained to him. But this opinion has not been followed. In *Welsh* v. *Cousin* [6] a workman, without the advice of a law agent who was acting for him, settled his claim for £20. The defender, who arranged the settlement and took a discharge, did not mention the fact that he had already made a tender of £50. It was held that the discharge was binding. Admitting that the existence of the tender of £50 was a material fact, there was no obligation to disclose it. So where it was averred that a discharge granted by a workman was taken when he was in a weak state of body and health, and without advice, it was held that these averments were not relevant in a reduction of the discharge.[7] On the other hand, in *Gilmour, Morton & Co.* v. *Bolland* [8] the Lord Ordinary (Johnston) held that a discharge of all future claims under the Workmen's Compensation Act, taken from an uneducated man who could neither read nor write, and signed for him by an agent for his employers, was ineffectual, apart from any question as to the validity of the method of execution. But it does not appear upon what legal proposition the decision was rested, nor how it can be reconciled with the other cases on the subject. Where a sum is offered to a workman to redeem payments under the Workmen's Compensation Act, no general duty of disclosure lies on the employer, or on the company with which the employer is insured.[9]

[1] *Dent* v. *Bennett*, 1839, 1 My. & Cr. 269. [2] *M'Callum* v. *Graham*, 1894, 21 R. 824.

[3] *Tate* v. *Williamson*, 1866, L.R. 2 Ch. 55. But this is doubtful on early authorities in Scotland. See *Monymusk* v. *Lesly* (1635, M. 4956), where a wadset in favour of an uncle who had been curator was sustained; *Trinch* v. *Watson* (1669, M. 4958), where a disposition to an ex-curator was reduced, but on averments of facility.

[4] *Supra*, p. 493.

[5] 1886, 13 R. 1000. See comments by Lord Kyllachy (Ordinary) in *Welsh* v. *Cousin*, 1899, 2 F. 277.

[6] *Welsh* v. *Cousin*, 1899, 2 F. 277; *Gow* v. *Henry*, 1899, 2 F. 48. In *North British Rly. Co.* v. *Wood* (1891, 18 R. (H.L.) 27) the Second Division had held, apparently on a concession by counsel, that a discharge given by a commercial traveller in respect of a payment made to cover claims for damages for personal injury was not binding when it turned out that his injuries were more serious than had been supposed. The judgment was reversed, but the facts did not raise, and the House of Lords did not rely on, any question of inequality of business knowledge between the party signing the discharge and the party taking it.

[7] *Mackie* v. *Strachan, Kinmond & Co.*, 1896, 23 R. 1030; *Matheson* v. *Hawthorns & Co.*, 1899, 1 F. 468; *Mackay* v. *Rosie*, 1908, S.C. 174.

[8] 1906, 14 S.L.T. 583. [9] *Mackay* v. *Rosie*, *supra*; *Park* v. *Anderson*, 1924, S.C. 1017

It has been stated that "where a man is without advice and in broken health, and does under these circumstances sign a discharge, Courts of justice should watch with care the conditions of such a settlement, and that if there has been any misrepresentation inducing the contract, the Court ought not to hesitate to act."[1] But this seems only to mean that the absence of professional advice is an element, to be weighed with the other evidence, in cases where some specific ground of reduction is averred, not that the mere absence of professional advice is in itself a ground for the reduction of a contract.

[1] *Crossan* v. *Caledon Shipbuilding Co.*, 1906, 43 S.L.R. 852; 14 S.L.T. 33, per Lord Chancellor Halsbury.

CHAPTER XXXII

CONDITIONS OF RIGHT OF REDUCTION

Agreements Void or Voidable. An agreement, apparently regular and complete, may be void or voidable. Void, speaking generally, when there is a fundamental infirmity in its constitution, as in cases of want of capacity to contract, or error excluding consent: voidable when it has been brought into being by means which the law regards as illegitimate. A contract may also be void because illegal when, though there is no irregularity in its inception, its objects are such as cannot legally be promoted or secured by agreement. Reserving for a later chapter the case of illegality, it is proposed now to consider, under reference to what has already been said, the conditions under which the right to set aside a contract, as void or voidable, may be exercised.

Void Agreements. A contract—it would be more accurate to say a seeming contract—which is actually void, either from want of capacity to assent to it, or from the fact that no consent has been given, is a mere nullity. An obligation cannot be enforced against a party who had no power to undertake it: no one can be forced to fulfil an obligation based on agreement when in fact he has not agreed. And third parties cannot maintain rights if their title implies the assertion of the validity of an agreement actually void. Thus, as has already been shewn, if goods are sold to a person who induces the contract by pretending to be some one else, they may be recovered though they have been resold to a third party who was not aware of the fraud.[1] If an obligatory document is signed in the belief that it is a document of a different character, a party to whom the document is indorsed or assigned cannot enforce it.[2] So if a party who has no right to lands makes up a title to them, complete and regular on the face of it, and duly recorded in the Register of Sasines, the true owner may recover from disponees from him, though they bought in reliance on the title as it appeared on the records.[3] The question how far a contract originally void may be made valid by adoption will be considered at a later page.[4]

Actings on a Void Agreement. In cases where there is no fraud, and the parties to an agreement which is actually void have acted upon it in reliance on its validity in a way which precludes the restoration of the *status quo*, the case is dealt with on equitable principles. If goods have been delivered and consumed, and it is afterwards discovered that the agreement upon which the delivery followed was void, the purchaser, though not liable on the contract of sale, is bound to pay the market price of the goods. This principle was applied where a sale was held void because the parties had never reached agreement as to the price,[5] and where a sale was by statute void, because it

[1] *Supra*, p. 442.
[2] *Supra*, p. 444.
[3] *Mackie* v. *Mackie*, 1896, 34 S.L.R. 34; *Stobie* v. *Smith*, 1921, S.C. 894.
[4] *Infra*, p. 546.
[5] *Wilson* v. *Marquis of Breadalbane*, 1859, 21 D. 957. Cp. *Stuart & Co.* v. *Kennedy*, 1885, 13 R. 221.

was not based on imperial measures.[1] And " where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor." [2] But it has been held in England that where *A.*, who had taken over *B.'s* business, delivered goods under an order addressed to *B.*, the party who had obtained the goods was under no obligation to pay anything for them. The argument that he had had the benefit of the goods, and was therefore bound to pay for them, was pressed but rejected, on the ground that he was under no obligation to do so, unless he had made a contract express or implied.[3]

Where work is done or services rendered on an agreement which is afterwards found to be void, probably the rule to be applied is that the party who has had the benefit of the work or services is liable *in quantum lucratus sit*, to the extent to which they have proved beneficial to him.[4] The law as to the recovery of payments in advance, when the consideration in respect of which they have been paid cannot be given, has already been considered.[5]

Voidable Contracts.—Where a contract has been induced by fraud or misrepresentation, but the resulting error is not such as to preclude consent, the contract, as has been frequently laid down, is not void, but merely voidable. The law may be stated in the words of Lord Kinnear, dealing with a case of a contract induced by fraud : " It is very clear in law that a contract induced by fraud is not null and void, but voidable. It is valid until it is rescinded, and accordingly the party defrauded has in general the option, when he discovers the fraud, of rescinding the contract or of affirming it. But he must do either one or other. He cannot take the benefit of the contract in so far as it is beneficial to himself, and reject it in so far as it is burdensome to him. If he affirms it, he must affirm it in all its terms. If he reduces it, he must give up any benefit he may have before the fraud was discovered." [6]

Reduction of Voidable Contract.—If the ground which renders a contract voidable consists in fraudulent misrepresentations, the party who is misled thereby may reduce the contract and may also claim damages. If there is no fraud, but merely an innocent misrepresentation, or want of capacity to contract, the only remedy is reduction.[7] Reduction involves restitution of money paid in pursuance of the contract. Thus where a contract of partnership was reduced, the plaintiff was entitled to recover the money he had put into the business.[8] The question whether he was also entitled to an indemnity against his liability to third parties was considered in *Adam* v. *Newbigging*.[9]

[1] *Cuthbertson* v. *Lowes*, 1870, 8 M. 1073, on the principle that the statute (5 & 6 Will. IV. c. 63, sec. 6) was not intended to protect either party to the contract of sale, but to enforce a rule of public policy, and that, though void as illegal, the contract did not involve *turpis causa* ; and see *infra*, p. 550.

[2] Sale of Goods Act, 1893, sec. 2.

[3] *Boulton* v. *Jones*, 1857, 2 H. & M. 564. See opinion of Martin, B. But *quære* whether this case would be followed by the Scottish Courts on the point in question, though it has been approved as a decision on the assignability of contracts. See *supra*, p. 422. The argument in support of the refusal to pay seems to be completely met by the reasoning of Lord President Inglis in *Cuthbertson* v. *Lowes*, *supra*.

[4] See analogous cases—*Ramsay* v. *Brand*, 1898, 25 R. 1212 ; *Steel* v. *Young*, 1907, S.C. 360.

[5] *Supra*, p. 58.

[6] *Smyth* v. *Muir*, 1891, 19 R. 81, at p. 89. See *Tennent* v. *City of Glasgow Bank*, 1879, 6 R. 554 ; affd. 1879, 6 R. (H.L.) 69 ; *Price & Pierce* v. *Bank of Scotland*, 1910, S.C. 1095 ; affd. 1912, S.C. (H.L.) 19 ; English authorities in Pollock, *Contract*, 9th ed., 625.

[7] *Supra*, p. 471.

[8] *Adam* v. *Newbigging*, 1888, 13 App. Cas. 308.

[9] *Supra*.

decided in the affirmative by the Court of Appeal, but expressly left open in the House of Lords. But it is clear that he is not entitled, under the name of restitution, to recover expenses into which he has been incidentally led in reliance on the contract. That would be in effect to give him damages for a wrong in a case where no wrong had been committed. "When you are dealing with innocent misrepresentation, you must understand that proposition—that he is to be replaced *in statu quo* with this limitation, that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter."[1] And it would appear that the remedies open to a party who has been misled by a representation which is not fraudulent are limited to the reduction of the contract and the recovery of anything which he may have paid under it. If the result of the misrepresentation has been that he has been induced to offer more than he otherwise would, he may be entitled to reduce the contract altogether; he cannot maintain that he is entitled to it on the terms which he would have obtained if no misrepresentation had been made.[2] Thus where a commissioner in a sequestration made bids at an auction sale of a property of the bankrupt, in competition with *A.*, with the result that the property was ultimately knocked down to *A.* at a high price, and *A.* maintained that, as it was illegal for a commissioner to bid,[3] he was entitled to the subjects at the price which he had offered before the illegal bidding commenced, it was held that he was asking for a remedy which was open only in cases of fraud; and, as it was proved that the commissioner's bids, though illegal, were not made fraudulently, his claim could not be supported. His right, at the highest, was to reduce the sale.[4]

Defences to Reduction.—There are various circumstances which may preclude the reduction of a contract which is merely voidable, not actually void. These may be considered under three heads: (1) The intervening interests of third parties: (2) the impossibility of *restitutio in integrum*; (3) conduct, on the part of the party proposing to reduce, which precludes his right to do so on the ground of personal bar.

(1) *Interests of Third Parties*

Interest of Third Parties. Transfer of Property.—The right to reduce a voidable contract may, in some cases, though not in all, be barred if third parties have acquired rights under it which would be affected by the reduction. The most obvious application of the rule is where the voidable contract, or some act following upon it, results in the transfer of a real right of property. Then, though the contract may be voidable as between the original parties, it has its full effects until reduced; and therefore if the property in question is transferred to a third party, he is in the position of having acquired a title from one who had for the time being a good title to bestow, and, provided that he gave value, and had no notice of the defect which rendered his author's title voidable, may resist the reduction of the contract. In the case of sale of goods this rule is now statutory: "When

[1] Per Bowen, L.J., *Adam* v. *Newbigging*, 34 Ch. D., at p. 592. See also *Whittington* v. *Seale-Hayne*, 1900, 16 T.L.R. 181.

[2] *Wishart* v. *Howatson*, 1897, 5 S.L.T. 84.

[3] Under sec. 120 of the Bankruptcy (Scotland) Act, 1856.

[4] *Wishart* v. *Howatson*, *supra*.

the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."[1] The same principle applies where a party with a voidable title pledges the property he has acquired, or otherwise conveys it in security so as to confer on the security holder a real right in the subject. So where under a contract of sale the bill of lading was transferred to the purchaser and pledged by him, the title of the pledgee was sustained in a question with the original seller, though it was proved that the sale had been induced by the fraud of the purchaser.[2] "It is well-settled law that a contract induced by fraud is not void, but voidable at the option of a party defrauded. It follows that when third parties have acquired rights in good faith and for value, these rights are indefeasible."[3] The same principles have been applied in the case of heritable property. While, as has already been explained, a purchaser from a party who is owner of lands *ex facie* of the records, but has no real title to them whatever, acquires no right,[4] yet if a title is obtained by fraud, a sub-purchaser,[5] or the holder of a heritable security granted by the fraudulent party,[6] if not affected with notice of the fraud, is safe.

Again, if one party, without transferring the property in goods, confers on another authority to dispose of them, that authority, though voidable if induced by fraud, is valid until it is reduced, and anyone taking the goods without notice of the fraud will acquire a good title, not on the ground that the owner of the goods is barred from disputing it—an argument which may also be open—but on the principle that the actual authority given has its full effects until steps are taken to reduce it.[7] So where a retail dealer, by

[1] Sale of Goods Act, 1893, sec. 23. The title of a sub-purchaser under this section, and in analogous cases, is good only if his author has obtained a title to the goods he resells, though that title may be voidable. Thus if *A.* is induced by fraud to sell goods to *B.*, and *B.* resells to *C.*, *C.'s* title is good against *A.*, because *B.* had obtained a real, though voidable, title to the goods (Bell, *Com.*, i. 261). But if *A.* sells goods to *B.* in the belief that he is some one else, he has not given the consent which is necessary to the validity of the contract, and obtains no title, and can transfer none to *C.* See *Morrison* v. *Robertson*, 1908, S.C. 332, and other cases, *supra*, p. 442. A thief acquires no title, and theft, according to the law of Scotland, involves a *vitium reale* in the title of any subsequent taker of the property stolen, so that the true owner can always recover it so long as it remains *in forma specifica* (Bell, *Prin.*, sec. 527; *Henderson* v. *Gibson*, 17th June 1806, F.C.; *Todd* v. *Armour*, 1882, 9 R. 901; *International Banking Corporation* v. *Ferguson*, 1910, S.C. 182). But it may be a narrow and difficult question whether the act by which property is dishonestly acquired amounts to theft or merely to fraud; and it is by no means clear that an act—such as the pawning of goods obtained on approbation—which might warrant a conviction for theft, would involve the civil consequence that no title to the goods could pass. See *Brown* v. *Marr, Barclay, etc.*, 1880, 7 R. 427, and cases in criminal law collected in Macdonald, *Criminal Law*, 3rd ed., 38. In England, if the conduct of the party who obtains goods amounts merely to fraud, a purchaser from him obtains a good title; if it amounts to the crime of "larceny by a trick," he obtains none (*Whitehorn Brothers* v. *Davison* [1911], 1 K.B. 463; *Heap* v. *Motorist's Advisory Agency* [1923], 1 K.B. 577).

[2] *Price & Pierce* v. *Bank of Scotland*, 1910, S.C. 1095; affd. 1912, S.C. (H.L.) 19.

[3] *Ibid.*, 1910, S.C., at 1106, per Lord Kinnear.

[4] *Supra*, p. 531.

[5] Stair, i. 40, 22; *Wilson* v. *Elliott*, 1826, 4 S. 429; affd. 1828, 3 W. & S. 60; *Fraser* v. *Hankey*, 1847, 9 D. 415.

[6] *Thomson* v. *Douglas, Heron & Co.*, 1786, M. 10229; 3 Ross, *L.C.*, 132; *Williamson* v. *Sharp*, 1851, 14 D. 127.

[7] *Brown* v. *Marr, Barclay, etc.*, 1880, 7 R. 427; *Bryce* v. *Ehrmann*, 1905, 7 F. 5; *White* v. *Garden*, 1851, 10 C.B. 919; *Pease* v. *Gloahec*, 1866, L.R. 1 P.C. 219; *Babcock* v. *Lawson*, 1879, 4 Q.B.D. 394; 5 Q.B.D. 284; *Henderson & Co.* v. *Williams* [1895], 1 Q.B. 521. Contrast cases where goods are fraudulently disposed of by a person who has obtained possession of them without any authority to dispose of them (*Mitchell* v. *Heys*, 1894, 21 R. 600; *Farquharson Brothers* v. *King* [1902], A.C. 325; *Commonwealth Trust* v. *Akotey* [1926], A.C. 72, on which see comments by Lord Sumner in *Jones Ltd.* v. *Waring & Gillow* [1926], A.C. 670.

conduct which amounted to a fraud for which he was convicted, obtained goods on sale or return, and pawned them, it was held that the pawnbroker obtained a good title in a question with the wholesale dealer.[1] And where a wholesale dealer, in sending goods to a retail dealer on approbation, protects himself by providing that they are not to be sold to customers without his consent, and is induced by fraud to give that consent, the title obtained by a purchaser is unchallengeable.[2]

Assignee of Personal Right.—It cannot be stated as an absolute, or even as a general, rule that the reduction of a voidable contract is precluded merely because it would affect the interests of third parties. While, as has just been explained, parties who have obtained a real right in goods or heritable property are not affected by latent defects in the title of their author, the same rule does not hold in cases where a man, having obtained a title by means which render it voidable, has merely come under a personal obligation to transfer to a third party. That third party, so long as his right is personal, remains subject to other personal rights which are prior to his. So, in questions relating to heritable property, a purchaser who has recorded his title in the Register of Sasines is not affected by the fact that the seller may have acquired the lands fraudulently; till he does record the title and thereby vest himself with a real right to the lands, he remains open to objections which would be good against the seller. The distinction is noted by Lord Stair. After stating that singular successors in feudal rights are not subject to the exception of fraud of their authors, he proceeds: "But in personal rights the fraud of authors is relevant against singular successors, though not partaking nor conscious of the fraud when they purchased, because assignees are but procurators, albeit *in rem suam*, and therefore they are in the same case with their cedents, except that their cedents' oaths, after they were denuded, cannot prejudge their assignees."[3] The same doctrine is laid down, in very clear language, by Lord Kilkerran: "That singular successors in land rights completed by infeftment are not affected by back-bonds, or other personal rights, or the fraud of the author, where the acquirer is not *particeps criminis*, is a point so established that it needs no argument. It is the very purpose of our records, on the faith whereof we are in safety to purchase. But, first, if no infeftment has followed, and that the purchaser has only a personal right or disposition, that disposition, or other personal right, is affected by the personal deeds or fraud of the author, as all personal rights are."[4] So, in the case of moveables, if the property in goods has passed on a sale induced by fraud, the seller, though helpless in a question with a sub-purchaser or sub-pledgee, is not precluded from reducing the sale by the fact that the immediate purchaser may in the meantime have agreed to sell or pledge the goods.[5]

Again, while a right of property acquired from one who had a voidable title may preclude the reduction of that title, a party who has incurred an obligation under circumstances which render it voidable is not debarred from avoiding it by the fact that the right to exact it may be assignable, and may have been assigned to a third party who has no notice of the facts

[1] *Brown* v. *Marr, Barclay, etc.*, 1880, 7 R. 427.

[2] *Bryce* v. *Ehrmann*, 1905, 7 F. 5. See *Weiner* v. *Smith* [1906], 2 K.B. 574; *Weiner* v. *Harris* [1910], 1 K.B. 285.

[3] Stair, iv. 40, 21.

[4] *Neilson* v. *Ireland*, 1755, 3 Ross, *L.C.*, 128 (5 Brown's Supp. 828).

[5] *Price & Pierce* v. *Bank of Scotland*, 1910, S.C. 1095; affd. 1912, S.C. (H.L.) 19 (*Duncanson's Claim*).

which render it voidable. The general rule is that the assignee takes no better title than his cedent, and that his right is therefore open to reduction on the ground of his cedent's fraud. That rule, and its limitations, have been considered in a prior chapter.[1]

Donee Taking under Voidable Title.—A party who insists in maintaining rights which have to be traced to a contract tainted by fraud must have given value for his rights. There would seem to be no circumstances under which a mere donee can acquire a better title than the donor had to give. So where the tutor of a lunatic had been allowed to enter into office without finding caution for his intromissions, and subsequently induced his sister to sign a bond of caution, it was held that the sister, on being sued on the bond by a *curator bonis* subsequently appointed on the lunatic's estate, was entitled to a proof before answer of the averment that she had been induced to sign the bond by fraud on the part of the tutor, on the ground that, in the circumstances, the bond was a gratuitous advantage to the lunatic's estate.[2]

Good Faith.—It is a further requisite that the subordinate right shall have been acquired in good faith. The Bills of Exchange Act, 1882 (sec. 90), and the Sale of Goods Act, 1893 (sec. 62 (2)), each give statutory expression to the general rule that a thing is deemed to be done in good faith when it is in fact done honestly, whether it be done negligently or not. An inadequate price, not in itself conclusive, may be evidence on which the Court may come to the conclusion that no questions were asked because something wrong was suspected, or may lay upon the purchaser the onus of proof that he had no knowledge of the seller's defective title.[3] But parties dealing with others in the ordinary course of business are not bound to be suspicious of fraud. So where a banker advanced money on bills of lading, knowing the borrower to be in difficulties, and in circumstances indicating clearly that the goods represented by the bills of lading had not been paid for, it was held that there was nothing in these circumstances to impeach his good faith in a question with the seller of the goods, who had been induced to sell by fraudulent statements on the part of the borrower.[4]

Interest of Creditors.—An alternative interest that may be advanced as a bar to the reduction of a voidable contract is that of the creditors of the party whose conduct has rendered it voidable. Apart from the case of a shareholder who has been fraudulently induced to take shares (which will be considered immediately), it would seem that the interests of creditors are not entitled to consideration. The mere fact that diligence has been used by the creditors of a party in possession of goods acquired by a voidable contract does not operate as a bar to the true owner reducing the contract and recovering the goods.[5] Where a reduction of a title to land was brought on the ground that the title was obtained by fraud, amounting to breach of trust, and was defended by the holders of heritable securities granted by the fraudulent party, and also by creditors of his who had adjudged the lands from him, it was held that while the right of the heritable creditors could not be impugned, the adjudgers had no higher right than that which

[1] *Supra*, Chap. XXV.

[2] *Wardlaw* v. *Mackenzie*, 1859, 21 D. 940.

[3] *Jones* v. *Gordon*, 1877, 2 App. Cas. 616. And see analogous cases as to parties relying on the ostensible authority of an agent, *supra*, p. 151.

[4] *Price & Pierce* v. *Bank of Scotland*, 1910, S.C. 1095; affd. 1912, S.C. (H.L.) 19.

[5] Stair, i. ix. 14; *Chrysties* v. *Fairholms*, 1748, M. 4896; *Campbell, Robertson & Co.* v. *Shepherd*, 1776, 2 Paton, 399; *Muir* v. *Rankin*, 1905, 13 S.L.T. 60.

their debtor possessed, and could not therefore resist the reduction of his title.[1]

Trustee in Bankruptcy. Where a contract is voidable on the ground of fraud, the right to reduce it, and thereby to recover property which has been transferred under it, is, it is conceived, not abrogated by the fact that the fraudulent party has become bankrupt before measures for the reduction of the contract have been taken. In other circumstances it is well established that a trustee in bankruptcy cannot take advantage of the bankrupt's fraud,[2] and cannot therefore maintain a contract which has been obtained by that fraud. So where *A.* was induced by fraud to sell goods to *B.*, it was held that he might recover them though *B.* had become bankrupt before his right had been challenged.[3] But there are certain cases where the fraud in question has consisted in assurance of ability to pay for the goods which seem to preclude any confident statement on this point. In *Watt* v. *Findlay*[4] whisky was sold without any definite representations by the buyer as to his ability to pay. At the time fixed for delivery, and when the price should have been paid, the buyer was aware that he was insolvent, and was in course of taking measures for sequestration. Concealing this fact, he obtained delivery of the whisky by promising to pay within a few days. On his subsequent sequestration it was held that the seller might recover the whisky. The opinions seem to proceed on the ground that it was fraudulent on the part of the buyer to take delivery without revealing his circumstances, and that the trustee in bankruptcy could not take advantage of the fraud. In a subsequent case,[5] however, the Lord Justice-Clerk (Hope) explained the decision in *Watt* v. *Findlay*, on the ground that in that case it had been held that the property in the goods had not passed, and decided that when it was admitted that the property in the goods had passed, the seller made no relevant case for their recovery from the trustee in the buyer's bankruptcy by the mere averment that the sale had been induced by the buyer's representations of his ability to pay. The judgment of the Court, however, holding the pursuer's averments to be irrelevant, proceeded on the absence of any definite statements of fraudulent misrepresentation, and on his admission that he had not demanded payment on delivery, but had taken a bill for the price; and the case cannot be regarded as any authority against the proposition that a definite assurance of ability to pay for goods, made by a buyer fraudulently and in the knowledge of his own insolvency, will entitle the seller to recover the goods from the buyer's bankruptcy. The validity of that proposition was considered, but not decided, in *Gamage* v. *Charlesworth's Tr.*[6] Goods were obtained on credit by definite statements as to the buyer's means. Some months afterwards the sellers raised an action for the rescission of

[1] *Thomson* v. *Douglas, Heron & Co.*, 1786, M. 10229; 3 Ross, *L.C.*, 132, as explained by Lord Watson in *Heritable Reversionary Co.* v. *Millar, infra*, 19 R. (H.L.), at p. 48. The case was one of a latent trust, but it is conceived that Lord Watson's application of it amounts to this, that though creditors may, by the use of diligence, acquire a right preferable to personal obligations of their debtor, they cannot benefit by his dishonesty. See opinion of Lord Kinnear, *Colquhoun's Tr.* v. *Campbell's Trs.*, *infra*.

[2] *Molleson* v. *Challis*, 1873, 11 M. 510; *Graeme's Tr.* v. *Giersberg*, 1888, 15 R. 691; *Colquhoun's Tr.* v. *Campbell's Trs.*, 1902, 4 F. 739; *Paul's Tr.* v. *Paul*, 1912, 2 S.L.T. 61. Cp. *Heritable Reversionary Co.* v. *Millar*, 1891, 18 R. 1166; revd. 1892, 19 R. (H.L.) 43.

[3] *Price & Pierce* v. *Bank of Scotland*, 1910, S.C. 1095; affd. 1912, S.C. (H.L.) 19 decided in the Outer House, and not reclaimed on this point. See also *Muir* v. *Rankin*, 1905, 13 S.L.T. 60; *In re Eastgate* [1905], 1 K.B. 465; *Sandieman* v. *Kempt's Creditors*, 1786, M. 4947.

[4] 1846, 8 D. 529. As to the question when concealment of insolvency amounts to fraud, see *supra*, p. 459.

[5] *Richmond* v. *Railton*, 1854, 16 D. 403.

[6] 1910, S.C. 257.

the sale on the ground that these statements were fraudulent. Shortly after the action was raised the buyer was sequestrated, and her trustee was sisted as a defender in the action. On other grounds, the majority of the Court held that the action must fail. On the question whether, assuming it to be proved that the sale was voidable on the ground of the buyer's fraud, the right to reduce it was barred by her sequestration, Lord Kinnear found it unnecessary to give an opinion, but held that an action for rescission raised before the sequestration was sufficient. Lord Johnston considered that the question was doubtful, but inclined to hold that goods could not be recovered after sequestration. Lord Salvesen (who dissented from the judgment) held that the authorities established that a sale of goods induced by fraud might be reduced, and the goods recovered, even if no proceedings for reduction were taken until after the sequestration of the buyer.

Liquidation of Company. It is settled law that a party who has been induced to take shares by the misrepresentations of the directors or other agents of the company cannot reduce the contract and have his name removed from the list of contributories after the company has gone into liquidation.[1] The exact date is not the order for winding up, but the public declaration of inability to carry on business.[2] The rule rests partly on the ground that the interests of creditors are involved, partly on the fact that after liquidation it is impossible by rescission to restore matters to their former position. So it applies even where all the creditors have been paid, and the question is really between the defrauded shareholder and the other shareholders who are liable to calls.[3]

But the rule rests on the principle that a contract to take shares, if induced by misrepresentation, though voidable, is not void. If a party whose name is on the register can shew that he has never agreed to become a shareholder, the liquidation of the company is not a bar to the removal of his name. So where *A.* applied for and was allotted preference shares in a company, and it was afterwards found that the issue of preference shares was *ultra vires*, it was held that *A.* was a creditor of the company for the money he had paid, and that the company had no right to treat him as the holder of an equivalent number of ordinary shares which he had never agreed to take.[4] If a man applies for shares in company *A.* under the impression that he is applying for shares in company *B.* (the names being similar), he has never given any real consent to become a shareholder in company *A.*, and may have his name removed from the register even after it has gone into liquidation.[5]

A party who has commenced proceedings for the reduction of the contract to take shares before the liquidation may carry them out after it.[6] And if action is taken on a test case, and other shareholders in the same position agree with the company to stand or fall by the result, they may have the benefit of a favourable verdict, even although liquidation has intervened.[7]

[1] *Addie* v. *Western Bank*, 1865, 3 M. 899; revd. 1867, 5 M. (H.L.) 80; *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 325.

[2] *Tennent* v. *City of Glasgow Bank*, 1879, 6 R. 554; affd. 1879, 6 R. (H.L.) 69.

[3] *Burgess's* case, 1880, 15 Ch. D. 507.

[4] *Waverley Hydropathic Co.* v. *Barrowman*, 1895, 23 R. 136; *National House Property Investment Co.* v. *Watson*, 1908, S.C. 888. As to the effect of forfeiture of shares for non-payment of calls, see *Mount Morgan Gold Mine (Liquidators of)* v. *M'Mahon*, 1891, 18 R. 772.

[5] *Baillie's* case [1898], 1 Ch. 110. As to discrepancy between the objects stated in the prospectus and the powers taken in the memorandum, see *supra*, p. 448.

[6] *Whiteley's* case [1900], 1 Ch. 365.

[7] *In re Scottish Petroleum Co.*, 1883, 23 Ch. D. 413.

But it is decided in England that a mere repudiation of liability, without legal proceedings, is insufficient.[1] It is enough if the directors accept an intimation of repudiation, and delete the shareholder's name from the register, while the company is still a going concern.[2] A definite agreement with the directors, under which they undertake to take steps for the rectification of the register, will have the same effect.[3] In *Edinburgh Employers' Liability Co.* v. *Griffiths* new shares had been issued. The directors intimated by circular that they had discovered a serious misrepresentation in the prospectus, and that they proposed to present a petition for the deletion of the shareholders' names. Two shareholders intimated that they agreed to the deletion of their names. The others did not reply. The petition was lodged, but before decree an application for winding up by the Court was presented. It was held that the two shareholders who had definitely accepted the offer made in the circular were exempt; the others must be placed on the list of contributories. The principle was that the two shareholders had elected to give up their shares, and could not afterwards have opposed the directors' petition, the others had held their election in suspense until it was too late.

(2) *Impossibility of "Restitutio in Integrum"*

A contract that is merely voidable can in general be set aside only on the condition that the other party be restored to the position in which he was in before it was made. He is entitled to *restitutio in integrum*, and if, in the circumstances, that is impossible, the reduction of the contract may be precluded. This, as has been already stated, is one of the reasons for the rule that an agreement to take shares cannot be rescinded after the company has gone into liquidation.[4] The shares have ceased to exist, except as sources of liability, and therefore cannot be restored. In the liquidation of the Western Bank, the bank, which had previously been an unincorporated company, was registered, for the purposes of winding up, under the Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49). It was put by Lord Cranworth as a separate ground for holding that rescission of a contract to take shares was precluded that this alteration in the nature of the company's stock made restitution of the original shares impossible.[5] The principle of this judgment would seem to apply to a case where a transfer of shares had been induced fraudulently, but, before rescission, the original shares had been altered by division into preferred and deferred shares. In *Hay* v. *Rafferty*[6] the pursuer conveyed to the defender his right in certain fishings held from the Crown. These were not assignable without the consent of the Crown. The defender was accepted by the Crown as tenant, thereby incurring the liabilities incident to that position. The pursuer then brought an action

[1] Buckley, *Companies Acts*, 10th ed., 102; *Hare's* case, 1869, L.R. 4 Ch. 503; *First National Insurance Co.* v. *Greenfield*, *infra*.

[2] *Reese River Silver Mining Co.* v. *Smith*, 1869, L.R. 4 H.L. 64; *Westville Shipping Co.* v. *Abram Steamship Co.*, 1923, S.C. (H.L.) 68, per Lord Atkinson, p. 74; *Anglo-American, etc., Co.* v. *Scottish Investment Co.*, 1896, 4 S.L.T., p. 37; *First National Reinsurance Co.* v. *Greenfield* [1921], 2 K.B. 260.

[3] *Edinburgh Employers' Liability Co.* v. *Griffiths*, 1892, 19 R. 550; *In re Scottish Petroleum Co.*, 1883, 23 Ch. D. 413, per Baggallay, L.J., at p. 434.

[4] *Supra*, p. 538; *Houldsworth* v. *City of Glasgow Bank*, 1880, 7 R. (H.L.) 53, opinion of Lord Hatherley, p. 60.

[5] *Addie* v. *Western Bank*, 1865, 3 M. 899; revd. 1867, 5 M. (H.L.) 80, at p. 89; *Clarke* v. *Dickson*, 1859, E.B. & E. 148.

[6] 1899, 2 F. 302.

of reduction of the assignation, on the ground that he had been induced to grant it by fraud. It was held that his action was precluded by the consideration that he did not offer to relieve the defender of the obligations he had undertaken to the Crown, and could not do so without the Crown's consent.

Reduction where Work Done.– In *Boyd & Forrest* v. *Glasgow and South-Western Rly. Co.*[1] contractors, who had constructed a branch line for a contract price, averred that they had been induced to enter into the contract by misrepresentation, in respect that journals of bores taken on the proposed route, which intending contractors had been allowed to see, had been altered and edited by the railway company's engineer. They had not discovered this until the line was completed. The engineer's conduct, it had been found in a prior judgment, was not fraudulent. The contractors claimed to rescind the contract and charge for their work on the principle of *quantum meruit*. It was decided that a claim for payment *quantum meruit* must rest on implied agreement; that an agreement could not be implied on a point which was settled by express contract; and that a reduction of that contract was precluded by the impossibility, when the railway was built, of *restitutio in integrum*. The House of Lords rejected the argument, which had been accepted by the majority of the Second Division, that the necessity for *restitutio in integrum* was merely an equitable rule, not applicable in a case where the grounds for reduction were not known until the contract was executed, and where justice could in effect be done between the parties by an adjustment of accounts. The case appears to decide that if work has been done for a contract price, and it is afterwards discovered that the contract has been induced by misrepresentation, the party who has done the work has no remedy unless he can prove that the misrepresentation was fraudulent. An innocent misrepresentation affords no ground for damages, and reduction of the contract is not possible after the work has been done.

Effect of Resale.—The resale of an article which has been bought in reliance on fraudulent misrepresentations precludes *restitutio in integrum*, and therefore precludes the reduction of the contract.[2] If, however, the misrepresentation is repeated, or if on any other ground the sub-purchaser has the right to reduce his contract, and does in fact reduce it, matters are restored to their former position, and, as the article can now be returned, the original seller has no answer to a reduction of the sale.[3] Judicial opinions favour the view that a voluntary repurchase would not have the same effect, and would not render a reduction of the original sale competent.[4]

There must necessarily be some limitation to the principle that *restitutio in integrum* is a condition of reduction, otherwise no contract could ever be reduced. For some time must always have elapsed between the contract and the reduction, and that time cannot be restored. And the mere fact that a purchaser, in ignorance of the circumstances which entitle him to reject the article, has in the meantime had possession of it, is not a bar to reduction and

[1] 1914 S.C. 472; revd. 1915, S.C. (H.L.) 20. The opinions in this case seem to overrule *Milne* v. *Ritchie*, 1882, 10 R. 365, where it was held (Lord Rutherfurd Clark dissenting) that *restitutio in integrum* was not necessary if the ground of reduction was fraud.

[2] *Edinburgh United Breweries* v. *Molleson*, 1893, 20 R. 581; affd. 1894, 21 R. (H.L.) 10.

[3] *Westville Shipping Co.* v. *Abram Steamship Co.*, 1922, S.C. 571; affd. 1923, S.C. (H.L.) 68.

[4] Per Lord Watson in *Edinburgh United Breweries*, 21 R. (H.L.), at p. 15; per Lord President Clyde in *Westville Shipping Co.*, 1922, S.C., at p. 582. If this is not definitely settled—and in neither case was the point directly in issue—it may be respectfully questioned. *A.* by misrepresentation induces *B.* to buy an article. To *B.'s* action of reduction the defence is that *restitutio in integrum* cannot be given, because *B.* has resold. If *B.* is in fact able to produce and tender the article, what concern has *A.* with the means *B.* took to get it?

the recovery of the price. So where a motor car which had been stolen was sold (honestly) by *A.* to *B.*, and, after *B.* had been in possession of it for four months, was recovered by the true owner, the contention that a claim for repetition of the price was excluded by the possession which *B.* had enjoyed was repelled.[1] If, however, the possessor has altered the article, as where mining property had been partially worked, reduction will be excluded.[2] The mere fact that the party against whom an action of reduction is brought has expended money on the subject-matter is no defence; although the defender may be entitled to reimbursement in so far as his expenditure has proved beneficial.[3] And a fall in the value of the subject, due to causes for which the pursuer is not responsible, is no bar to reduction. So a contract under which shares in a company have been allotted or transferred may be reducible though in the meantime the value of the shares has fallen.[4] In *Adam* v. *Newbigging* [5] *N.* had become a partner in a business which was then insolvent. He was induced by representations, inaccurate but not fraudulent, made by the other partners, and relating to the state of the business. After the insolvency of the business had become patent, and it was no longer carried on, *N.* sued for the reduction of the contract and the return of the money he had contributed. He was successful, in spite of the objection that as the business had become openly insolvent and was no longer carried on *restitutio in integrum* was impossible. The case has been explained as one where the thing transferred—the interest in the business—could be restored, and it was no objection that it had fallen in value.[6] So where a concession granted by a foreign Government, and already subject to forfeiture, was transferred to a company, reduction was not precluded by the fact that in the meantime it had actually been forfeited.[7]

The question raised by the accidental destruction of the subject-matter of the contract has been considered where something has been sold with warranty of qualities which it did not possess. If its loss is due to the want of these qualities, as where a horse, warranted sound, died of a latent disease which constituted unsoundness,[8] or where, warranted "correct in wind and work," it was killed in an accident due to its unruly character,[9] the impossibility of restoring it is no bar to a refusal by the purchaser to pay the price, or an action for the recovery of the price, if paid. The legal result of loss due to some accident not attributable to the lack of the qualities warranted, was expressly reserved in *Kinnear* v. *Brodie*, and has not been decided in Scotland. It is arguable that the buyer, assuming that the property in the thing sold had passed to him, has no remedy. He cannot reduce the sale because he cannot offer *restitutio in integrum*: he cannot sue for damages, because the seller's breach of warranty has caused him no loss.

[1] *Rowland* v. *Divall* [1923], 2 K.B. 500. See observations on the earlier English cases by Lord Atkinson in *Boyd & Forrest* v. *Glasgow and South-Western Rly.* (1915, S.C. (H.L.) 20, at p. 29), and in *Westville Shipping Co.* v. *Abram Steamship Co.* (1923, S.C. (H.L.) 68, at p. 73).

[2] *Bald* v. *Scott*, 1847, 10 D. 289; *Rutherford* v. *Acton—Adams* [1915], A.C. 866. Not if the alteration was immaterial—*Westville Shipping Co.* v. *Abram Steamship Co.*, *supra*.

[3] *Stewart's Trs.* v. *Hart*, 1875, 3 R. 192; *York Buildings Co.* v. *Mackenzie*, 1795, 3 Paton 378.

[4] *Addie* v. *Western Bank*, 1867, 5 M. (H.L.) 80, per Lord Cranworth, at p. 90; *Westville Shipping Co.* v. *Abram Steamship Co.*, 1922, S.C. 571; affd. 1923, S.C. (H.L.) 68, per Lord President Clyde, 1922, S.C., at p. 584; *Armstrong* v. *Jackson* [1917], 2 K.B. 822.

[5] 1888, 13 App. Cas. 308.

[6] See per Lords Atkinson and Shaw in *Boyd & Forrest* v. *Glasgow and South-Western Rly.*, 1915, S.C. (H.L.) 20.

[7] *Phosphate Sewage Co.* v. *Hartmont*, 1877, 5 Ch. D. 394.

[8] *Wright* v. *Blackwood*, 1833, 11 S. 722.

[9] *Kinnear* v. *Brodie*, 1901, 3 F. 540. See also *Rowland* v. *Divall* [1923], 2 K.B. 500.

English cases, however, decide that if the purchaser has an express right to return the article and reclaim the price if the warranty is not fulfilled (a right which, in Scots law, would be implied [1]) his right is not affected by the accidental destruction of the article.[2] Even where there is an express provision that the article, if found to be disconform to warranty, must be returned within a certain period, this is to be read subject to the implied condition that the return shall continue to be possible.[3]

Void Agreements. The principle that *restitutio in integrum* is a condition of reduction does not apply to a contract which is actually void. So where the ground of reduction of an assignation was that the subject assigned was inalienable as an alimentary right, it was no objection to the action that *restitutio in integrum* was not offered.[4] Where a company had purchased its own shares, and the purchase was found to be *ultra vires*, it was decided that the contract was reducible after the company had gone into liquidation, and that the seller of the shares might be placed on the list of contributories, although the shares which he had sold could not be restored to him.[5]

(3) *Conduct Barring Right of Reduction*

Cases of Personal Bar.—The conduct of the party entitled to reduce a voidable contract may be such as to debar him from exercising that right. In such cases the underlying theory of the defender's case may be that the pursuer has acquiesced in the maintenance of the contract, that he has waived his right to rescind it, that he is personally barred from disputing it, or that he has impliedly contracted not to question it—pleas which may all be open in a particular case, and between which it would be vain to attempt to draw any exact distinctions. But the cases may be considered according as the salient feature in defence of the contract is lapse of time (*mora*, taciturnity) or subsequent acts from which an implied agreement not to disturb the contract may be inferred (homologation, adoption).

***Mora* and Taciturnity.**—If more than forty years have elapsed since the date of the contract, the right of challenge is cut off by the negative prescription.[6] Delay for less than forty years does not *per se* preclude the assertion of a right of action. "*Mora* is not a good *nomen juris*. There must either be prescription or not. We are not to rear up new kinds of prescription under different names." [7] "Effect cannot be given to mere taciturnity, unless the conduct of the party would not have been such as it has been, or any other supposition than that he did not intend to make such a claim." [8] These passages refer more particularly to the assertion of a definite and ascertained obligation, where the plea of *mora*, or *mora* and taciturnity, if rested merely on delay, and not supported by averments that the defender, to the knowledge of the pursuer, has altered his position on the assumption that the obligation would not be enforced, is probably untenable.[9] "The plea of taciturnity is often misunderstood, and pleaded where there is no

[1] Sale of Goods Act, 1893, sec. 11 (2).
[2] *Head* v. *Tattersall*, 1871, L.R. 7 Ex. 7.
[3] *Chapman* v. *Withers*, 1888, 20 Q.B.D. 824.
[4] *Balls* v. *Macdonald*, 1909, 2 S.L.T. 310.
[5] *General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282.
[6] *Infra*, Chap. XL.
[7] Per Lord Deas, *Mackenzie* v. *Catton's Trs.*, 1877, 5 R. 313, 317. See also opinion of Lord Chancellor Selborne, *C.B.* v. *A.B.*, 1885, 12 R. (H.L.) 36, at p. 40; *Alexander's Trs.* v. *Muir*, 1903, 5 F. 406, opinion of Lord Stormonth-Darling (Ordinary).
[8] Per Lord Glenlee, *Brisbane's Trs.* v. *Lead*, 1828, 7 S. 69, 70.
[9] *Robson* v. *Bywater*, 1870, 8 M. 757; *Moncreiff* v. *Waugh*, 1859, 21 D. 216; *Cuninghame* v. *Boswell*, 1868, 6 M. 890; *Chrystal* v. *Chrystal*, 1900, 2 F. 373.

foundation for it, except silence for a length of time: but silence in itself is not taciturnity. In order to found the plea, the relation of the parties and the whole surrounding circumstances must be considered, and unless these, coupled with silence, are sufficient to infer a presumption of payment, satisfaction, or abandonment, there is no ground for the plea."[1] It is more stateable when the claim in question is the right to reduce a contract, especially if it can be shewn that a more prompt enforcement would have given the other party an opportunity to recoup himself.[2] And where a man has the right to reduce a contract, but the advantageousness of doing so depends on speculative considerations, he must decide on his course of action without undue delay. A purchaser is not entitled to wait to see whether the thing he has been fraudulently induced to buy will increase in value. "The Court must be careful that in its anxiety to correct frauds it does not enable persons who have joined with others in speculations to convert their speculations into certainties at the expense of those with whom they have joined."[3] Thus, in *Stewart* v. *North*,[4] one of two partners purchased and carried on for his own behoof an enterprise which competed with the business carried on by the partnership. The other partner, though aware of the facts, took no action for nine years, when he claimed a share of the profits which had resulted. It was held that his claim was barred by delay.

Delay as Affecting Evidence.—Mere delay is irrelevant as a bar to reduction in cases where fraud or misrepresentation is admitted, its relevancy is in the question whether they are in fact established. In the most recent cases it has been explained that delay, or *mora*, is not a plea in law, but that the lapse of time is a circumstance which ought to be taken into account, and should influence the decision on the facts of the case. And it may be specially important in a question where the evidence is scanty or conflicting.[5] Thus if the delay has resulted in the loss of evidence which would have been available at an earlier date, every fact thereby left doubtful will be presumed in favour of the defender. In *Bain* v. *Assets Co.*[6] a discharge had been granted on the condition that the debtor disclosed all his assets, and after the lapse of twenty years it was proposed to reduce the discharge on the ground that this condition had not been fulfilled, and that certain assets had been fraudulently concealed. The party to whom the discharge had been granted and two of the agents who had arranged it on behalf of the creditor had died. It was possible that their evidence, if it had been available, might have shewn that the disclosure had been complete. It was held that it must be presumed that their evidence would have been favourable to the defenders, and that the pursuer's case must therefore fail.

Knowledge of Grounds of Reduction.—It is conceived that a party who has been induced to enter into a contract by fraud cannot be deprived of his remedy by mere delay unless in the meantime he has become aware, or had

[1] Per Lord Justice-Clerk Inglis in *Moncreiff* v. *Waugh*, *supra*, 21 D., at p. 218.

[2] *Fraser* v. *Hankey*, 1847, 9 D. 415; *Stewart* v. *Brown*, 1882, 10 R. 192; *Buckner* v. *Jopp's Trs.*, 1887, 14 R. 1006; *Whyte* v. *Forbes*, 1890, 17 R. 895; *Liquidators of City of Glasgow Bank* v. *Mackinnon*, 1882, 9 R. 535. But in *Leiper* v. *Cochrane* (1822, 1 S. 552), a reduction on the ground of fraud was sustained after thirty years.

[3] *Jennings* v. *Broughton*, 1854, 5 De G.M. & G. 126, per Turner, L.J.

[4] 1893, 20 R. 260. See also *M'Kersie* v. *Mitchell*, 1872, 10 M. 861.

[5] *Bain* v. *Assets Co.*, 1904, 6 F. 676, 692, 754; revd. 1905, 7 F. (H.L.) 104 (see opinion of Lord Davey); *Mackison* v. *Burgh of Dundee*, 1909, S.C. 971; affd. 1910, S.C. (H.L.), 27; *Harrison* v. *North of Scotland Bank*, 1890, 28 S.L.R. 162; *Lees' Trs.* v. *Duncan*, 1912, S.C. 50; affd. 1913, S.C. (H.L.) 12; *Miller's Exrx.* v. *Miller's Trs.*, 1922, S.C. 150.

[6] *Supra.*

the means of becoming aware, of the facts indicating fraud.[1] If the question comes to relate to the inference to be drawn from the loss of evidence, there would seem no equity in presumptions in favour of a party accused of fraud in a question with one who has taken action as soon as he has discovered that he has been defrauded. But this consideration does not apply to the case where, though no actual knowledge may be proved, the means of discovering the fraud were available and neglected.[2] And if a man is induced to buy an article by fraudulent misrepresentations or devices which induce him to think it other than it is, he will lose the right to reject it if he fails to examine it within a reasonable time.[3]

Voidable Agreements to take Shares.—The strongest case for the application of the plea of *mora* is where shares in a company have been applied for, and allotted in consequence of misrepresentations sufficient to render the contract voidable. The possibility that credit may have been given to the company in reliance on the shareholder's name is considered, and probably in all cases he is bound to take proceedings for rescission as soon as the facts come to his knowledge. At any rate, it is a definite rule that a shareholder is bound to make himself acquainted with the memorandum and articles of association—the "charter" of the company—and if he has taken shares in reliance on misrepresentations in the prospectus, and their untruth is discoverable from the memorandum, he will lose his remedy if he fails to take action at once.[4]

Homologation.—The plea of homologation imports that the Court is asked to hold that a party has expressly or impliedly recognised the validity of an obligation which he has the right to challenge, and cannot therefore either proceed for the reduction of that obligation or found on its invalidity in defence to an action to enforce it.[5] With the cases where the right to challenge a will has been held to be barred by acts involving recognition of it we are not directly concerned. In contractual questions homologation is a plea which is applicable in all cases in which an obligation is merely voidable. Thus it may be founded on as a defence to the rescission of a contract which has been induced by misrepresentation or fraud;[6] to a reduction on the ground of minority and lesion;[7] to the reduction of a lease on the ground that trustees, in granting it, exceeded their powers;[8] to the challenge of a bond, lease, or other obligatory document on the ground of want of proper authentication.[9] But it implies the existence of a real, though voidable, obligation; it is not applicable to the semblance of an obligation which can be shewn to be completely void. So where, in the reduction of a deed, the pursuer took alternative issues of insanity at the time it was granted, and facility and circumvention, it was held that a counter-issue of homologation might be allowed to meet the latter issue,

[1] *Ayr Road Trs.* v. *Adams*, 1883, 11 R. 326; *Lees' Trs.* v. *Duncan*, *supra*, opinion of Lord Salvesen, 1912, S.C., at p. 66, as to actual and imputed knowledge.

[2] *Bain* v. *Assets Co.*, *supra*.

[3] *Hyslop* v. *Shirlaw*, 1905, 7 F. 875.

[4] *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 325; *Caledonian Debenture Co.* v. *Bernard*, 1898, 5 S.L.T. 392; *First National Reinsurance Co.* v. *Greenfield* [1921], 2 K.B. 260.

[5] Bell, *Prin.*, sec. 27. Where in Scotland it would be argued that a party had homologated a voidable contract, in England it would be said that he had elected to affirm it (see Pollock, *Contract*, 9th ed., 624; *Clough* v. *London and North-Western Rly. Co.*, 1871, L.R. 7 Ex. 26).

[6] *Rigg* v. *Durward*, 1776, M. App. Fraud, No. 2; *Gall* v. *Bird*, 1855, 17 D. 1027; *Vigers* v. *Pike*, 1842, 8 Cl. & F. 562.

[7] *Supra*, p. 84.

[8] *Lord Advocate* v. *Wemyss*, 1896, 24 R. 216; revd. 1899, 2 F. (H.L.) 1.

[9] *M'Calman* v. *M'Arthur*, 1864, 2 M. 678; *Danish Dairy Co.* v. *Gillespie*, 1922, S.C. 656; and see *supra*, p. 171.

but not the former. The allegation that the party who signed a deed was insane imported, if proved, that the deed was completely void; the allegation of facility and circumvention merely went to make it voidable.[1]

Knowledge, or Means of Knowledge. Homologation implies knowledge of the facts which render the obligation voidable. It may be possible to maintain that a party has barred himself, by his words or acts, from relief from an obligation induced by fraud, but for the purpose of such a plea his conduct before he discovered the fraud is clearly not relevant.[2] But it would appear that actings extending over a considerable period, with full means of knowledge of the ground of objection, will amount to homologation, although proof of actual knowledge may be wanting.[3] And it has been held in England that where a party discovered that he had been induced to contract by fraud, and thereafter acted in such a way as to amount to an election to affirm the contract, his subsequent discovery of other fraudulent acts was no answer to the plea of bar.[4]

Acts Involving Homologation.—Homologation may be by express recognition of the validity of the contract, or it may be inferred from the actings of the party. Thus it has been inferred from such acts as continued possession and payment of rent on a voidable lease;[5] from acceptance of rent under similar circumstances;[6] from acceptance of the expenses incurred in the negotiations for a lease;[7] from leading evidence under a voidable submission;[8] from accepting payment of an annuity provided under a contract for the dissolution of a partnership;[9] from the payment of interest on a bond;[10] from an arrangement for the reduction of a royalty payable under a lease of minerals;[11] from payment of dividends to the transferee of shares by a company which had the right to object to a transfer unless certain conditions were complied with;[12] from receiving dividends, or voting as a shareholder, in the case of a voidable agreement to take shares.[13]

Effect of Homologation. The effect of homologation is to bar the plea that a particular obligation is voidable. Therefore, if sustained, the result of the plea is that the obligation is binding from the date when it was undertaken, not merely from the date of the actings from which homologation is inferred.[14]

Equivocal Acts.—Erskine lays down the rule that, in order to infer homologation, "the approbatory acts must be so strong and express that no reasonable construction can be put on them other than that they were performed by the party from his approbation of the deed homologated; for

[1] *Gall* v. *Bird*, 1855, 17 D. 1027. See, as to adoption of a void contract, p. 546.

[2] *Douglas* v. *Douglas's Trs.*, 1859, 21 D. 1066; *Countess of Kintore* v. *Earl of Kintore*, 1886, 13 R. (H.L.) 93; *Paterson* v. *Moncrieff*, 1866, 4 M. 706; *Lord Panmure* v. *Crokat*, 1854, 17 D. 85. Cp. *Mactavish's Judicial Factor* v. *Michael's Trs.*, 1912, S.C. 425.

[3] *Lord Advocate* v. *Wemyss*, *supra*; *Crerar* v. *Bank of Scotland*, 1921, S.C. 736; affd. 1922, S.C. (H.L.) 137.

[4] *Law* v. *Law* [1905], 1 Ch. 140.

[5] *Rigg* v. *Durward*, 1776, M. App. Fraud, No. 2.

[6] *Oliphant* v. *Scott*, 1830, 8 S. 985; *Hamilton* v. *Lady Cardross*, 1712, Robertson's App. 37. See review of English authorities, by Lord Atkinson, *Westville Shipping Co.* v. *Abram Steamship Co.*, 1923, S.C. (H.L.) 68, 77.

[7] *Danish Dairy Co.* v. *Gillespie*, 1922, S.C. 656.

[8] *Brown* v. *Gardner*, 1739, M. 5659.

[9] *Gall* v. *Bird*, 1855, 17 D. 1027.

[10] *M'Calman* v. *M'Arthur*, 1864, 2 M. 678.

[11] *Lord Advocate* v. *Wemyss*, 1896, 24 R. 216; revd. 1899, 2 F. (H.L.) 1.

[12] *Fife Bank* v. *Thomson's Trs.*, 1834, 12 S. 260.

[13] *Bell* v. *Lady Ashburton*, 1835, 13 S. 920.

[14] Bell, *Com.*, i. 140, a passage approved by Lord Cowan in *Gall* v. *Bird*, 1855, 17 D. 1027, at p. 1030.

no man is *in dubio* presumed to have an intention of obliging himself."[1] It might be more accurate to say that the acts must be such that no reasonable man could doubt that homologation was intended. The absence of any modern case in which it has been held that a fraudulent party could maintain the contract on the ground of homologation suggests that, while it may be comparatively easy to presume that a man has made up his mind not to take advantage of an accidental want of authentication in a deed, it can rarely be supposed that he has decided to submit to being defrauded, unless the circumstances admit of the explanation that he considered the contract, on the whole, beneficial to him.[2]

Homologation and Approbate and Reprobate.—But a distinction may here be suggested. The plea of homologation is wide enough to cover both cases of waiver or acquiescence, where all that is alleged is that the party has recognised the obligation, and cases more properly belonging to the category of approbate and reprobate, where the argument is that the party, having enforced rights which he could derive only from the contract, is barred from afterwards challenging it.[3] In the former case it is submitted that the plea will rarely, if ever, be held relevant in defence to a reduction on the ground of fraud: in the latter it has certainly been held in England that if the party defrauded, after he has notice of the fraud, exercise any right under the contract, he has conclusively elected to regard it as binding.[4] Where the purchaser of a ship in course of construction had intimated that he repudiated the contract on the ground of misrepresentation, his consent to an alteration in the plans on which the ship was to be built, at a time when the validity of his repudiation was still in question, did not amount to homologation or election to affirm the contract.[5]

Adoption.—The term homologation is not properly applicable to the case where it is sought to infer liability on a form of obligation admittedly originally void, on the ground that by his words or conduct the party ostensibly liable has recognised it as binding. There is then nothing to homologate. But a man may adopt an obligation on which he had originally no liability, and in certain cases adoption may be inferred without any express contract to that effect. One case, the ratification or adoption by a principal of his agent's unauthorised contract, has been already considered.[6] Apart from cases of agency, a distinction has been taken between homologation and adoption—the former infers liability from the date when the obligation was originally undertaken, the latter only from the date of adoption.[7] But while this may be the general rule, if an obligation is expressly or impliedly adopted, the question from what date liability is undertaken must be one to be solved on a construction of the adopter's words or acts.

Express adoption is in effect a new contract. Whether it has or has not been completed is a question to which the general rules of contract are applicable.

Adoption from Failure to Repudiate.—Attempts have been made to imply adoption from actings, equivocal words, or mere silence in face of a demand

[1] Ersk. iii. 3, 48.

[2] See opinions in *British Linen Co.* v. *Cowan*, 1906, 8 F. 704; *Leiper* v. *Cochran*, 1822, 1 S. 552.

[3] See the distinction drawn in a case of succession—*Lord Panmure* v. *Crokat*, 1854, 17 D. 85.

[4] *United Shoe Machinery Co.* v. *Brunet* [1909], A.C. 330. Question whether the decision of the Judicial Committee in this case did not carry the doctrine of election to an unreasonable length.

[5] *Westville Shipping Co.* v. *Abram Steamship Co.*, 1922, S.C. 571; affd. 1923, S.C. (H.L.) 68.

[6] *Supra*, p. 143.

[7] Bell, *Prin.*, sec. 27.

for payment. In modern cases, assuming that there was no original obligation, as, for instance, in the case of a forgery, they have usually been unsuccessful. It has been pointed out by Lord Kyllachy that in the earlier history of the law there may be observed a tendency to infer a legal obligation from failure to fulfil the moral duty of warning another that he was in danger of incurring loss by trusting to an apparent obligation which was not really obligatory, a tendency which more recent decisions have corrected.[1] Thus where an illegitimate son made up a title to subjects included in the intestate estate of his father, by special service duly recorded in the Register of Sasines, and sold the subjects to parties who took on the faith of the records, and without notice of any infirmity in the title, it was held that as the title was a mere nullity, analogous to possession obtained by theft, the heir might recover the subjects from the purchasers, and was not barred by the fact that he had known of his rights for several years and taken no steps to assert them.[2] In *Henry* v. *Scott*[3] the tenant of an estate in Shetland, who, according to a local custom, had deposited money with the landlord, sued his son for repayment. The landlord's interest had been that of a liferenter, and the son, though he had succeeded to the estate, did not in any way represent his father, and had taken nothing from him. On the son, therefore, there lay no original liability for the deposit. The pursuer attempted to prove adoption of the debt. For this he relied on a letter by the defender, in reply to a request for payment, which amounted to nothing more than an assurance that the request would receive attention, and to a letter, written in the course of an attempt to recall the defender's sequestration, asking the pursuer not to enforce his claim in the meantime. It was held that there was nothing in either of these letters from which it could be inferred that the defender had undertaken to be responsible for a debt for which he was under no antecedent liability. In *Gillespie* v. *City of Glasgow Bank*,[4] *A.* had, without his knowledge, been assumed as a trustee, and his name had in consequence been registered as a shareholder in a bank in respect of shares held by the trust. The only proof that *A.* had agreed to this was his signature to a mandate to pay dividends to the law agents. The majority of the Court accepted *A.'s* evidence that he had signed this mandate in the belief that it referred to a different trust in which he was a trustee, and held that he had never agreed to become a shareholder, and was not liable as a contributory in the liquidation of the bank.

Forged Bills. It is now settled that where a man's name is forged to a bill, he does not incur any liability merely because he fails to repudiate it as soon as it is brought to his notice.[5] In *Mackenzie* v. *British Linen Co.* the suspension of a charge on a bill, on the ground that the signature of the defender was a forgery, was opposed on the plea of adoption. It was proved that the suspender received, on 14th July, a notice from the holder of the bill that it would mature on the 17th, and that he did not repudiate liability until the 29th. It was not averred that the holder had suffered any prejudice by the delay, and held that the mere failure to repudiate liability did not

[1] *British Linen Co.* v. *Cowan*, 1906, 8 F. 704, at p. 712. Some of the cases on forged bills, referred to in the succeeding paragraph, are examples.

[2] *Mackie* v. *Mackie*, 1896, 34 S.L.R. 34.

[3] 1892, 19 R. 545.

[4] 1879, 6 R. 813. Contrast *Roberts* v. *City of Glasgow Bank*, 1879, 6 R. 805.

[5] *Boyd* v. *Union Bank*, 1854, 17 D. 159; *Mackenzie* v. *British Linen Co.*, 1880, 7 R. 836; revd. 1881, 8 R. (H.L.) 8; *British Linen Co.* v. *Cowan*, 1906, 8 F. 704. *Urquhart* v. *Bank of Scotland* (1872, 9 S.L.R. 508) must be taken to be overruled.

amount to adoption. In *British Linen Co.* v. *Cowan* [1] the defender, whose signature was forged to a bill, had at once repudiated liability. But the particular bill was one of a series, to all of which his name had been forged, and to these his attention had been called by letters from the bank with which they were discounted. Of these letters he had taken no notice, and the bills, as they fell due, had been retired by the forger. It was not proved that the defender had read, or appreciated the effect of, the letters relating to the prior bills. It was held that nothing had been proved from which any liability on the defender could be inferred. The pursuers' case, when analysed, involved the proposition that where a man received a notice which, if read, would have conveyed the information that his name had been forged, he was bound to read it, and warn his correspondent that he repudiated the signature, with a corresponding liability if that duty was not fulfilled. No such duty, it was held, was imposed by law. "I consider it to be the right of every person who receives a letter or other document regarding a matter with which he has no concern to destroy that document at once, and take no further notice of it." [2] There are, however, some decisions to the effect that if failure to intimate the fact of forgery has the result of inducing the holder of a bill to alter his position for the worse, or of allowing the forger to abscond, the party whose name has been forged may incur liability, not properly on the ground of adoption, but on the principle of personal bar.[3] In such cases actual knowledge must be proved. Where it was admitted that the party whose name had been forged (an old lady) was personally unaware of the fact, it was held to be irrelevant to aver that she had asked a nephew to inquire as to a notice which she had received from the Inland Revenue, that he had discovered the forgery, and, in order to screen the forger, had concealed it from his aunt.[4]

Adoption Requires Power to Contract. If the reason why the original contract was null was that one of the parties had no power to enter into it, he cannot make it valid on the principle of adoption, either expressly or by his actings, unless in the meantime the power to enter into the contract has been acquired. So if a corporation or company purports to do something which is *ultra vires*, and therefore null, the mere fact that the obligation is subsequently recognised goes for nothing, if the contractual powers remain the same. "I have never been able to understand how a statutory company can confirm a nullity; and if they could not by direct resolution confirm a nullity, I do not see how that can be done *rebus et factis*. Acquiescence is nothing at all, unless it amounts to confirmation or be equivalent to confirmation, and if it be impossible for a statutory corporation to confirm a nullity by direct resolution, it certainly cannot do so in any other way." [5]

[1] 1906, 8 F. 704.

[2] Per Lord Ardwall (Ordinary) in *British Linen Co.* v. *Cowan*, *supra*, 8 F., at p. 707; approved and adopted by Lord Justice-Clerk Macdonald, at p. 710.

[3] *Maiklem* v. *Walker*, 1833, 12 S. 53; *Findlay* v. *Currie*, 1850, 13 D. 278; *Brown* v. *British Linen Co.*, 1863, 1 M. 793. These cases were reviewed, and, apparently, not disapproved, by Lord Watson in *Mackenzie* v. *British Linen Co.* (8 R. (H.L.), at p. 21). But they seem quite inconsistent with the opinions given in *British Linen Co.* v. *Cowan*, *supra*.

[4] *Muir's Exrs.* v. *Craig's Trs.*, 1913, S.C. 349.

[5] Per Lord President Inglis, *General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282, at p. 294 (company buying its own shares). See also *Stein's Assignees* v. *Brown*, 1831, 5 W. & S. 47, opinion of Lord Chancellor (Brougham).

CHAPTER XXXIII

PACTA ILLICITA

Scope of Chapter. It is proposed to consider, in this chapter, those agreements which the law declines to enforce on the ground either that they are directly forbidden by law; that they are designed to further some illegal purpose; or that they result from some illegal act. The phrase illegal contracts, or *pacta illicita*, is wide enough to cover the cases where it has been held that certain confidential relationships existing between the contracting parties preclude the enforcement of contracts which would be lawful as between parties dealing with each other as strangers. These cases, however, have been considered in a prior chapter.[1] They are, it is conceived, distinguishable from illegal contracts, in respect that the defect in the contract does not consist in any illegality in its content or object, but solely in the relationship of the parties who undertake it. Excluding, therefore, cases where the imperfection of the agreement is due to the relationship of the parties, there remain contracts which are illegal because the law, directly or indirectly, has prohibited or penalised them.

***Pars judicis* to Notice Illegality.** It is probably now established as a general rule, both in Scotland and England, that it is the duty of the Court to take cognisance of the illegality of any claim, even although no plea to that effect is put forward,[2] if the illegality appears on the face of the contract. If it depends on surrounding circumstances it must be pleaded.[3]

Illegality by Statute and at Common Law.—In considering what contracts are illegal, the most convenient distinction is between those contracts which are forbidden by statute and those which are illegal at common law. But a particular contract may be open to objection on both grounds; a practice illegal at common law may be forbidden or penalised by statute.

Statutory Illegality. The numerous statutes which encroach on the general freedom to contract, either by a direct provision that a particular object may not be secured by agreement, or by imposing a penalty on the commission of a particular act, and thereby inferring an illegality in an agreement to commit it, are by no means uniform in their phraseology. An attempt to consider the construction put upon them must be read subject to the general principle that the will of the Legislature, if clearly expressed, must prevail, and is not to be controlled by analogies drawn from decisions on similar provisions in other statutes.[4]

Degrees of Illegality. Illegality in contract admits of degrees. It may range from a statutory prohibition of a particular method of entering into

[1] Chap. XXXI.

[2] *Hamilton* v. *M'Lauchlan*, 1908, 16 S.L.T. 341; *Scott* v. *Brown* [1892], 2 Q.B. 724; *Gedge* v. *Royal Exchange Assurance Corporation* [1900], 2 Q.B. 214; *North-Western Salt Co.* v. *Electrolytic Alkali Co.* [1914], A.C. 461.

[3] *Rawlings* v. *General Trading Co.* [1921], 1 K.B. 635.

[4] See opinion of Lord Dunedin in *Whiteman* v. *Sadler* [1910], A.C. 514, 527

a contract which may be lawfully completed in other ways, at the one end of the scale, to contracts intended to secure the commission of a crime, of some act generally recognised as immoral, or subversive of the interests of the State, at the other. And as the degree of illegality varies, so do the legal results. On the one side are cases where, though a contract cannot be enforced, the incidental rights of parties arising under it may be the subject of action; on the other, cases where a party may be entirely deprived of legal redress on the ground that to give it would involve the recognition of acts of which the law will not take cognisance except to visit them with penalties.

One feature all illegal contracts have in common: they cannot be directly enforced by action. No Court will compel a party to fulfil an agreement which is declared by statute to be void, or decided at common law to be illegal. Nor will the party who refuses to fulfil such a contract be found liable in damages.

Statutory Avoidance.—Illegality resting merely on a statutory avoidance may have no further results. If an act, method of contracting, or particular agreement was at common law unobjectionable, and is subsequently penalised or declared to be void by statute, the statutory avoidance will not be construed as inferring any further consequences. It will not make the contract it affects illegal in the wider sense, so as to induce the Court to deprive the parties engaged in it of any rights against each other enforceable by law. Either party may with impunity refuse to implement a promise which by law is declared to be void, but if the promise is in fact implemented, the Court will take cognisance of rights incidentally arising, and intervene to prevent one party obtaining an advantage at the expense of the other. There is, it has been pointed out, a distinction between agreements which the law will not allow to operate as contracts, and contracts which are contrary to law.[1]

The distinction is illustrated in *Cuthbertson* v. *Lowes*.[2] Statutes intended to secure uniformity of weights and measures contained a provision that agreements with reference to any weight or measure established by local custom, if they did not specify the ratio which that measure bore to imperial standards, should be "void and null."[3] Potatoes had been sold and delivered at the price of £24 per Scotch acre, without mentioning the ratio borne by the Scotch to the imperial acre. In an action for the price the purchaser pleaded that, under the statutes referred to, the contract was null and void, and wholly illegal. It was held that the contract could not be enforced, but that the defender was not entitled to retain possession of the potatoes without accounting to the pursuer for their value as at the date when he took possession of them. The law was explained by Lord President Inglis as follows: "If the defender's contention were well founded, one of the parties would make a large gain at the expense of the other, upon whom the whole loss would fall. The defender seeks to retain the pursuer's potatoes without paying anything for them, on the ground that the Court cannot take cognisance of an agreement which by the statutes is declared to be null and void. I cannot readily yield assent to a proposition which would be productive of a result so inequitable, and I am of opinion that we

[1] See opinion of Lord Halsbury in *Mogul Steamship Co.* v. *Macgregor* [1892], A.C. 25, at p. 39.

[2] 1870, 8 M. 1073.

[3] 5 Geo. IV. c. 74; 5 & 6 Will. IV. c. 63; repealed by Weights and Measures Act, 1878 (41 & 42 Vict. c. 49). See sec. 19 of that Act.

are not constrained to do so. No doubt the Court cannot enforce performance of an illegal contract, and *in turpi causa melior est conditio possidentis*, but there is no turpitude in a man selling his potatoes by the Scotch and not by the imperial acre: and although he cannot sue for implement of such a contract, I know of no authority, in the absence of *turpis causa*, to prevent the pursuer from recovering the market value of the potatoes at the date when they were delivered to the defender."[1]

Though it is conceived that the general rule of the English authorities is that if a contract is declared by statute to be void no claim can be founded on it,[2] principles analogous to those explained in *Cuthbertson* v. *Lowes* have been applied to certain statutes. Thus the Gaming Act, 1845, provides that "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void." It was held that this provision did not render a wager illegal, and that a turf commissioner, employed to make bets, could recover from his employers sums he had expended in paying bets which he had lost, although the parties with whom he had betted could not have enforced payment by action.[3] And even between two principals it was held that though a bet was not recoverable, yet, as there was no illegality to taint subsidiary contracts, an agreement to pay the sum lost, in consideration of the other party allowing time and abstaining from publishing the fact of default in payment, was a valid and enforceable contract.[4]

Again, the Life Assurance Act, 1774 (14 Geo. III. c. 48), prohibits insurance by a party who has no insurable interest, and provides that such insurance, if made, shall be "null and void, to all intents and purposes whatsoever." It has been held that this provision merely makes such insurances void in a question with the company, and that, if the company chose to pay, the rights of competing parties to the sum paid was a question which the Court was entitled and bound to entertain.[5]

Statutory Avoidance of Contract does not Involve *turpis causa*.—On these authorities it is conceived that the general construction of a statute by which a particular contract is declared to be void, in cases where that contract, apart from the Act, would be legal or indifferent, is that it cannot be the foundation of a civil obligation except: (1) where property has passed, or money has been paid, under it; or (2) when the question is between third parties.[6]

Statutory Penalty.—A statute may impose a penalty upon a particular contract, or upon a contract entered into without the observance of statutory conditions or the payment of a statutory duty. If there is no additional provision that the contract shall be void, it is a question of construction whether liability to the penalty is the sole result of disregard of the statutory provisions, or whether, in addition, the avoidance or illegality of the contract is implied.

[1] *Cuthbertson* v. *Lowes*, 1870, 8 M. 1073, 1075.

[2] *In re Monolithic Building Co.* [1915], 1 Ch. 643; *Anderson* v. *Daniel* [1924], 1 K.B. 138.

[3] *Read* v. *Anderson*, 1882, 13 Q.B.D. 779. The law, in England, is altered by the Gaming Act, 1892 (55 Vict. c. 9). As to Scots law, see *infra*, p. 579.

[4] *Hyams* v. *King* [1908], 2 K.B. 696.

[5] *Hadden* v. *Bryden*, 1899, 1 F. 710. And see *London County Reinsurance Co., in re* [1922], 2 Ch. 67, and cases of p.p.i. (policy proof of interest) policies under sec. 4 of the Marine Insurance Act, 1906—*Cheshire* v. *Vaughan* [1920], 3 K.B. 240; *Edwards* v. *Motor Union Insurance Co.* [1922], 2 K.B. 249.

[6] As in *Hadden* v. *Bryden*, *supra*.

While the question is one turning on the terms of the particular statute, and on the nature of the act penalised, there is a general presumption that an Act which imposes a penalty impliedly provides that a contract which would render that penalty exigible is illegal. Apart from revenue cases, and statutes where the penalty provided is the loss of an office or official position, the presumption may probably be regarded as a rule.[1] But in exceptional cases it may be held that the imposition of the penalty is the sole effect of the statute, either because its object is merely the collection of revenue, or because the circumstances are such as to make the avoidance of contracts a penalty greater than the Legislature can be supposed to have intended to inflict. So it was found that a penalty imposed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), sec. 193, on a servant of a local authority, who is concerned or interested in a contract with the authority which he serves, inferred that where one of a firm of engineers was a servant of the local authority, a contract by the firm could not be enforced.[2] On the various statutes by which certain methods of cruive fishings are penalised, it was held that an agreement, whereby the other owners of fishings on a river agreed to permit illegal methods by the owner of a cruive, was void as an unlawful contract.[3]

Loss of Office as Penalty.—Statutory provisions to the effect that if an official shall enter into a particular contract he shall thereby vacate his office have been held not to infer a provision that the contract shall be void as illegal. Thus the Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17), provides (sec. 89) that if a director shall be "either directly or indirectly concerned in any contract with the company . . . the office of such director shall become vacant, and thenceforth he shall cease from voting or acting as a director." In a question as to the validity of a contract for the supply of goods to a company by a firm of which a director was a partner, it was held that the only result of the section was the avoidance of the director's office; the validity of the contract was not affected.[4] A similar construction has been given to the Act of 1594, c. 220, which declares "that it shall not be leisome" for a member of the College of Justice to purchase heritage which is the subject of a pending action, and imposes the penalty of deprivation of office. In spite of the express declaration that such a purchase is unlawful, it is established by the decisions that the statute merely infers deprivation of office, and leaves the validity of the purchase unaffected.[5] Where, however, a member of a public body did work for that body, contrary to a statute which declared that contracts between the body and any of its members should be null and void, should infer a penalty, and also deprivation of office, it was held that he could not recover any payment.[6]

Penalties in Stamp Acts.—If a statute imposes a stamp duty on a particular contract, with a penalty on the party failing to affix the stamp, and it is held that the provision was intended merely for revenue purposes, it will not be

[1] *Brightman* v. *Tate* [1919], 1 K.B. 463; *Anderson* v. *Daniel* [1924], 1 K.B. 138.

[2] *Melliss* v. *Shirley Local Board*, 1885, 16 Q.B.D. 446. But see *Aberdeen Rly. Co.* v. *Blaikie*, *infra*.

[3] *Fullarton* v. *Scot*, 1743, M. 9586.

[4] *Aberdeen Rly. Co.* v. *Blaikie*, 1851, 14 D. 66; revd. (on other grounds) 1854, 1 Macq. 461.

[5] *Home* v. *Earl of Home*, 1713, M. 9502, and preceding cases in Morison, from p. 9495; *Drysdale* v. *Nairne*, 1835, 13 S. 348. The reports give no clue to the reasons for this construction of the Act.

[6] *Deas* v. *Murray*, 1851, 13 D. 1236.

inferred that the contract is illegal and unenforceable.[1] In *Learoyd* v. *Bracken*, decided upon a provision of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), sec. 16, by which a stamp duty was imposed on contract notes sent by stockbrokers to their clients, and a penalty was provided in case of failure, it was held that a stockbroker who sent an unstamped contract note, or did not send one at all, was not precluded from recovering his commission. But any contracts involving smuggling, or entered into between smugglers, are illegal, though the statutes they contravene are purely for revenue purposes.[2]

Contracts Declared Unenforceable. A statute, without declaring a contract illegal, or imposing any penalty, may declare it to be unenforceable. On the construction of such a provision there would seem to be no general rule. The law with regard to contracts by trade unions, under the provisions of the Trade Union Act, 1871, has been already considered.[3] Other cases in Scotland have related to the Tippling Act, 1750 (24 Geo. II. c. 40). That Act provides (sec. 12): "No person shall be entitled unto or maintain any cause, action, or suit for or recover . . . any debt for or on account of any spirituous liquors, unless such debt shall have really been and *bona fide* contracted at one time to the amount of twenty shillings or upwards." The result of this section has been held to be that a sale of liquor on credit, to the amount of less than twenty shillings at one time, is a *pactum illicitum*, which cannot be enforced in any way, or regarded as a source of right in any action. Thus in *Maitland* v. *Rattray*[4] it was held that a bill given for such supplies could not be enforced, in a question between the original parties; and the majority of the Court were of opinion that indefinite payments could not be ascribed to a debt struck at by the Act.[5] In *Macpherson* v. *Jamieson*[6] a grocer's account would have fallen under the triennial prescription, were it not for the last items, which were for supplies within the three years. They were, however, entries for the supply of spirits for less than twenty shillings at a time. It was laid down that the Tippling Act did not merely cut off the right of action for such furnishings, but rendered them positively illegal, and held that the account must be looked at as if the last items had not been there.

But in England a different construction has been placed on a statute expressed in terms very similar. The Solicitors Act, 1843, provides (sec. 26) that no solicitor who has not taken out a certificate shall "be capable of maintaining any action or suit at law or in equity" for his account. It was held that the provision merely deprived the solicitor of the right of direct action, but did not extinguish the debt, on which, therefore, he was entitled to maintain a plea of compensation.[7] And the Registration of Business Names Act, 1916 (6 & 7 Geo. V. c. 58) provides that certain firms must furnish specified particulars to the Registrar, imposes a penalty for failure, and enacts (sec. 8) "When any firm or person by this Act required to furnish a statement of particulars . . . shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made

[1] *Johnson* v. *Hudson*, 1809, 11 East, 180; *Learoyd* v. *Bracken* [1894], 1 Q.B. 114. The law has been altered, and the commission is now irrecoverable if a stamped contract note be not sent (Stamp Act, 1891, sec. 53; Revenue Act, 1898, sec. 7 (1)).

[2] *Infra*, p. 567. [3] *Supra*, p. 121. [4] 1848, 11 D. 71.

[5] This had been decided in *Johnston* v. *Law*, 1843, 5 D. 1372. The Act does not apply to liquor supplied to a guest in a hotel (*Guthrie's Trs.* v. *Ireland*, 1891, 18 R. 833).

[6] 1901, 4 F. 218.

[7] *In re Jones*, 1869, L.R. 9 Eq. 63. Cp. *Seymour* v. *Pickett* [1905], 1 K.B. 715 (Dentists Act, 1878).

or entered into by or on behalf of such defaulter in relation to the business, in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be recoverable by action or other legal proceeding either in the business name or otherwise." In *David* v. *Rogers*,[1] *A.*, who was a "defaulter" under sec. 8, had purchased *B.'s* business and stock-in-trade, and had taken possession. Creditors of *B.* attached the goods in question, founding their right on the ground that *A.'s* title was invalid under the Act. It was held that in a question with the creditors *A.'s* common law title involved in possession was sufficient, and opinions were given that the Act did not render the contract between *A.* and *B.* void, and that, in any event, the Act applied only in questions between the original parties to the contract in question, and did not affect the rights of the defaulter in a question with third parties.

Statutes Regulating Trades. A number of statutes deal with the methods by which particular trades or professions may be carried on, and contain provisions respecting the qualifications required from parties so engaged, requiring the registration of practitioners, and imposing statutory obligations on the practitioner or trader.[2] When there is no definite provision that contracts by parties who have not complied with the statute shall or shall not[3] be illegal or void, it is a question of construction, on which the decisions form but an indefinite guide, whether illegality and avoidance of contracts is implied.

Prohibition of Unqualified Person. —If the form of the statutory regulations amounts to a direct prohibition of the conduct of a particular business by a party who has not complied with them, it follows that his contracts are void. A statutory provision that certain conditions must be fulfilled by *A.* before he can carry on a particular trade amounts to a provision that contracts made by *A.* before such compliance are illegal acts.[4] Any speculation as to the intention of the statute—to secure the revenue, or to protect the public from unqualified persons—would seem to be out of place in cases where its language amounts to a direct prohibition.[5]

Penalty on Unqualified Person.—If, however, the terms of the statute are that parties engaging in a particular occupation without observing the statutory conditions or regulations shall incur a penalty, it does not necessarily follow that all contracts made by such parties are illegal. It is a question of the intention of the Legislature. That may have been simply to secure revenue, from licences to carry on a trade, or from penalties recovered for breach of statutory regulations, or it may have been to prevent unqualified or unregistered persons from carrying on that occupation. If the

[1] *David* v. *Rogers* [1918], 2 K.B. 228.

[2] *E.g.*, law agents, *infra*, p. 555; moneylenders—Moneylenders Acts, 1900 and 1927 (63 & 64 Vict. c. 51; 17 & 18 Geo. V. c. 21); doctors—Medical Acts, 1858 to 1886 (21 & 22 Vict. c. 90; 22 Vict. c. 21; 23 & 24 Vict. c. 7; 39 & 40 Vict. cc. 40 and 41; 49 & 50 Vict. c. 48); dentists—Dentists Act, 1878 (41 & 42 Vict. c. 33); pawnbrokers—Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93); publicans—Licensing (Scotland) Act, 1903 (3 Edw. VII. c. 25).

[3] The Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), provides regulations for the conduct of pawnbroking, but with a special provision (sec. 51) that contracts are not to be void for failure to observe them, except in the case of the regulations relating to licences. Under a statute now repealed (39 & 40 Geo. III. c. 99) it was held that the non-observance of its regulations made all the pawnbroker's contracts illegal. So a secret partnership in a pawnbroking business, involving non-observance of the regulation that the name of the pawnbroker must appear above the door, was held to be a *pactum illicitum*, on which one partner could not sue the other (*Gordon* v. *Howden*, 1843, 5 D. 698; revd. 1845, 4 Bell's App. 254).

[4] *Cope* v. *Rowlands*, 1836, 2 M. & W. 149; *Melliss* v. *Shirley Local Board*, 1885, 16 Q.B.D. 446; *Whiteman* v. *Sadler* [1910], A.C. 514; *Brightman* v. *Tate* [1919], 1 K.B. 463.

[5] *Smith* v. *Mawhood*, 1845, 14 M. & W. 452; see opinion of Alderson, B., at p. 464.

former construction is placed on the statute, it does not infer any illegality in a contract by a party who has not taken out a licence, or has not observed the regulations. Thus where an Excise Act (6 Geo. IV. c. 81) provided that a party who carried on the business of a dealer in tobacco without obtaining a licence and without having his name legibly painted on the door should incur a penalty, it was held that these provisions were intended for revenue purposes, and did not infer that a party who had sold tobacco without complying with them could not recover the price.[1] If, on the other hand, it is held (and it is conceived that this is the normal construction) that the statute was intended to be prohibitive, there arises the further question whether it was designed that the penalty should be the sufficient and sole deterrent, or whether the further penalty of avoidance of contracts was implied.[2] It cannot be laid down as an absolute rule that because a party has incurred a penalty by failure to observe the statutory conditions of his business he has therefore lost the right to enforce the contracts he has made in the course of that business.[3] But if it is clear that the object of the statute is to protect the public from the danger of fraud or imposition by parties who have not complied with the statutory conditions, it will be held that a penalty involves the avoidance of contracts by a party who has incurred it. This was held with regard to a statute to secure the regulation of brokers,[4] and to a provision penalising the selling of coal without delivering a ticket to the purchaser.[5] In both cases it was decided that the objects of the statute were the prevention of fraud and the protection of the public. And under the former Act regulating the business of pawnbroking, whereby it was provided that all and every person or persons carrying on that business should have his or their names, with the word "pawnbroker," legibly on the door, and the statute referred to its object "for the better manifesting by whom the trade or business of a pawnbroker shall hereafter be carried on," it was held in the House of Lords that this provision inferred a general illegality in cases where it was not observed, and therefore that a secret partnership in pawnbroking was illegal.[6]

Without attempting to frame a list of the contracts, or contractual relations, which have been made void or penal by statute,[7] a few of the more important cases may be considered.

Law Agents' Certificates.—Since 1785 it has been the law that every person practising as a law agent must take out an annual certificate.[8] Failure to do so involves pecuniary penalties and a disability to sue for or otherwise recover his account. The existing statutory provisions on the subject are to be found in the Stamp Act, 1891 (54 & 55 Vict. c. 39), sec. 43,

[1] *Smith* v. *Mawhood*, 1845, 14 M. & W. 452.

[2] See, as bearing on the question, opinions in *Institute of Patent Agents* v. *Lockwood* (1894, 21 R. (H.L.) 61), where the question was whether a statutory penalty imposed on an unregistered patent agent implied that he might be interdicted from carrying on business. It was held that the statute intended the penalty as an adequate deterrent.

[3] See opinion of Lord Dunedin in *Whiteman* v. *Sadler* [1910], A.C. 514, at p. 527. Lord Mersey pointed out that it was a strong argument against inferring any general illegality from the imposition of a penalty that the penalty might be incurred through mere inadvertence.

[4] *Cope* v. *Rowlands*, 1836, 2 M. & W. 149 (6 Anne, c. 16).

[5] *Cundell* v. *Dawson*, 1847, 4 C.B. 376 (1 & 2 Vict. c. 101).

[6] *Gordon* v. *Howden*, 1843, 5 D. 698; revd. 1845, 4 Bell's App. 254.

[7] In the earlier editions of Pollock on *Contract* such a list is attempted (Appendix, note G). In the latest edition it is omitted.

[8] For earlier statutes, see Begg, *Law Agents*, 2nd ed., 49.

and the Law Agents and Notaries Public (Scotland) Act, 1891 (54 & 55 Vict. c. 30), sec. 3.[1]

Under these statutes a law agent who has not taken out a certificate cannot recover his account from his client, nor, in the event of an action being successful, is he entitled to decree for expenses in his own name.[2] But the objection must be taken timeously. So where decree had been allowed to go out in the name of the agent, it was held that it was not competent to maintain, as a ground for suspension of a charge on the decree, that the agent had not a certificate.[3] And if a law agent makes a claim in a sequestration, and agrees to a composition by which he is ranked for a dividend on his claim, the debtor and his cautioners are barred from taking the objection of the want of a certificate.[4]

It is not clear whether the statutory provisions go further than to deprive the agent of his right to sue. In England, on analogous provisions, it was held that the employment of a solicitor who had not a certificate created a debt, though a debt for which no action would lie: and therefore that the solicitor, being indebted to his client on another account, could maintain a plea of compensation.[5] But in *A. B.* v. *C. D.*[6] the Lord Ordinary held that a partnership in a law agent's business between a qualified and an unqualified person was illegal both at common law and under sec. 43 of the Stamp Act, 1891 (quoted *supra*), with the result that one partner was not entitled to call on the other for an accounting of the profits of the business. This would seem to proceed on the ground that practice by an unqualified law agent is an illegal act, on which no claim can be founded.

As the Law Agents Act, 1891, sec. 3 (quoted *supra*), provides that the costs, etc., of proceedings by a law agent who is not duly qualified shall not be recoverable "by any person or persons whomsoever," it was held that the client was not entitled to decree for expenses which had been found due in an action in which he was represented by a law agent who had not taken out his certificate, and who, therefore, was not "duly qualified" within the meaning of the section.[7]

Truck Acts.—The Truck Acts, 1831 to 1896,[8] make provisions to secure the payment of wages in current coin, and the freedom of workmen to spend their wages as they choose. The Truck Act, 1831, declares "illegal, null, and void" any contract for the employment of any artificer in which provision is made for payment other than in current coin;[9] any contract between

[1] The former section enacts: "Every person who in any part of the United Kingdom—(*a*) directly or indirectly acts or practises as a . . . law agent in any Court, or as a notary public, without having in force at the time a duly stamped certificate . . . shall incur a fine of fifty pounds, and shall be incapable of maintaining any action or suit for the recovery of any fee, reward, or disbursement on account of, or in relation to, any act or proceeding done or taken by him in any such capacity." The latter section: "No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as a law agent or as a notary public without being duly qualified so to act, or who, not being so qualified, gives legal advice, or frames or draws any deed, shall be recoverable in any action, suit, or matter by any person or persons whomsoever."

[2] *Ewing* v. *Wallace*, 1832, 6 W. & S. 222.

[3] *Ewing* v. *Wallace*, *supra*.

[4] *Gemmell's Exrs.* v. *Moon*, 1838, 16 S. 505.

[5] *In re Jones*, 1869, L.R. 9 Eq. 63.

[6] 1912, 1 S.L.T. 44 (O.H., Lord Skerrington). For circumstances not inferring partnership, see *Rutherford* v. *Thyne*, 1907, S.C. 84.

[7] *Innes* v. *Macdonald*, 1899, 2 F. 6.

[8] Truck Acts, 1831 (1 & 2 Will. IV. c. 37); 1887 (50 & 51 Vict. c. 46); 1896 (59 & 60 Vict. c. 44).

[9] Sec. 1. By sec. 8 bank notes or drafts are allowed on certain conditions. By the Currency and Bank Notes Act, 1928 (18 & 19 Geo. V. c. 13), sec. 1 (5) Bank of England notes for one pound or ten shillings are allowed. The word "artificer" is defined, by sec. 2 of the Truck Act, 1887, as including any workman as defined by sec. 10 of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90).

artificer and employer making any provision, directly or indirectly, respecting the place where, the manner in which, or the persons with whom, the wages of the artificer shall be laid out or expended ;[1] and any payment made to such artificer, in respect of his wages, by the delivery to him of goods, or otherwise than in current coin.[2] It also precludes action for any goods supplied by the employer, or by a shop in which he is interested, on account of wages.[3] The Truck Amendment Act, 1887, provides that no employer shall, directly or indirectly, by himself or his agent, impose as a condition, express or implied, in or for the employment of any workman, any terms as to the place at which, or the manner in which, or the person with whom, any wages paid to the workman are to be expended.[4] Penalties are imposed on any employer contravening these provisions.

By sec. 23 of the Truck Act, 1831, it is made lawful for an employer to supply certain benefits to a workman, and in respect thereof make deductions from his wages, provided that the agreement for such deduction shall be in writing, and signed by the workman.[5] These excepted benefits are—rent, medicine or medical attendance, fuel, materials, tools or implements to be used by the workman in his trade or occupation, provender for a horse or other beast of burden employed by the artificer in his trade or occupation, or victuals dressed or prepared under the roof of any such employer, and there consumed by the artificer, or for money advanced to the artificer for any such purpose. And by the Act of 1887 it is provided that nothing in the prior Act shall render illegal a contract (which does not require to be in writing) with a servant in husbandry for giving him food, drink, not being intoxicating, a cottage, or other allowances or privileges in addition to money wages as a remuneration for his services.[6] The Truck Act, 1896,[7] permits, under specified conditions, deductions from wages in respect of fines or of payment for damaged goods. It is also conditionally permissible, to deduct payment for "the use or supply of materials, tools or machines, standing room, light, heat, or for or in respect of any other thing to be done or provided by the employer in relation to the work or labour of the workman." The question has been raised, but not decided, whether this provision is wide enough to cover deductions from wages made in respect of a pass for a workmen's train.[8]

An artificer is entitled to recover so much of his wages as have not been paid to him in current coin, or deducted from his wages in accordance with the provisions above stated.[9] And the construction of the Acts have been that they prohibit any deduction from wages except for the purposes expressly authorised.[10] Thus, where by a written agreement a house was let by an employer to his workman, with a provision binding the workman to quit the house on leaving the employment, or otherwise to pay, as rent, 1s.

[1] Sec. 2. It is immaterial that the employer is not interested in the shop (*Finlayson* v. *Braidbar Quarry Co.*, 1864, 2 M. 1297). The legality of a provision whereby workmen are precluded from dealing with a particular store was raised, but not decided, in *Gray* v. *MacKenna* (1899, 1 F. (J.C.) 65).

[2] Sec. 3. [3] Sec. 6. [4] Sec. 6.

[5] In *Hynd* v. *Spowart & Co.* (1884, 22 S.L.R. 702) it was held that the agreement must be an agreement for the future, and that pay-tickets, stating the fact of deduction, and signed by the workman, did not satisfy the requirements of the Act. See also *M'Lucas* v. *Campbell*, 1892, 30 S.L.R. 226.

[6] Truck Act, 1887, sec. 4. [7] 59 & 60 Vict. c. 44.

[8] *St Helens Colliery* v. *Hewitson* [1924], A.C. 59.

[9] Truck Act, 1831, sec. 4.

[10] *Williams* v. *North's Navigation Collieries* [1906], A.C. 136, followed in *Summerlee Iron Co.* v. *Thomson*, 1913, S.C. (J.) 34.

per day, with a right to the employer to deduct these payments from wages, and to retain any wages due until he was paid, it was held that as the stipulated payment of 1s. a day was not rent, but liquidate damages for breach of the workman's obligation to quit the house, its enforcement constituted an offence against the Act.[1] And the same result was arrived at where the workman signed a contract "In the event of my leaving your employment, I authorise you to retain whatever moneys are in your hands until I remove from your house."[2] And the employer who has obtained decree in an action of damages against the workman for breach of contract cannot legally deduct the damages from wages, though it was observed that if he refused to pay the wages, and was sued by the workman, the damages might be set off as a counter-claim.[3]

In *Hewlett* v. *Allen*[4] it was held that where an employer had made a deduction from wages for a purpose not allowed by the Truck Acts (sickness insurance), and the wages had been regularly received without objection, any civil remedy of the workman was barred by his acquiescence.

Insurable Interest. Since 1746, in the case of the Marine Insurance,[5] since 1774, in the case of insurance other than marine, it has been the statutory law that a policy effected by a person who has no insurable interest in the matter at risk is an illegal contract.

Life Assurance Act, 1774.—The Life Assurance Act, 1774,[6] provides (sec. 1): "No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever,[7] wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering, and every assurance, made contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes whatsoever." By sec. 2 the name of the person interested in the policy must be inserted; by sec. 3 no greater sum can be recovered than the amount or value of the interest of the assured.

This Act makes a policy effected by one who has no insurable interest void and illegal, so that it has been held that it is *pars judicis* to take the objection (in an action for payment of the policy), even if the insurance company do not choose to do so.[8] And the party who has effected the policy in the belief that he had an interest is not entitled to recover the premium on discovering that he had not, even if his belief on the subject

[1] *M'Farlane* v. *Birrell*, 1888, 16 R. (J.C.) 28.

[2] *Summerlee Iron Co.* v. *Thomson*, 1913, S.C. (J.) 34.

[3] *Williams* v. *North's Navigation Collieries* [1906], A.C. 136. It was questioned, but not decided, whether a general agreement to conform to the employer's rules and regulations, involving, but not expressing, an agreement for illegal deductions from wages, amounted to a contravention of the Acts.

[4] *Hewlett* v. *Allen* [1894], A.C. 383.

[5] 19 Geo. II. c. 37, repealed by the Marine Insurance Act, 1906, by which marine policies without an insurable interest are declared void. By the Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. VII. c. 12), penalties are imposed on insurer and underwriter.

[6] 14 Geo. III. c. 48. The Act does not apply to insurances on "ships, goods, or merchandises" (sec. 4).

[7] These words are wide enough to cover fire insurance (Bell, *Com.*, i. 627). But it would seem that the Act does not apply to contracts which may be in substance contracts of insurance, but are not so in form, *e.g.*, an agreement to pay to a person who used a certain remedy and yet caught a disease (*Carlill* v. *Carbolic Smoke-Ball Co.* [1893], 1 Q.B. 256).

[8] *Gedge* v. *Royal Exchange Assurance Corporation* [1900], 2 Q.B. 214. An Outer House decision—*Turnbull* v. *Scottish Provident Association*, 1896, 34 S.L.R. 146—to the effect that if the insurance company has admitted the sufficiency of the interest it cannot afterwards be disputed, seems to be in conflict with the principles regulating the interpretation of statutory avoidance of contract.

had been induced by the representation, mistaken but not fraudulent, of an agent for the company that his interest was sufficient.[1] The general rule was applied that money paid for an illegal purpose could not be recovered, but it was observed, and subsequently decided,[2] that fraud on the part of the agent would alter the case, as the parties would then no longer be *in pari delicto*.[3] But the illegality only extends to an action on the policy; it does not taint the whole transaction. So if the insurance company choose to pay, the question, who has the right to the money, is one which the Court is bound to entertain.[4]

It is now settled that a policy of life insurance is not a contract of indemnity, as marine and fire policies are, but an undertaking to pay on the occurrence of a certain event. Therefore if the insured had an insurable interest at the time when the policy was taken out, it is not avoided by the cesser of that interest.[5] So a policy on the life of a debtor may be kept up after the debt has been paid.[6]

As mentioned above, sec. 3 of the Life Assurance Act, 1774, provides that no more can be recovered than the amount of the interest. But a person has an interest in his own life, on which no pecuniary limit can be placed; and he may assign the policy, though the assignees have no insurable interest.[7] But a policy effected by *A.* on his own life, when it is at once assigned to *B.*, by whom all the premiums are paid, may be void as an evasion of the Act. So where, in pursuance of a previous arrangement carried out by an insurance broker, a party who had no means took out a policy on his own life, and assigned it to one who had no insurable interest, and all the premiums were paid by him, it was held that it could not be enforced on the death of the "life," nor could the premiums be recovered.[8]

The general rule is, that to give an insurable interest on the life of another, there must be some pecuniary interest, not mere relationship. But it has been assumed to be the law in Scotland,[9] and decided in England,[10] that husband and wife have each an interest in each other's life which will support a policy to any amount. It would seem doubtful whether parents have an insurable interest in the lives of their children.[11]

[1] *Harse* v. *Pearl Life Co.* [1904], 1 K.B. 558; *Phillips* v. *Royal London, etc., Insurance Co.*, 1911, 105, L.T. 136.

[2] *Hughes* v. *Liverpool Friendly Society* [1916], 2 K.B. 483.

[3] *British Workmen's, etc., Co.* v. *Cunliffe*, 1902, 18 T.L.R. 502; as explained in *Harse* v. *Pearl Life Co., supra.*

[4] *Hadden* v. *Bryden*, 1899, 1 F. 710. See also *Dalgleish* v. *Buchanan*, 1854, 16 D. 332; *Stevenson* v. *Cotton*, 1846, 8 D. 872.

[5] *Dalby* v. *India and London Assurance Co.*, 1854, 15 C.B. 365; 2 Smith, *L.C.*, 12th ed., 241; *Turnbull* v. *Scottish Provident Institution*, 1896, 34 S.L.R. 146.

[6] *Turnbull, supra.*

[7] Bell, *Prin.*, sec. 520.

[8] *Macdonald* v. *National, etc., Association of Australasia*, 1906, 14 S.L.T. 173, 249; *Shilling* v. *Accidental Death Insurance Co.*, 1858, 1 F. & F. 116.

[9] *Wight* v. *Brown*, 1849, 11 D. 459. And see Married Women's Policies of Assurance (Scotland) Act, 1880 (43 & 44 Vict. c. 26), sec. 1.

[10] *Griffiths* v. *Fleming* [1909], 1 K.B. 805.

[11] It is decided in the negative in England—*Halford* v. *Kymer*, 1830, 10 Barn. & Cr. 724 (son); *Harse* v. *Pearl Life Co.* [1904], 1 K.B. 558 (mother). But in Scotland Lords Dundas and Guthrie were of opinion that a father had an insurable interest in the life of his son, though Lord Salvesen's opinion was to the opposite effect. The point was not considered in the House of Lords. *Carmichael* v. *Carmichael's Exrx.*, 1919, S.C. 636; revd. 1920, S.C. (H.L. 195. Insurance on the lives of children, in cases where there is no insurable interest, is competent, under statutory conditions, under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), secs. 62-67. By the Assurance Companies Act, 1909 (9 Edw. VII. c. 49) provision is made for insurance to cover the funeral expenses of a parent, grandparent, grandchild, brother, or sister. See *Tofts* v. *Pearl Life Assurance Co.* [1915], 1 K.B. 189.

A pecuniary interest in the life of another, *i.e.*, a loss, actual or possible, in the event of that other's death, will amount to an insurable interest. But the pecuniary interest at stake must be enforceable. A mere expectation, such as the hope of succeeding as heir to a relative, however probable the realisation of that expectation may be, will not support an insurance of that relative's life.[1] And where *A.* had borrowed money from *B.*, and *B.* had undertaken not to demand payment during his lifetime, it was held that as *B.'s* promise (according to English law) was not binding, it gave *A.* no insurable interest on his life.[2]

A contract giving *A.* an expectation of advantage from the continuance of *B.'s* life will suffice as an insurable interest. Thus a servant who is engaged for a definite term may insure the life of his employer to the amount of the salary he would earn if the term were duly completed.[3] And an employer has been held to have the right to insure the life of his agent, on proof that he obtained business through the agent's introduction, and without any limit on amount other than that fixed by the policy.[4] In *Barnes* v. *London, Edinburgh, and Glasgow Insurance Co.*[5] it was held that a woman who had undertaken to maintain and educate a child had a sufficient interest to support a policy on the child's life, in respect of the claim for reimbursement which she would have against the child. But this decision has been doubted ;[6] and by the Children's Act, 1908 (8 Edw. VII. c. 67, sec. 6), a policy on the life of a child by a party by whom the child is kept for reward is expressly declared to be illegal, and subjects the party taking the policy, and the company issuing it, to penalties.

A creditor has an insurable interest in the life of his debtor, in respect that repayment may wholly or partly depend upon the debtor's survivance. The interest is limited to the amount of the debt ;[7] and so, if it is covered by more than one policy, with the same or with different insurers, payment on one policy precludes action on the others.[8] Subject to the same limitation, a cautioner has an insurable interest in the life of the principal debtor.[9] And partners have insurable interest in each other's lives.[10]

Illegality at Common Law.—Apart from statute, a contract may be illegal at common law because its objects are the furtherance of a criminal, fraudulent, or immoral act, or an act contrary to public policy. While it may in all cases be said that contracts morally reprobable are forbidden because they are contrary to public policy, a general distinction may be drawn between those cases where the element of crime, fraud, or immoral conduct is in evidence, and those where the objection to the contract is based on political or economical grounds. Gaming contracts, in Scots law, form a class by themselves, and must be considered separately.

Crime.—It is probably safe to lay down as a general rule that a contract to commit an act which is indictable as a crime is a *pactum illicitum*, involving

[1] *Lucena* v. *Craufurd*, 1808, 6 R.R. 623, per Lord Eldon.
[2] *Hebdon* v. *West*, 1863, 3 B. & S. 579.
[3] *Hebdon* v. *West*, *supra*.
[4] *Turnbull* v. *Scottish Provident Institution*, 1896, 34 S.L.R. 146.
[5] [1892], 1 Q.B. 864.
[6] Per Kennedy, L.J., in *Griffiths* v. *Fleming* [1909], 1 K.B. 805, at p. 819.
[7] *Lindsay* v. *Barmcotte*, 1851, 13 D. 718.
[8] *Hebdon* v. *West*, 1863, 3 B. & S. 579 ; *Simcock* v. *Scottish Imperial Insurance Co.*, 1902, 10 S.L.T. 286.
[9] *Stevenson* v. *Cotton*, 1846, 8 D. 872.
[10] Bunyon, *Life Insurance*, 5th ed., 23, citing an unreported case and American authority.

the consequence that the Court will not only refuse to enforce it, but will take no cognisance of the rights of parties under it.[1]

Fraud. An agreement to defraud a third party is an unlawful contract, on which no action can be based. In *Laughland* v. *Millar, Laughland & Co.*[2] the sale of a company's business had resulted in a surplus. *A.*, who was the manager of the company, arranged with *B.*, who was one of the directors, that if £700 were voted to him (*A.*) as a bonus, he would pay £200 to *B.* At a meeting of the directors, on *B.'s* motion, the bonus of £700 was voted, and duly paid. In an action by *B.* for £200 it was held that the agreement amounted to a conspiracy to defraud the shareholders of the company, from which no right could arise of which the Courts could take cognisance. So an agreement by one party to a contract to pay a secret commission to the agent of the other is a *pactum illicitum*, and was held to be unenforceable in cases arising before the Prevention of Corruption Act, 1906 (6 Edw. VII. c. 34), came into operation, and irrespective of the question whether the agent's conduct was influenced by the bribe or not.[3] In *Henderson* v. *Caldwell*[4] a business was sold for £1,200, which was paid. The seller sued for £200, averring that the price agreed upon was really £1,400, but that £1,200 had been named because a third party had promised financial assistance to the buyer if he got the business for that sum. The action was dismissed as irrelevant, on the ground that the seller's averments, assuming their truth, were averments of a plot to defraud a third party, on which he could not in any way found. Where *A.* agreed to buy two horses if they were passed as sound by a veterinary surgeon, and the seller made a secret payment to the surgeon, it was held that he could not found on the surgeon's certificate as excluding *A.'s* contention that the horses were in fact unsound, and that he was entitled to reject them.[5] And where several parties entered into a scheme to make a market for shares by bogus dealings on the Stock Exchange, it was held that, as their conduct amounted to an indictable conspiracy, one of them could not maintain an action founded on allegations that he had been defrauded by the others.[6]

Breach of Trust. From the opinions in the Court of Session in a recent case it would appear that if a contract refers to the actings of one of the parties in a position of trust, and offers inducements to him to misuse that position, it is an illegal contract on which no action can be taken, though no actual breach of trust may have been committed.[7] In a contract by which a firm of auctioneers engaged a manager it was provided that the manager, though engaged for his whole time, should be at liberty to act as trustee under private trust deeds for creditors, that his fees in that capacity should be pooled with fees earned by the firm for valuations of the bankrupt assets, and divided, subject to the deduction of the balance of any debt due to the firm by the bankrupt estate. It was held that the contract was illegal, and that the firm was not entitled to decree in an action of accounting for

[1] *Macdougall* v. *Bremner*, 1907, 15 S.L.T. 193. See unreported case of an action by one highwayman against another in Pollock, *Contract*, 9th ed., p. 340. In Evans' translation of *Pothier* (vol. ii., p. 3) the author states that he is satisfied, from an examination of the records, that there was no such case. Compare cases of trade name based on fraudulent advertisement —*Bile Beans Co.* v. *Davidson*, 1906, 8 F. 1181; *Plotzker* v. *Lucas*, 1907, 15 S.L.T. 186.

[2] 1904, 6 F. 413.

[3] *Macdougall* v. *Bremner*, 1907, 15 S.L.T. 193; *Harrington* v. *Victoria Graving Dock Co.*, 1878, 3 Q.B.D. 549.

[4] 1890, 28 S.L.R. 16.

[5] *Shipway* v. *Broadwood* [1899], 1 Q.B. 369.

[6] *Scott* v. *Brown* [1892], 2 Q.B. 724.

[7] *Farmers' Mart Ltd.* v. *Milne*, 1914, S.C. 129; affd. 1914, S.C. (H.L.) 84.

fees which the manager refused to contribute. The illegality was determined on the ground that the contract offered an inducement to the manager, when acting as trustee, to employ the firm as valuators, and to rank them as creditors for more than they were justly entitled to. In the House of Lords, however, this judgment was affirmed on the separate ground that the contract was in conflict with the principle illustrated in the next paragraph, that all creditors must share equally in the distribution of a bankrupt estate.[1]

Bankruptcy Offences. -Contracts which conflict with the rule that all creditors should share equally in any process of distribution of a bankrupt's estate are illegal, on the ground that they amount to a fraud upon the other creditors. Thus an agreement between a bankrupt and a particular creditor, by which the creditor stipulates for a payment or security, in consideration of his accession to a composition, is illegal.[2] And an agreement by a friend of the bankrupt, without his knowledge, to make a payment to a creditor in order to induce him to withdraw his claim to a preferential ranking, was held to be illegal and unenforceable.[3]

A security for prior debts, or other arrangement by which a creditor obtains a preference which is challengeable in bankruptcy, is not void or illegal, only voidable at the instance of other creditors or of the trustee in sequestration. So where it was a condition in such a transaction, to which several creditors were parties, that none of them should use independent diligence, it was decided that this condition was binding, and precluded diligence by a creditor who was a party to it.[4]

Illicit Intercourse.—A contract having as its object the furtherance of illicit sexual intercourse is illegal. Thus a bond granted to a woman to induce her to submit to intercourse, or to reward her for having submitted, cannot be enforced.[5] Where a bill was given to induce a man to take back his divorced wife—there being no provision that he should remarry her, and the agreement being in effect that he should live with her as his mistress—opinions were given that this consideration amounted to *turpis causa*.[6] And neither a bond nor a legacy given or promised as the price of continued illicit intercourse can be enforced.[7] On the other hand, there is no legal objection to a provision made for the woman after the illicit intercourse has ceased.[8] And the fact that *A.* and *B.* were living, and continued to live, in adultery, was held not to invalidate a mutual will, so as to deprive a third party of a benefit under it.[9]

[1] It is hard to see, on the assumption that the manager acted honestly in the position of trustee in bankruptcy, how the other creditors were in any way injured by the manner in which the trustee disposed of his fees—a fund in which, under no circumstances, could they have any right to share. The observations on *Farmers' Mart* v. *Milne* in *Munro* v. *Rothfield* (1920, S.C. (H.L.) 165) do not seem to remove the difficulty.

[2] *Riddell* v. *Christie*, 1821, 1 S. 151; *Arrol* v. *Montgomery*, 1826, 4 S. 499; *Robertson* v. *Ainslie's Trs.*, 1837, 15 S. 1299; *Macfarlane* v. *Nicoll*, 1864, 3 M. 237; *Farmers' Mart Ltd.* v. *Milne*, *supra*. See also Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), sec. 150. *Pendreigh's Tr.* v. *M'Laren*, 1871, 9 M. (H.L.) 49; *Thomas* v. *Sandeman*, 1872, 11 M. 81. As to the argument that creditor and bankrupt are not *in pari delicto*, see *infra*, p. 587.

[3] *Thomas* v. *Waddell*, 1869, 7 M. 558.

[4] *Munro* v. *Rothfield*, 1920, S.C. 118; affd. 1920, S.C. (H.L.) 165. Contrast *Bankruptcy Notice, in re* [1924], 2 Ch. 76, where there was a statutory avoidance.

[5] Bell, *Prin.*, sec. 37; *Hamilton* v. *Main*, 1823, 2 S. 356.

[6] *Graham* v. *Kennedy*, 1860, 22 D. 560.

[7] *Johnstone* v. *M'Kenzie's Exr.*, 1835, 14 S. 106 (legacy); *Hamilton* v. *De Gares*, 1765, M. 9471 (bonds to a woman with whom granter was living in adultery, and to her daughter, the former reduced, the latter sustained).

[8] *Duke of Hamilton* v. *Waring*, 21st May 1816, F.C.; revd., on another ground, 1820, 2 Bligh, 196; 6 Paton, 644; *Webster* v. *Webster's Tr.*, 1886, 14 R. 90.

[9] *Young* v. *Johnston & Wright*, 1880, 7 R. 760. Cp. *M'Kechnie* v. *M'Kechnie's Trs.*, 1908, S.C. 93 (will induced by influence of mistress).

Freedom of Marriage. Certain contracts interfering with the liberty of marriage, or with marital relations, are illegal. Thus obligations granted in consideration of bringing about a marriage are regarded as *contra bonos mores*, and cannot be enforced.[1] A promise to marry, given by a married man to a woman who was aware that he had a wife, was held to be void as contrary to public policy, and would not support an action for damages for failure to implement the promise after the wife's death.[2] It is laid down in Bell's *Principles* (sec. 39) that an obligation not to marry, or not to marry a particular person, is void. But this would seem to be doubtful. Thus where a father undertook to pay £1,000 to his daughter on her marriage, it was held that a condition of avoidance in the event of her marrying without his consent was effectual.[3] A legacy may be made conditional on the legatee not marrying a particular person, or one of a particular class.[4] There is no legal objection to a provision in favour of the testator's daughters, excluding those who may be married.[5] And a provision in a post-nuptial marriage contract, in favour of either spouse, determinable in the event of a second marriage, was held to be free from any taint of illegality.[6]

Parental Relations. —The effect of a contract involving an interference with the relations of parents and children is not free from doubt. In England it has been held that any contract whereby a parent gives up in perpetuity the right to custody of a child is void as illegal.[7] In Scotland, however, it has been treated as legal, though not pleadable as a ground for refusing to restore the child to the custody of the parent.[8] In *Kerrigan* v. *Hall* a mother sued for the custody of her pupil child. The defender, in whose custody the child was, averred that she had taken it on a contract whereby she was to have the custody until the child reached the age of five, and to receive payment at a certain rate per month. It was decided that the mother was entitled to the custody, in the absence of relevant averments that she was unfit, but remarked that she was liable in damages for breach of contract. "It may often be necessary for the parents of a child to enter into an arrangement with a stranger for its board. Such a contract is enforceable in law, subject to the qualification that the law will not specifically enforce a contract where an order of specific performance would interfere with personal liberty."[9] But an agreement that a child should not live with either of its parents, made without any provision whereby a third party should be paid for maintaining it, would probably be held unenforceable, on the analogy of cases relating to wills.[10]

Contracts Promoting Immorality. Contracts, in themselves innocent, may be treated as *pacta illicita* if they were entered into for the purpose of promoting an illegal or immoral purpose, a fact which may be proved by parole evidence though the contract be in writing and contain no reference

[1] *Earl of Buchan* v. *Cochran*, 1698, M. 9507; *Thomson* v. *Mackaile*, 1770, M. 9519; *Hermann* v. *Charlesworth* [1905], 2 K.B. 123 (matrimonial agency).

[2] *Wilson* v. *Carnley* [1908], 1 K.B. 729.

[3] *Hay* v. *Wood*, 1781, M. 2982.

[4] *Ommaney* v. *Bingham*, 1792, M. 2985; revd. 1796, 3 Paton, 448; *Forbes* v. *Forbes' Trs.*, 1882, 9 R. 675; *Jenner* v. *Turner*, 1880, 16 Ch. D. 188.

[5] *Sturrock* v. *Rankin's Trs.*, 1875, 2 R. 850, where the Court declined to follow English cases on the subject.

[6] *Kidd* v. *Kidd*, 1863, 2 M. 227.

[7] *Humphrys* v. *Polak* [1901], 2 K.B. 385.

[8] *Macpherson* v. *Leiskman*, 1887, 14 R. 780; *Kerrigan* v. *Hall*, 1901, 4 F. 10. See Custody of Children Act, 1891 (54 & 55 Vict. c. 3); *Mitchell* v. *Wright*, 1905, 7 F. 568.

[9] Per Lord M'Laren, *Kerrigan* v. *Hall*, 1901, 4 F. 10, at p. 16.

[10] *Fraser* v. *Rose*, 1849, 11 D. 1466; *Grant's Trs.* v. *Grant*, 1898, 25 R. 929.

to the illegal object.[1] "Any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied."[2] Where a coachbuilder supplied a brougham to a prostitute, and it was found in fact that he knew it was to be used "as a part of her display to attract men," it was held that he could not recover the stipulated hire.[3] And a landlord was refused action for recovery of rent where he knew that the house was to be used by the tenant for the purpose of keeping a mistress,[4] or where the purpose of the lease—a particular method of boiling tar—was prohibited by statute.[5] So money lent for the purpose of playing an illegal game cannot be recovered.[6] And it was found that an advertising agent could not recover money which he had spent in advertisements of an illegal lottery.[7]

It is assumed in all the cases that in order to make a contract, in itself innocent, unlawful on the ground that it was designed to serve an illegal purpose, it must be shewn that the party suing upon it was aware of that purpose. But it is not necessary to prove that he was aware that the purpose was illegal; he is presumed to know the law. Thus an advertising agent's account was held irrecoverable on the ground that the matter advertised (a "missing word" competition) was illegal as a lottery, though the fact that such a competition was in effect a lottery was at the time disputable.[8]

Public Policy.—An agreement which is not tainted by crime, fraud, or immoral conduct may nevertheless be illegal on the ground that it is contrary to public policy.

Meaning of Public Policy.—The exact meaning of the phrase public policy is not easy to determine. In earlier times there is no doubt that the Courts were prepared to declare any contract illegal which shocked their sense of morality, or was in conflict with current views of political economy.[9] And the anxiety of the English Courts to discourage actions upon wagers, which, until the Gaming Act, 1845 (8 & 9 Vict. c. 109), were by English law maintainable, led to an extension of the principle of the protection of public policy which resulted in decisions which would probably not be followed in a modern case, and which are certainly of no authority in Scotland.[10] In more recent times the opinion has been gaining ground that it is part of the objects of public policy that people should fulfil their contracts. "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice."[11] And there is high authority for the proposition that while the fact that a

[1] *Gas Light and Coke Co.* v. *Turner*, 1840, 6 Bing. N.C. 324.

[2] Per Pollock, C.B., *Pearce* v. *Brooks*, 1866, L.R. 1 Ex. 213, at p. 217.

[3] *Pearce* v. *Brooks*, *supra*. See also *Bowry* v. *Bennet*, 1801, 1 Camp. 348; *Taylor* v. *Chester*, 1869, L.R. 4 Q.B. 309.

[4] *Uppfill* v. *Wright* [1911], 1 K.B. 506.

[5] *Gas Light and Coke Co.* v. *Turner*, 1840, 6 Bing. N.C. 324.

[6] *M'Kinnell* v. *Robinson*, 1838, 3 M. & W. 434. Cp. *Saxby* v. *Fulton* [1909], 2 K.B. 208.

[7] *Smith's Advertising Agency* v. *Leeds Laboratory Co.*, 1910, 26 T.L.R. 335.

[8] *Smith's Advertising Agency*, *supra*. Cp. *Waugh* v. *Morris*, 1873, L.R. 8 Q.B. 202.

[9] See early cases on trade unions, *supra*, p. 120.

[10] On these cases see opinion of Alderson, B., in *Egerton* v. *Earl Brownlow*, 1853, 4 H.L.C. 1, at pp. 108, 109; Pollock, *Contract*, 9th ed., 380.

[11] Per Jessel, M.R., *Printing and Numerical Registering Co.* v. *Sampson*, 1875, L.R. 19 Eq. 462.

particular kind of contract had been held void would not necessarily rule a modern case,[1] the cases to which the doctrine is applied should not be extended, and that a judge would not now hold a contract to be illegal on the ground that it was contrary to public policy in a case where no precedent, or obvious analogy, could be found.[2]

A contract may be void on the ground that it is contrary to public policy because it conflicts with the national foreign policy, with the administration of the law, with individual liberty, or with freedom of trade.

War.—The effect of a declaration of war, in rendering contracts with persons who thereupon become alien enemies illegal, has been considered already.[3]

Laws of Friendly State.—It is not clear how far the law condemns contracts inconsistent with the policy of a friendly State. A loan for the purpose of assisting subjects in rebellion is unlawful.[4] But it has been decided that a contract entered into in England for the purpose of trading with a port blockaded by a friendly State was not illegal.[5] It was at one time regarded as established in England that the Court would not take cognisance of the revenue laws of a foreign State, and therefore that there was no illegality in an English contract having as its object to break or evade such laws,[6] but recently Lord Justice-Scrutton has expressed the opinion that the rule is not in accordance with modern ideas of international relations, and that the cases which established it should be reconsidered.[7]

Home Policy.—Contracts tending to interfere with the ordinary course of the internal administration of the country are illegal.

Election Law. Apart from the provisions of the Corrupt Practices Acts, by which various election offences are penalised, it would appear that any attempt to interfere by contract with the free and responsible exercise of the right to vote is at common law a *pactum illicitum*. Thus a bond granted with the object of securing the grantee's vote at an election was held void ;[8] an action of accounting for money given for the purpose of bribery was dismissed.[9] A contract intended to stifle an election petition was held illegal in England.[10] A bond whereby certain members of a town council bound themselves to vote at an election of magistrates as the majority of their members should decide was found to be a *pactum illicitum*, and an election of magistrates which followed was annulled.[11] And in a question as to the

[1] *Bowman* v. *Secular Society* [1917], A.C. 406.

[2] *Nordenfelt* v. *Maxim-Nordenfelt Gun, etc., Co.* [1894], A.C. 535, opinion of Lord Watson ; *Janson* v. *Driefontein Consolidated Mines* [1902], A.C. 484 ; *Earl of Caithness* v. *Sinclair*, 1912, S.C. 79, per Lord President Dunedin, at p. 84. But see, *contra*, opinion of Vaughan Williams, L.J., in *Wilson* v. *Carnley* [1908], 1 K.B. 729, 738, and opinion of M'Cardie, J., in *Naylor, Benzon & Co.* v. *Krainische Industrie* [1918], 1 K.B. 331 ; affd. on a separate ground [1918], A.C. 260. In a case relating to a will Lord Kyllachy expressed the opinion that a legacy would be void as contrary to public policy if it involved an absolute waste of the testator's money—if, *e.g.*, the trustees were directed "to turn the income of the estate into money, and to throw the money into the sea." This opinion seems to suggest a new application of the principle of public policy (*M'Caig* v. *University of Glasgow*, 1907, S.C. 231, at p. 242 ; *M'Caig's Trs.* v. *Kirk Session of Lismore*, 1915, S.C. 426 ; *Aitken's Trs.* v. *Aitken*, 1927, S.C. 374).

[3] *Supra*, p. 96.

[4] *De Wütz* v. *Hendricks*, 1824, 2 Bing. 314.

[5] *The* "*Helen*," 1865, L.R. 1 Ad. & Eccl. 1.

[6] The English cases are collected in Dicey, *Conflict of Laws*, 3rd ed., p. 597. As to Scots law, see *Valery* v. *Scott*, 1876, 3 R. 965 ; *Att.-Gen. for Canada* v. *Schultze*, 1901, 9 S.L.T. 4 ; *Stewart* v. *Gelot*, 1871, 9 M. 1057.

[7] *Ralli Brothers.* v. *Compania Naviera* [1920], 2 K.B. 287, 300.

[8] *Glen* v. *Dundas*, 1822, 1 S. 234.

[9] *Campbell* v. *Scotland*, 1778, M. 9530.

[10] *Coppock* v. *Bower*, 1838, 4 M. & W. 361.

[11] *Hoggan* v. *Wardlaw*, 1735, 1 Paton, 148 ; *Paterson* v. *Magistrates of Stirling*, 1775, M. 9527.

legality of a rule whereby members of a trade union were taken bound to subscribe to a parliamentary fund, opinions were given that any arrangement whereby a member of Parliament bound himself to vote as some other person or body should dictate, was an unlawful agreement, as tending to interfere with the fulfilment of a public duty incumbent on the member.[1] But the tenets of a religious body, which enjoined its members, on pain of suspension, to refrain from voting or taking the oath of allegiance, were not, it was decided, such as to render the body an illegal association, and deprive it of the right to sue.[2]

In spite of a dictum by Lord Cranworth,[3] there is nothing illegal in a contract with a landowner designed to buy off his threatened opposition to a private Bill or Provisional Order, and the contract is not rendered unlawful by the fact that the landowner happens to be a member of Parliament, and may therefore be binding himself in a matter in which he has a duty to vote.[4]

The English Courts condemned a bribe to a newspaper proprietor to induce him to refrain from comment on a particular company : [5] the Italian Courts, a contract under which a politician was subsidised by a newspaper.[6]

Peerage Cases. — In *Egerton* v. *Earl Brownlow* [7] a bequest to a person who was already a peer was made conditional on his obtaining, within a specified time, a higher rank in the peerage. The condition was held to be invalid as contrary to public policy, because it offered an inducement to the legatee to misuse his position as a member of the House of Lords in order to obtain the higher rank. In Scotland the argument was advanced, but unsuccessfully, that a clause in an entail, providing that in the event of the heir of entail in possession succeeding to a particular peerage the lands should devolve on the next heir, was void as a *pactum illicitum*.[8] But, as was pointed out, succession to a peerage opened by operation of law, and could not be advanced or retarded by the efforts of the individual concerned.

Obstruction of Justice. — Agreements to obstruct the course of justice are illegal. The illegality of a contract to bribe a judge is too clear to be illustrated by express decision. A bond granted by a man who had been outlawed for murder, in order to secure influential support in his efforts to obtain a pardon, was held to be void.[9] A contract between a law agent and a messenger-at-arms, under which the law agent was to receive the messenger's fees for his official duties and pay him an annual salary, was decided to be illegal, with the result that the messenger had no redress for breach of the contract.[10] Undertakings to pay for private influence in obtaining an advance from a department of State,[11] and for assistance in a scheme to raise a bogus prosecution for advertising purposes,[12] were held to be *pacta illicita*. It is clear law that a contract to indemnify a party for penalties

[1] *Amalgamated Society of Railway Servants* v. *Osborne* [1909], 1 Ch. 163, per Fletcher-Moulton, L.J., at p. 186, Farwell, L.J., at p. 196 ; [1910], A.C. 87, per Lord Shaw, at p. 106. See also *Kemp* v. *Glasgow Corporation*, 1920, S.C. (H.L.) 73, and *supra*, p. 104.

[2] *Ferguson Bequest Fund*, 1879, 6 R. 486.

[3] *Scottish North-Eastern Rly. Co.* v. *Stewart*, 1859, 3 Macq. 382, 408.

[4] *Simpson* v. *Lord Howden*, 1842, 9 Cl. & F. 61.

[5] *Neville* v. *Dominion of Canada News Co.* [1915], 3 K.B. 556.

[6] See Stammler, *Theory of Justice*, p. 317.

[7] 1853, 4 H.L.C. 1. There was no similar objection to a legacy conditional on the legatee obtaining a baronetcy (*Champion* v. *Wallace* [1920], 2 Ch. 274).

[8] *Earl of Caithness* v. *Sinclair*, 1912, S.C. 79.

[9] *Stewart* v. *Earl of Galloway*, 1752, M. 9465 ; see also *Herman* v. *Jeuchner*, 1885, 15 Q.B.D. 561.

[10] *Henderson* v. *Mackay*, 1832, 11 S. 225.

[11] *Montefiore* v. *Minday Motor Co.* [1918], 2 K.B. 241.

[12] *Dann* v. *Curzon*, 1910, 27 T.L.R. 163.

that may be imposed upon him in a Court of Justice is illegal, if it relates to the commission of a criminal act involving *mens rea*;[1] whether the same rule applies to indemnity for a criminal act which may be committed inadvertently is doubtful.[2] The law as to agreements to stifle a prosecution has been already considered.[3]

Smuggling. Contracts to evade the revenue laws are illegal. In spite of some hesitation in the earlier cases, it was established in the latter half of the eighteenth century that all contracts with the object of smuggling were *pacta illicita*.[4] The price of goods sold to be smuggled cannot be recovered, nor can a bill given for it be enforced.[5] Where goods were supplied by a foreign merchant, it was held that he had no action for the price if he were aware of the intention to smuggle them,[6] though in one very doubtful decision the Court arrived at the conclusion that such knowledge was not to be inferred merely from the fact that gin was imported from Norway in small ankers, known in Scotland as smuggle ankers.[7] Similar principles have been applied to the statutory rules regarding permits for the sale of spirits, and contracts involving a disregard of these have been held to be illegal.[8]

Permit Cases. When dealings in various commodities were subject to control by Orders having statutory force it was found to be illegal to enter into agreements which, though not expressly prohibited, were calculated to defeat the objects for which the Orders were promulgated. So where the clearance of wine from bond was limited, under a system whereby each applicant received a permit for the clearance of an amount estimated as a percentage of the amount he had cleared in a prior year, it was held that as the legislative object was to secure that the restrictions should fall with equal force on all importers, a contract for the sale of a permit was illegal and void.[9] Where it was provided that a permit was required "to sell or enter into any contract for the sale of" timber, the construction of the Order was that an agreement to sell, though under the express condition that the buyer should obtain a permit, fell within the purview of the Order, and was illegal.[10] A similar decision was pronounced in England with regard to an Order under which building required a licence from the Ministry of Munitions.[11]

Improper Exercise of Patronage. As a general rule, parties who have the right of patronage to public offices ought to exercise it on public grounds,

[1] *Anderson* v. *Torrie*, 1857, 19 D. 356; *Amalgamated Society of Railway Servants* v. *Motherwell Branch*, 1880, 7 R. 867, per Lord Young, at p. 873; *Shackell* v. *Rosier*, 1836, 2 Bing. N.C. 634; *Smith & Son* v. *Clinton*, 1908, 25 T.L.R. 34; *Weld-Blundell* v. *Stephens* [1920], A.C. 956.

[2] *Burrows* v. *Rhodes* [1899], 1 Q.B. 816; *Leslie* v. *Reliable Advertising Agency* [1915], 1 K.B. 652. In *Tinline* v. *White Cross Insurance Co.* [1921], 3 K.B. 327, and *James* v. *British General Insurance Co.* [1927], 2 K.B. 311, motor accident policies were held to cover injuries where the insured had been convicted in a criminal Court, but in respect of acts which did not involve any deliberate wrongdoing on his part. The question whether a client can claim damages from his law agent for advice leading him to commit, unwittingly, a criminal offence, has been suggested but not decided—*Shane* v. *Girvan*, 1927, S.L.T. 460.

[3] *Supra*, p. 491.

[4] Bell, *Prin.*, sec. 42, where the earlier cases are cited. See *Cairns* v. *Walker*, 1914, S.C. 51.

[5] *Duncan* v. *Thomson*, 1776, M. App. *Pactum Illicitum*, No. 1; *Burns* v. *Forbes & Boyd*, 1807, Hume, 694.

[6] *Cullen & Co.* v. *Philp*, 1793, M. 9554.

[7] *Isaacson* v. *Wiseman*, 1806, Hume, 714.

[8] *Greig* v. *Conacher*, 1876, 4 R. 187.

[9] *Trevalion* v. *Blanche*, 1919, S.C. 617.

[10] *Eisen* v. *M'Cabe*, 1920, S.C. 111; affd. 1920, S.C. (H.L.) 146.

[11] *Brightman* v. *Tate* [1919], 1 K.B. 463 (M'Cardie, J.).

and any contract for the purchase of an office, or involving a bribe to the patron, is illegal.[1] Thus the sale of a commission in the Army, at a price higher than that allowed by the existing Army regulations, was held to be a *pactum illicitum*. The price could not be recovered.[2] Where one of two candidates for an office agreed, at the instigation of the body holding the right of patronage, that if elected he would pay an annuity to the other, it was found that the obligation could not be enforced.[3] Nor is it legal to impose conditions on a party appointed to a public office, such as a clause binding the holder of an office tenable *ad vitam aut culpam* to resign when called upon to do so by the patron.[4] And the holder of a public office cannot lawfully bargain with another party for the discharge of his duties by deputy.[5]

It is not an absolute rule that the right to appoint to a public office cannot be sold.[6] But the fact that the right of patronage is saleable does not render legal a contract whereby the presentee agrees to share the profits of the office with the patron. Thus where a party appointed to a macership in the Court of Session undertook to make an annual payment to a nominee of the patron, it was held, even on the assumption that the right to appoint to the particular macership was marketable, that the agreement could not be enforced.[7]

Simoniacal Contracts.—Somewhat similar rules are applicable to appointments in the Church. Prior to the abolition of patronage any agreements of a simoniacal character were *pacta illicita*.[8] An obligation by a clergyman that, if elected, he would not raise an action for augmentation of his stipend, was held void, and no bar to the process of augmentation ;[9] and the same rule was applied to a case where a parish minister purchased the consent of the heritors to an augmentation by undertaking not to raise a second process.[10]

Restraint on Liberty. Contracts may be unlawful because they involve an undue restraint on the liberty of the individual or on the freedom of trade.

Slavery.—Slavery as a status is not recognised by the law of Scotland ;[11] but it is somewhat doubtful within what limits a man may bind himself to serve. A contract whereby fishermen bound themselves to serve in a particular boat for fifty-seven years was reduced on the ground that it was too great a restriction on natural liberty.[12] But in 1728, when this decision, was pronounced, and until 1799, workers in coal and salt mines were subjected to restrictions involving perpetual service.[13] Erskine expresses the opinion that there is nothing illegal in a contract to serve for life,[14] and a

[1] *Ord* v. *Hill*, 1847, 9 D. 1118 ; *Hill* v. *Paul*, 1841, 2 Robinson, 524 ; *Stewart* v. *Miller*, 1802, 4 Paton, 286.

[2] *Carmichael* v. *Erskine*, 1823, 2 S. 530.

[3] *Thomson* v. *Dove*, 16th February 1811, F.C.

[4] *Adam* v. *Directors of Inverness Academy*, 1815, 14 S. 714, note ; *Simpson* v. *Tod*, 1824, 3 S. 150.

[5] *Mason* v. *Wilson*, 1844, 7 D. 160.

[6] See *Earl of Lauderdale* v. *Wedderburn*, 1908, S.C. 1237 ; revd. 1910, S.C. (H.L.) 35 ; Sale of Offices Act, 1809 (49 Geo. III. c. 126), extending to Scotland the provisions of 5 & 6 Edw. VI. c. 16. For history of the law see Brown on *Sale*, sec. 168.

[7] *Gardner* v. *Grant*, 1835, 13 S. 664 ; see also *Bruce* v. *Grant*, 1839, 1 D. 583.

[8] *Maxwell* v. *Earl of Galloway*, 1775, M. 9580 ; *Steven* v. *Lyell and Others*, 1759, M. 9578.

[9] *Boyd* v. *Earl of Galloway*, 1794, M. 9583.

[10] *Earl of Kellie* v. *Brodie*, 1803, M. 15710.

[11] *Knight* v. *Wedderburn*, 1778, M. 14545.

[12] *Allan and Mearns* v. *Skene*, 1728, M. 9454.

[13] Ersk. i. 7, 61 ; *Laird of Caprington* v. *Geddew*, 1632, M. 9454.

[14] Ersk. i. 7, 62 ; this has been decided in England—*Wallis* v. *Dey*, 1837, 2 M. & W. 273.

dictum by Lord Trayner to the opposite effect is clearly *obiter*.[1] In a modern case a nun, alleging a contract for life, brought an action against the superiors of her community for wrongful dismissal. It was held by the Lord Ordinary (Kincairney) that the plea that the contract was illegal was not maintainable. On the appeal, it was decided that there were no relevant averments of a contract.[2]

Restrictive Covenants.—An agreement not to exercise a particular trade or profession may be a *pactum illicitum* if it imposes a restriction wider than is reasonably necessary to safeguard the interest it is designed to protect. The argument that all such agreements were contrary to public policy, and therefore illegal, which at one time seems to have been favoured in England,[3] was negatived in the earliest case reported on the subject in Scotland.[4] A clause in a partnership as booksellers contained a provision that if either of the partners, at the expiry of the term, should refuse to enter into a new contract on the old terms, he should be debarred from any concern in bookselling within the City of Glasgow. It was found to be a "lawful paction, and not contrary to the liberty of the subject."

A general statement of the existing law may be taken from an opinion, frequently quoted, of Lord Macnaghten.[5] "The true view at the present time, I think, is this: The public has an interest in every person's carrying on his trade freely, so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. But there are exceptions: restraint of trade and interference with individual liberty of action may be justified by the special circumstances of an individual case. It is a sufficient justification, and indeed it is the only justification, if the restraint is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the interests of the public."

Restrictions Wider than Required.—In the case from which this passage is taken a maker of cannon had sold his business to a company and had undertaken not to carry on the business of a maker of cannon for twenty-five years in any part of the world. In defence to an action based on this agreement he pleaded that it was not binding on him, in respect that restrictions of a world-wide character were unlawful. It was held that there was no absolute rule of law rendering a world-wide restraint illegal; that in each case the question was whether the restraint imposed was reasonable; and that looking to the nature of the business, and the character of the possible customers, a world-wide restraint was necessary for the purchasers' protection.[6] Though there has been no case in which a restriction, world-wide and without limit as to time, has been presented for decision, it is conceived that it would not be illegal if shewn to be necessary for its object. But the restriction must refer to a particular business or profession—an agreement

[1] *Stewart* v. *Stewart*, 1899, 1 F. 1158.

[2] *Mulcahy* v. *Herbert*, 1898, 25 R. 1136.

[3] *Mitchel* v. *Reynolds*, 1711, 1 Smith, *L.C.*, 12th ed., 458. The development of the law is traced by Lord Parker, *Att.-Gen. of Australia* v. *Adelaide S.S. Co.* [1913], A.C. 781.

[4] *Stalker* v. *Carmichael*, 1735, M. 9455.

[5] *Nordenfelt* v. *Maxim-Nordenfelt Gun, etc., Co.* [1894], A.C. 535, at p. 565. Adopted by Lord Chancellor Haldane and Lord Shaw in *Mason* v. *Provident Clothing and Supply Co.* [1913], A.C. 724.

[6] *Nordenfelt* v. *Maxim-Nordenfelt Gun, etc., Co.* [1894], A.C. 535.

whereby a man undertook not to exercise any means of gaining his livelihood would be a *pactum illicitum*.[1]

Restrictions on Servants. In the question whether a restriction is reasonable, the circumstances of both parties must be considered, and the more recent authorities in England have drawn a marked distinction between restrictions imposed on a servant or apprentice, and restrictions undertaken by the seller of a business. In the latter case the purchaser is entitled to protect himself from competition by the seller, and the only objection that can be taken to the covenant is that the protection is wider than the safety of the business demands; in the former case a restriction will not be enforced if it is designed merely to protect an employer from competition by his former servant, or if, whatever may have been the design, that is the only possible result.[2] So restrictions imposed on the manager of the tailoring department of a store,[3] on a canvasser,[4] on the draughtsman in an engineering firm,[5] on a clerk to a firm of auctioneers,[6] on a newspaper reporter,[7] on a film actor,[8] on the assistant to a pathologist,[9] have all been denied effect, when it was made evident that the only effect of freedom from the restriction would be to expose the employer to competition by the servant. There may, however, be cases—such as that of the managing clerk to a solicitor—where the relationship of the servant to the business, and to the customers, is so intimate that the only method of protecting the employer from unfair competition is to enforce a restrictive covenant.[10] The protection of trade secrets may save a restriction which could not be justified by the fear of competition.[11] But the secret to be protected must be something of the nature of a secret process of manufacture; the mere knowledge of his employer's methods of organisation, which in many cases the servant must possess, is not enough.[12] The restriction is *primâ facie* unenforceable, and the onus is on the employer to shew the exceptional circumstances which render it justifiable.[13] It is an element against him that the restriction is unusual in the trade.[14]

Scotch Cases.—The enforceability of restrictive covenants has not been

[1] *Watson* v. *Neuffert*, 1863, 1 M. 1110; *Mulvein* v. *Murray*, 1908, S.C. 528; *Perls* v. *Saalfeld* [1892], 2 Ch. 149.

[2] *Mason* v. *Provident Clothing Co.* [1913], A.C. 724; *Morris* v. *Saxelby* [1916], 1 A.C. 688; *M'Ellistrim* v. *Ballymacelligott Co-operative Society* [1919], A.C. 548. The result of these decisions of the House of Lords has been expressed by Younger, L.J. (*Fitch* v. *Dewes* [1920], 2 Ch. 159; affd. [1921], 2 A.C. 158). "While a purchaser of the goodwill of a business may properly protect himself by covenant from the competition of the vendor, it is not permissible for an employer by covenant to protect himself merely from the competition of his former servant after the service has terminated. It is permissible for the employer by covenant to protect his trade or professional secrets, and to protect himself also against his clients being enticed away by his former assistant: in other words, to protect his connection" [1920], 2 Ch., at p. 185. As to prohibition against entering into any other business during the period of service, see *Rely-a-Bell, Burglar, etc., Co.* v. *Eisler* [1926], 1 Ch. 609.

[3] *Attwood* v. *Lamont* [1920], 3 K.B. 571.

[4] *Mason* v. *Provident Clothing Co.* [1913], A.C. 724.

[5] *Morris* v. *Saxelby* 1916], 1 A.C. 688.

[6] *Bowles* v. *Lovegrove* [1921], 1 Ch. 642.

[7] *Leng* v. *Andrews* [1909], 1 Ch. 763.

[8] *Hepworth Manufacturing Co.* v. *Ryott* [1920], 1 Ch. 1. See summary of law by Astbury, J.

[9] *Eastes* v. *Russ* [1914], 1 Ch. 468.

[10] *Fitch* v. *Dewes* [1921], 2 A.C. 158 (managing clerk to solicitor, lifelong restriction within radius of seven miles from a country town held binding).

[11] *Haynes* v. *Doman* [1899], 2 Ch. 13.

[12] See distinction between subjective knowledge—knowledge of his trade—and objective knowledge—knowledge of the secrets of his employer's business—drawn by Lord Shaw in *Mason* v. *Provident Clothing Co.* [1913], A.C. 724, and in *Morris* v. *Saxelby* [1916], 1 A.C. 688.

[13] See summary of law by Younger, L.J., *Attwood* v. *Lamont* [1920], 3 K.B. 571; by Astbury, J., in *Hepworth Manufacturing Co.* v. *Ryott* [1920], 1 Ch. 1.

[14] *Leng* v. *Andrews* [1909], 1 Ch. 763.

considered in Scotland[1] since the law has been developed by the decisions referred to in the preceding paragraph. In the prior cases the test applied has been whether the restriction imposed was or was not wider than was necessary for the interests of the party who imposed it, with little regard for any distinction between cases of master and servant and cases between the seller and purchaser of a business. In *Ballachulish Slate Quarries Co.* v. *Grant*[2] a doctor, who had been employed by a company to attend their workmen in a remote country district, as a salaried official but with liberty to accept private practice and local medical appointments, had undertaken to discontinue practice in the locality on the termination of his employment. The restriction was enforced, and, though the opinions lay more stress on the sanctity of contract than would be permissible in view of the recent English cases, the decision may be supported on the ground that the restriction was not really designed to protect the company from their servant's competition, but to protect their business by enabling them to furnish their workmen with medical attendance, which it would be difficult to do if any doctor whom they might appoint was to be subject, so far as any additional practice was concerned, to the competition of his predecessor. The case of *Watson* v. *Neuffert*,[3] sustaining a restriction imposed by a corn factor on his clerk, and clearly designed to avoid competition, would probably not be followed. In *Mulvein* v. *Murray*[4] a commercial traveller undertook "not to sell or travel in any of the towns or districts traded in" by his employer. This was held to be unenforceable, mainly on the ground that its terms were too vague, and the opinions lay no stress on the fact that its only object was to prevent competition by the traveller.

Restrictions in Sale of Business.—Where the seller of a business undertakes not to carry on business of the same kind the mere fact that the object of the covenant is to preclude his competition is no objection to its enforcement.[5] Restrictions laid on a partner, to take effect on the dissolution of the partnership, appear to be in the same category. They are not, however, cases where absolute freedom of contract is recognised; the covenant is enforceable only if it is not wider in its restrictive scope than the protection required. That is necessarily a question of degree, and of the circumstances of the particular case: a restriction limited to a specified area may, if the party restricted has no opportunity of dealing outside that area, be equivalent in effect to a restriction world-wide; if so, it would appear that the onus lies on the party imposing it to shew that it is reasonable.[6] The absence of any limit in time,[7] or in place,[8] does not necessarily make the restriction invalid. A world-wide restriction was enforced in the case of a maker of cannon;[9] a restriction covering the whole of Great Britain has been held unreasonable in the case of a local business.[10] The same rule was applied where, in a sale of a business for making imitation jewellery, a

[1] In *Pratt* v. *Maclean*, 1927, S.N. 161, Lord Constable held that a restriction on the manageress of an hotel, unlimited as to time, was invalid as contrary to public policy, but the report gives no more than a summary of his Lordship's opinion.

[2] 1903, 5 F. 1105, Lord Young dissenting. See also *Macintyre* v. *Macraild*, 1866, 4 M. 571; a more doubtful case.

[3] 1863, 1 M. 1110.

[4] 1908, S.C. 528.

[5] Authorities cited in note 2, p. 570.

[6] *M'Ellistrim* v. *Ballymacelligott Co-operative Society* [1919], A.C. 548.

[7] *Fitch* v. *Dewes* [1921], 2 A.C. 158.

[8] *Nordenfeldt* v. *Maxim-Nordenfeldt Gun Co.* [1894], A.C. 535.

[9] *Nordenfeldt, supra.*

[10] *Dumbarton Steamboat Co.* v. *Macfarlane*, 1899, 1 F. 993; *British Workman's Assurance Co.* v. *Wilkinson*, 1900, 8 S.L.T. 67; *Dowden & Pook* v. *Pook* [1904], 1 K.B. 45.

restriction, reasonable if applicable to the United Kingdom, was in terms extended to cover other countries.[1] A covenant not to carry on the business of a bookseller in the same town,[2] not to trade as a glazier within Scotland,[3] not to practice as a doctor in Sanquhar or the surrounding district,[4] have all, in cases between the seller and the purchaser of a business or between partners, been held to be valid and enforceable. A restriction which is wider in the area covered than is reasonable for the protection of the business which is sold is not justified by the fact that the purchaser has already another business which he desires to protect from the seller's competition.[5]

Other Restrictions.—Restrictive covenants are usually imposed as a condition in contracts of service or apprenticeship, in partnership contracts, or in contracts for the sale of a business. But these are not the only possible cases. It was held to be competent, in lending money, to take an obligation from the borrower that he would not carry on the business in which the lender was engaged.[6] And there would seem to be nothing illegal in securing by contract the abandonment of a rival business. Where a company which employed a number of men in a particular district had engaged a doctor to practise there, they were held entitled to stipulate that on the expiry of his engagement (which was terminable on one month's notice on either side) he should cease to practise in the neighbourhood.[7] The restrictions that may lawfully be imposed on the conduct of a penitent thief,[8] or a prodigal son,[9] have been considered in England.

Interest to Enforce Restriction.—As the condition of the legality of a contract restricting the freedom of another to carry on a particular trade is that it must be reasonably necessary to protect the interests of the party who imposes it, it is clear that a merely capricious restriction, imposed by a party who had no business to protect, would be illegal. But where a company engaged a doctor for their workmen, it was held that they had a sufficient interest to support an obligation on his part to leave at the end of his engagement, in the difficulty which his continued presence and competition would place in the way of their obtaining another doctor.[10] A restriction cannot be enforced if it is imposed merely to obtain a hold upon the party restricted, by rendering it difficult for him to obtain other employment.[11] An interest is not only necessary when the restrictive covenant is undertaken; it must exist at the time when it is proposed to enforce it. Thus, where a business which is protected by restrictive covenants is discontinued, the covenants cannot be enforced.[12] The question how far the benefit of a restrictive covenant is assignable has been already considered.[13]

It is conceived that the question whether any consideration has been given for an obligation not to carry on a business is irrelevant in Scots law.[14] In a case where the objection of want of consideration was taken, but it

[1] *Goldsoll* v. *Goldman* [1915], 1 Ch. 292.
[2] *Stalker* v. *Carmichael*, 1735, M. 9455.
[3] *Meikle* v. *Meikle*, 1895, 33 S.L.R. 362.
[4] *Rodger* v. *Herbertson* [1909], S.C. 256.
[5] So held by Younger, L.J., in *British Concrete Co.* v. *Schelff* [1921], 2 Ch. 563, but see *Stewart* v. *Stewart*, 1899, 1 F. 1158.
[6] *Stewart* v. *Stewart*, 1899, 1 F. 1158. See *Kreglinger* v. *New Patagonia Storage Co.* [1914], A. C. 25.
[7] *Ballachulish Slate Quarries Co.* v. *Grant*, 1903, 5 F. 1105.
[8] *Horwood* v. *Millar's Timber, etc., Co.* [1917], 1 K.B. 305.
[9] *Denny's Tr.* v. *Denny & Warr* [1919], 1 K.B. 583.
[10] *Ballachulish Slate Quarries Co.* v. *Grant*, *supra*.
[11] *Hepworth Manufacturing Co.* v. *Ryott* [1920], 1 Ch. 1.
[12] *Berlitz School of Languages* v. *Duchene*, 1903, 6 F. 181; *Rodger* v. *Herbert on*, 1909, S.C. 256.
[13] *Supra*, p. 424.
[14] *Supra*, p. 48.

was unnecessary to decide the point, Lord Trayner said: "On this head it might be enough to say that according to our law consideration is not essential to a contract or obligation. Either may be quite binding without any consideration being given therefor."[1] And an obligation by the assistant to a doctor that he would not accept a particular appointment if offered was sustained, where the only consideration was that he had been accused of trying to undermine his employer's position, and thought it necessary to grant the obligation "in vindication of my own integrity."[2]

Breach of Contract Excluding Enforcement. On the principle that a party cannot enforce the provisions of a contract unless he has performed, or is prepared to perform, the obligations which are incumbent on him, it has been held that where an employer unwarrantably dismissed his servant he could not enforce a restriction on the servant's right to carry on business.[3] And where a company, which had engaged a manager for a term of years, was wound up before the term expired, it was held that the manager was relieved from a restrictive covenant to which he had bound himself.[4]

Construction of Restrictive Covenants. In the construction of restrictive covenants it has been laid down that the Court will *in dubio* prefer the reading which makes the contract lawful and enforceable.[5] So where a corn factor, engaging a clerk, took him bound "not to engage directly or indirectly in any business on your own account in Leith or neighbourhood," it was held that the general words "in any business" might be read as meaning "in any business of the nature of a corn factor," and that, so read, the contract was legal and binding.[6] But in *Mulvein* v. *Murray*,[7] where a boot and shoe factor bound his traveller not to sell or travel in certain districts, a majority of the Court read this as an absolute restriction upon acting as a commercial traveller in any business, and refused to enforce the agreement. In an English case the words used were "any business whatsoever," and it was not contended that words so wide could be read as meaning a restriction in one business only.[8] If, in the circumstances which have actually occurred, the restriction imposed appears reasonable, it will not be refused effect merely because circumstances might be suggested to which it would in terms apply, and in which it would be unreasonable.[9]

Evasion.—Assuming the restriction to be valid, the Court will discourage evasion. So it was decided that an agreement not to carry on the business or profession of a veterinary surgeon was contravened by acting as assistant to another surgeon.[10] But agreements in business must be construed as a business man would read them. In *William Cory & Son Ltd.* v. *Harrison*,[11] *A.*, who had both a home and an export business in coal, sold the home business, and undertook not "to be concerned or interested in" any business of that nature. He afterwards sold the export business to a company, receiving payment in shares. The company sold the business to *B.*, with an

[1] *Stewart* v. *Stewart*, 1899, 1 F. 1158, at p. 1169.
[2] *Macintyre* v. *Macraild*, 1866, 4 M. 571.
[3] *General Billposting Co.* v. *Atkinson* [1909], A.C. 118.
[4] *Measures Brothers Ltd.* v. *Measures* [1910], 2 Ch. 248.
[5] *Watson* v. *Neuffert*, 1863, 1 M. 1110 (opinion of Lord Cowan).
[6] *Watson* v. *Neuffert*, *supra*; *Mills* v. *Dunham* [1891], 1 Ch. 576.
[7] 1908, S.C. 528, per Lord Justice-Clerk and Lord Ardwall, Lord Low dissenting. *Watson* v. *Neuffert* (*supra*) was not cited.
[8] *Baker* v. *Hedgecock*, 1888, 39 Ch. D. 520.
[9] *Haynes* v. *Doman* [1899], 2 Ch. 13.
[10] *Williams & Son* v. *Fairbairn*, 1899, 1 F. 944. Cp. *Palmer* v. *Mallet*, 1887, 36 Ch. D. 411; *Fraser* v. *Renwick*, 1906, 14 S.L.T. 443.
[11] *William Cory & Son Ltd.* v. *Harrison* [1906], A.C. 274.

agreement that the price was to be paid by instalments out of the profits. *B.* started a home business. It was held that, taking the business sense of the expression, *A.* was not "concerned or interested in" the business carried on by *B.*, and had not committed any breach of contract.

Unreasonable Restriction Illegal. The general rule is, that if a restriction is held to be wider than is reasonably necessary it falls altogether, on the ground that to enforce it in more limited terms would be to make for the parties a contract which they have not made for themselves. In *Dumbarton Steamboat Co.* v. *Macfarlane*,[1] *A.*, who had carried on business as a carrier between Glasgow and Dumbarton, sold the business, and undertook not to carry on the business of a carrier anywhere within the United Kingdom. It was held that the restriction was too wide, and was therefore invalid, and that the Court would not limit it by granting interdict against *A.* acting as a carrier between Glasgow and Dumbarton. In *Mulvein* v. *Murray*[2] the obligation was "not to sell to or canvass any of" the employer's "customers, or to sell or travel in any of the towns or districts traded in" by the employer. It was argued that the restriction was too wide, and this argument was sustained. The employer maintained, but unsuccessfully, that the restriction might be limited to the towns in which the traveller had actually acted for him.

Severability. —In these cases the obligation was held to be indivisible. There may, however, be two restrictions imposed, one of which may be reasonable, the other not. Then the restriction which is reasonable may be enforced, though the other falls. Thus where a defendant had undertaken not to sell beer or aerated waters in a particular district, and the Court found that the restriction as to aerated waters was not required for the protection of the plaintiff's business, and was therefore unlawful, it was held that the two restrictions were severable, and that against selling beer might be enforced.[3] Where a commercial traveller undertook not to canvass his employer's customers, and not to act as a traveller within a certain area, it was decided that the former restriction might be enforced, though the latter was unjustifiable.[4] And a restriction against dealing in the United Kingdom, France, or Germany has been held enforceable as regards the United Kingdom only, on proof that the party who imposed it had no business in France or Germany to protect.[5] The most recent English decisions would limit the doctrine of severance to cases where there are really two restrictions, and where the excess over a reasonable restriction is trivial.[6] The suggestion that a restriction could be enforced if it could be made reasonable by deleting certain words was rejected by the Court of Appeal.[7] None of these cases, however, seem to cast any doubt on the proposition, vouched by *Mulvein* v. *Murray*,[8] that an undertaking not to canvass an employer's customers is always severable and enforceable.

Interdict.—Where a restrictive covenant is held to be valid, it may be

[1] 1899, 1 F. 993. See *Mason* v. *Provident Clothing, etc., Co.* [1913], A.C. 724, opinion of Lord Moulton, at p. 745; *Mulligan* v. *Corr* [1925], 1 Ir. R. 169.

[2] 1908, S.C. 528.

[3] *Rogers* v. *Maddocks* [1892], 3 Ch. 346.

[4] *Mulvein* v. *Murray*, 1908, S.C. 528.

[5] *Continental Tyre, etc., Co.* v. *Heath*, 1913, 29 T.L.R. 308; *Goldsoll* v. *Goldman* [1915], 1 Ch. 292.

[6] *Mason* v. *Provident Clothing, etc., Co.* [1913], A.C. 724, per Lord Moulton; *Attwood* v. *Lamont* [1920], 3 K.B. 571.

[7] *Attwood* v. *Lamont, supra.*

[8] 1908, S.C. 528.

enforced by interdict although the contract may contain an express provision for liquidate damages.[1]

Restraint of Trade.—The law as to contracts involving a restraint of trade presents other problems in cases where parties combine to subject themselves to restrictions in the exercise of their freedom of working or carrying on business. Questions of this kind, in so far as relating to the provisions of the Trade Union Acts, and the contractual powers of a trade union, have been considered in a prior chapter.[2] At common law it was assumed that any combination by which rules were imposed on the members limiting the methods by which they might exercise their work or trade was illegal. This was held with regard to combinations of workmen,[3] to combinations of employers,[4] and to a combination of posting-masters who had agreed not to accept less than a certain rate.[5] A decision that a particular combination amounts to a criminal conspiracy,[6] or to a civil wrong to third parties whose interests are affected,[7] affords a clear inference that the agreements involved could not be enforced against the individual members of the combination, but the converse does not necessarily hold. In *Mogul Steamship Co.* v. *Macgregor*[8] the decision was that a combination of shipowners to secure the monopoly of a trade by offering rebates to exporters did not render them liable in damages to an independent shipowner whose business they injured: in the opinions it was recognised that the provisions of the combination were, on the authority of *Hilton* v. *Eckersley*,[9] so far illegal and contrary to public policy that no action would have been possible against a recalcitrant member.

Some of the earlier cases—in particular *Hilton* v. *Eckersley*—might suggest that any agreement under which a party bound himself to conduct his business, or fix his prices, as others might determine, was contrary to public policy and a *pactum illicitum*. But the law cannot now be stated in terms so absolute as these cases would suggest. It is generally recognised that the interests of the public as well as those of the immediate parties may be involved, though in one case where that argument was submitted it was observed that that was a question for the Legislature and not for the Court.[10] Where the interests of the public are mooted the question whether they are affected is one of law, and, while evidence of the nature of the business and of the surrounding circumstances may be led, evidence as to the probable results on prices or the supply of commodities is not admissible.[11] If the point is not taken by the parties it will not be raised by the Court unless the injury to the public appears from the plain words of the contract.[12] And it would appear still to be open to question how far it is a tenable objection to a contract that its object is to increase prices by creating a

[1] *Curtis* v. *Sandison*, 1831, 10 S. 72.
[2] *Supra*, Chap. VII.
[3] *Procurator-Fiscal* v. *Woolcombers in Aberdeen*, 1702, M. 1961; *Baker* v. *Carr*, 1766, M. 9564. See early cases in England in Pollock, *Contract*, 9th ed., 426.
[4] *Corporation of Shoemakers* v. *Marshall*, 1798, M. 9573; *Hilton* v. *Eckersley*, 1855, 6 E. & B. 47, 66; *Chamberlain's Wharf* v. *Smith* [1900], 2 Ch. 605. And see *supra*, p. 120, on the question of the illegality of trade unions at common law.
[5] *Smith* v. *Scott*, 1798, 4 Paton, 17. Cp. *Mogul Steamship Co.* v. *Macgregor* [1892], A.C. 25.
[6] *Smith* v. *Scott*, *supra*.
[7] *E.g.*, *Quinn* v. *Leathem* [1901], A.C. 495.
[8] [1892], A.C. 25.
[9] 1855, 6 E. & B. 47.
[10] *United Shoe Machinery Co.* v. *Brunet* [1909], A.C. 330.
[11] *Att.-Gen. for Australia* v. *Adelaide S.S. Co.* [1913], A.C. 781; *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, *infra*, Lord Chancellor Haldane [1914], A.C., at p. 471.
[12] *North-Western Salt Co.* v. *Electrolytic Alkali Co.* [1914], A.C. 461; *Evans & Co.* v. *Heathcote* [1918], 1 K.B. 418.

monopoly.[1] In *North-Western Salt Co.* v. *Electrolytic Alkali Co.*[2] a company owning salt mines agreed to sell the bulk of their produce to a federation, and not to sell to anyone else. There were provisions whereby the company could repurchase a certain quantity at an enhanced price, and act as distributors for the federation. The Court of Appeal held that the agreement was illegal and unenforceable, on the ground that it was an attempt to keep up an artificial price for salt, and to conceal from the public the fact that the federation had secured a monopoly. In the House of Lords the sole question decided (in the negative) was whether it was *pars judicis* to take notice of the alleged illegality, but the opinions indicate that it is a question of the whole circumstances of each case whether a contract by which producers or dealers subject themselves to restrictions in order to keep up prices is or is not so contrary to the public interest as to make it a *pactum illicitum*. The most definite recognition of the public interest is in *Collins* v. *Locke*,[3] where the Judicial Committee decided that while a contract under which the stevedores at a port allocated the business among themselves was not in itself objectionable, a clause whereby, in particular circumstances, they bound themselves to refuse to discharge a ship if its owner disregarded their allocation was contrary to public policy. In the most recent case it was held that there was no illegality in a contract by which a hop-grower undertook to sell all his hops to an association established for the purpose of stabilising prices.[4]

Contracts held Legal.—Where the question of the interests of the public has not been raised there is no general illegality in a price maintenance agreement ;[5] in a pool of the business in a particular trade ;[6] or in a contract by which a purchaser or lessee binds himself to take goods from the seller or lessor. An agreement whereby a publican taking a lease of premises from a brewer undertakes to buy all his beer from the lessor is valid.[7] Where pattern cards were made by *A.*, in order to manufacture lace curtains from *B.'s* designs, it was held that there was no illegality in a custom of trade that a person in *A.'s* position was precluded from afterwards using the cards in his own business.[8] In *United Shoe Machinery Co.* v. *Brunet*,[9] *A.* "leased" to *B.* certain machinery for the manufacture of shoes for a period of twenty years. The machinery was not patented. It was a condition of the "lease" that *B.* should not use any machinery not supplied by *A.* for certain subordinate processes in the shoe manufacture. *B.* broke his contract, and argued that the restriction was void as a restraint of trade. The Judicial Committee held that no illegality was involved. Thus where an association of manufacturers of aerated waters promulgated a rule that no member should employ a traveller for six months after he had left the

[1] *Att.-Gen. for Australia* v. *Adelaide S.S. Co.* [1913], A.C. 781, at p. 797 ; *North-Western Salt Co., supra*, Lord Haldane [1914], A.C. at 471 ; *Thompson* v. *British Medical Association* [1924], A.C. 764 ; *M'Ellistrim* v. *Ballymacelligott Co-operative Society* [1919], A.C. 548, Lord Chancellor Birkenhead. These cases are considered and criticised in 41 L.Q.R., p. 393; *English Hop Growers* v. *Dering* [1928], 2 K.B. 174.

[2] [1914], A.C. 461. The opinions in the C.A. are reported, 107 L.T. 439—not in the Law Reports.

[3] 1879, 4 App. Cas. 674.

[4] *English Hop Growers* v. *Dering* [1928], 2 K.B. 174.

[5] *Elliman, Sons & Co.* v. *Carrington* [1901], 2 Ch. 275 ; *Palmolive Co.* v. *Freedman* [1928], 1 Ch. 264.

[6] *Collins* v. *Locke*, 1879, 4 App. Cas. 674 ; *Evans & Co.* v. *Heathcote* [1918], 1 K.B. 418.

[7] *Catt* v. *Tourle*, 1869, L.R. 4 Ch. 654 ; *Clegg* v. *Hands*, 1890, 44 Ch. D. 503 ; *Noakes & Co.* v. *Rice* [1902], A.C. 24.

[8] *Morton* v. *Muir Brothers*, 1907, S.C. 1211.

[9] [1909], A.C. 330.

employment of another member, within a radius of twenty-five miles from Edinburgh, it was held that there was nothing illegal in the regulation.[1] An agreement by a vendor of a patent to assign to the purchaser all future patents he might take out in the same department of invention was held unobjectionable.[2] In cases where the question was whether a wrong to third parties was involved it was decided that there was no illegality in an insurance company publishing a list of persons whom they declined to insure ;[3] on conditions imposed on the supply of newspapers to newsagents ;[4] on an intimation by an auctioneer that he would not receive bids from a particular interest ;[5] in an association of shipowners keeping a list of defaulting seamen.[6] But in any case where a party has agreed to a restraint on his method of carrying on his trade he may challenge its validity on the ground that the restrictions are more burdensome than is reasonably necessary for the purpose to be attained. The question is then one to be decided on a consideration of the whole contract, and the authorities have not established any particular conditions as universally illegal.[7]

Patent Cases.—If the contract is one for the use of a patented article, the power to adject restrictive conditions is limited by statute. The Patents and Designs Act, 1907 (7 Edw. VII. c. 29), provides (sec. 38 (1)) : "It shall not be lawful in any contract made after the passing of this Act in relation to the sale or lease of, or licence to use or work, any article or process protected by a patent to insert a condition the effect of which will be—(*a*) to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor, or his nominees ; or (*b*) to require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees, any article or class of articles not protected by the patent ; and any such condition shall be null and void, as being in restraint of trade and contrary to public policy." An exception is admitted if the purchaser, etc., had an option to purchase the article on reasonable terms without the condition, or has the right to relieve himself from the condition on giving three months' notice, and making such compensation as may be fixed by an arbitrator to be appointed by the Board of Trade. On these provisions it is illegal to stipulate, in a licence to work a patent, that the licensee shall purchase an article not protected by the patent.[8]

Clog on Redemption of Loan. The question whether a lender of money can lay restrictions on the borrower is one on which there is very little authority in Scotland. In *Brown* v. *Muir*[9] a borrower agreed that if he should at any time sell his lands he would sell them to the lender at a price agreed upon. In an action of reduction raised by the heir of the borrower

[1] *Nisbet* v. *Edinburgh, etc., Aerated Water Manufacturers' Association*, 1906, 14 S.L.T. 178, distinguishing *Mineral Water Bottle Exchange* v. *Booth*, 1887, 36 Ch. D. 465, where a similar regulation, but without limits as to time and area, was held illegal. See also *Collins* v. *Locke*, 1879, 4 App. Cas. 674 ; *Keith* v. *Lauder*, 1905, 8 F. 356.

[2] *Printing and Numerical Registering Co.* v. *Sampson*, 1875, L.R. 19 Eq. 462.

[3] *Mackenzie* v. *Iron Trades Insurance Corporation*, 1910, S.C. 79.

[4] *Sorrell* v. *Smith* [1925], A.C. 700.

[5] *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers, etc., Association*, 1898, 35 S.L.R. 645.

[6] *Keith* v. *Lauder*, 1905, 8 F. 356.

[7] See *M'Ellistrim* v. *Ballymacelligott Co-operative Society* [1919], A.C. 548, and *Evans & Co.* v. *Heathcote* [1918], 1 K.B. 418, where the conditions were held unduly severe ; *Palmolive Co.* v. *Freedman* [1928], 1 Ch. 264, where the restriction was sustained.

[8] *Sarason* v. *Frenay* [1914], 2 Ch. 474.

[9] 1737, M. 9464.

(who had been a consenting party to the bargain) it was found that the contract of sale was unlawful, by being adjected to a loan of money. In *Stewart* v. *Stewart*,[1] however, where *Brown* v. *Muir* was not cited, it was held to be no objection to an obligation not to carry on a particular business that it was granted by a borrower to a lender and as part of the transaction by which the money was lent. It is doubtful whether the English authorities as to the legality of a clog on redemption are applicable to the law of Scotland, and there is the authority of an *obiter dictum* by Lord Robertson to the effect that they are not.[2] So far as they have survived the criticism in a leading case,[3] it would seem that a restrictive agreement, or other collateral stipulation, inserted in a mortgage, is not open to any objection so long as the mortgage subsists, but may become unenforceable on repayment if it is so intimately connected with the subjects mortgaged that its survival would amount to a failure to return the subjects in their original state,[4] not if it may be regarded as a collateral contract.[5] So while a provision, in a mortgage of licensed premises, that the borrower shall take his supplies from the lender, cannot be enforced after the debt has been paid ;[6] a contract whereby a company borrowed money and granted a floating charge over their assets, with a right of pre-emption in favour of the lender for the next five years, was held to be valid for that period in spite of the fact that the money borrowed had been repaid.[7]

Pacta de quota litis.—A bargain by a law agent for a share of, or commission on, property to be recovered by litigation, is known as a *pactum de quota litis*, and is at common law illegal and void.[8] And the purchase of heritage which is the subject of an action by a member of the College of Justice is forbidden by the Act 1594, c. 220, the penalty, however, being deprivation of office, and not the avoidance of the contract.[9] But there is no illegality in a contract whereby a party who is not a law agent or a member of the College of Justice advances money for the prosecution of a lawsuit, on condition of receiving a share of the money to be recovered.[10]

Auction Sales.- The employment of a whitebonnet, or person employed by the seller to bid at an auction sale, is at common law fraudulent and illegal, and was held to entitle the next highest bidder to a declarator that the property had been sold to him.[11] It has been decided to be unlawful for a party intending to bid at a sale to give money to others to refrain from bidding.[12] In *York Buildings Co.* v. *Mackenzie*[13] Lord Thurlow doubted whether there was any objection in general to an arrangement between intending bidders, but held that it was illegal for the common agent at a judicial sale to enter into it. In *Murray* v. *Mackwhan*[14] three persons, all

[1] 1899, 1 F. 1158, Lord Young dissenting.
[2] *Bradley* v. *Carritt* [1903], A.C. 253, at p. 271.
[3] *Kreglinger* v. *New Patagonia Storage Co.* [1914], A.C. 25.
[4] *Bradley* v. *Carritt, supra* ; *Noakes* v. *Rice* [1902], A.C. 24.
[5] *Kreglinger, supra.*
[6] *Noakes* v. *Rice, supra.*
[7] *Kreglinger* v. *New Patagonia Storage Co., supra* ; see also *De Beers* v. *Chartered Co.* [1912], A.C. 52 ; *Cuban Land Co., in re* [1921], 2 Ch. 147.
[8] *Johnston* v. *Rome*, 1831, 9 S. 364 ; *Farrell* v. *Arnott*, 1857, 19 D. 1000 ; *Bolden* v. *Fogo*, 1850, 12 D. 798.
[9] *Supra*, p. 552.
[10] *Rucker* v. *Fischer*, 1826, 4 S. 438 ; *Waddel* v. *Hope*, 1843, 6 D. 160. For English law of Maintenance and Champerty, see Pollock, *Contract*, 9th ed., 404.
[11] *Grey* v. *Stewart and Others*, 1753, M. 9560 ; *Anderson* v. *Stewart*, 16th December 1814, F.C. See Sale of Goods Act, 1893, sec. 58.
[12] *Aitchison* v. ———, 1783, M. 9567.
[13] 1795, 3 Paton, 378, at p. 395.
[14] 1783, M. 9567.

of whom had been commissioned by others to bid, entered into an arrangement by which they agreed that one of them should purchase at the upset price, and divide the difference between that price and the highest sum which any of them had been commissioned to offer. This scheme was carried out. The seller, discovering it, was held entitled to recover from one of the conspirators the highest sum which the property would have realised had there been no prior concert, and all had bid in accordance with their commissions. An arrangement very similar was held to be lawful in an English case.[1] But it has now been provided by statute [2] that it constitutes a criminal offence for any dealer [3] to give, agree to give, or offer any consideration to any person as an inducement or reward for abstaining, or having abstained, from bidding at a sale by auction, with a corresponding liability on any person who agrees to accept, accepts, or attempts to obtain such consideration; and that the vendor at an auction may treat any sale, with respect to which any such transaction has been made or effected, and which has been the subject of a prosecution and conviction, as a sale induced by fraud, as against a purchaser who has been a party to the transaction. In England, it has been held that there is no illegality in a contract whereby one of two possible tenderers for a contract bound the other not to tender.[4]

Gaming Contracts.—The attitude of the law towards an action for the enforcement of an obligation based on a gambling transaction depends partly on statute, partly on common law.

Act 1621, c. 14.—By Act 1621, c. 14, it is provided that where any person wins above 100 merks within twenty-four hours at cards, dice, or horse-racing, the surplus shall be consigned to the kirk-session of the parish, to be used for behoof of the poor. The Act has been held applicable not only to the case of a demand for money won, but also to an attempt to enforce a bond given by the loser.[5] In the last case reported on the Act the winner sued the loser of a race, and the Court ordered intimation to be made to the kirk-session.[6] Though it has been stated from the bench that the Act is not in desuetude,[7] it may be doubted whether it would be enforced in a modern case.

Gaming Acts. By 9 Anne, c. 14, it is provided that all notes, bills, bonds, or other securities or conveyances, where the whole or any part of the consideration is for money lost in playing at any game or betting on the result of a game, or is for repayment of money advanced or lent for such betting or gaming, "shall be utterly void, frustrate, and of none effect." [8] This provision was construed as involving a *vitium reale* in bills or securities when granted for the purposes struck at, so that a bill could not be enforced by a holder in due course.[9] 9 Anne, c. 14, was repealed by the Gaming Act, 1845 (8 & 9 Vict. c. 109, sec. 15), and, although the latter Act does not apply to Scotland, it has been decided in the Outer House that the repeal is effective.[10] But by sec. 1 of the Gaming Act, 1835 (5 & 6 Will. IV. c. 41),

[1] *Rawlings* v. *General Trading Co.* [1921], 1 K.B. 635.

[2] Auctions (Bidding Agreements) Act, 1927 (17 & 18 Geo. V. c. 12).

[3] Defined (sec. 1 (2)) as "a person who in the normal course of his business attends sales by auction for the purpose of purchasing goods with a view to reselling them."

[4] *Jones* v. *North*, 1875, L.R. 19 Eq. 426.

[5] *Straiton* v. *Craigmillar*, 1688, M. 9506; *Ramsay* v. *Grant*, 1711, M. 10551.

[6] *Maxwell* v. *Blair*, 1774, M. 9522.

[7] *O'Connell* v. *Russell*, 1864, 3 M. 89, per Lord Deas, at p. 93.

[8] It is also provided that the loser of £10 or more may recover what he has paid at any time within two months.

[9] *Hamilton* v. *Russel*, 1832, 10 S. 549; earlier cases cited there.

[10] *Rayner* v. *Kent & Stansfield*, 1922, S.L.T. 331 (Lord Blackburn).

which has not been repealed, and is probably applicable to Scotland,[1] it is provided that notes, bills, securities, and conveyances which would have been void under the provisions of 9 Anne, c. 14, shall be taken to have been made, drawn, accepted, given, or executed for an illegal consideration.[2] The result of these statutory provisions, taken in conjunction with sec. 30, subsec. (2), of the Bills of Exchange Act, 1882,[3] is that a bill given for a gaming debt may be enforced by an indorsee, provided that he can discharge the onus of proof that he gave value for the bill without notice of its origin.[4] It is conceived that a bond or other security or conveyance granted for a gaming debt, and therefore for an illegal consideration, could not be enforced by an assignee. The maxim *assignatus utitur jure auctoris* would apply. It has been held that where a bond was given for money lost at cards, and assigned by the winner to a *bona-fide* third party, the latter, though he could not recover from the granter of the bond, was entitled to recover what he had paid from the cedent, on the principle that the transferror of a bond undertook impliedly warrandice *debitum subesse*.[5]

Betting Act. By the Betting Act, 1853 (16 & 17 Vict. c. 119), extended to Scotland by the Betting Act, 1874 (37 & 38 Vict. c. 15), it is declared to be a criminal offence to keep or use any house, office, room, or other place for the purpose of betting. By sec. 5 any money or valuable thing received by the keeper as a deposit on any bet may be recovered by the party from whom it was received. By sec. 6 nothing in the Act extends to any person receiving or holding any money or valuable thing by way of stakes or deposit to be paid to the winner of any race, or lawful sport or game, or to the owner of any horse engaged in any race.

Lotteries.—A lottery has been held to be illegal in Scotland at common law.[6] Penalties are imposed by the Lotteries Act, 1802 (43 Geo. III. c. 119), and the Lotteries Act, 1823 (4 Geo. IV. c. 60), but only the latter Act is applicable to Scotland. There are statutory exceptions in favour of art unions, under certain conditions.[7] The result of the common law and statutory provisions is that to hold a lottery is an illegal act, from which no civil rights enforceable by law can be derived. So an advertising agent could not recover from his employer the amount which he had expended in advertising a lottery which the employer proposed to hold.[8] And where a pony was disposed of by subscription sale, on the art union principle, by shilling tickets, it was held that an action by a party who averred that he had drawn the winning ticket could not be sustained, either on the ground that it was a *sponsio ludicra*, which the Court would not entertain, or on the ground that

[1] *Rayner, supra.*

[2] Sec. 2 of the Gaming Act, 1835, provided that where a bill or note given for a gaming debt had been paid to any indorsee, holder, or assignee thereof, the party so paying might recover what he had paid from the party to whom the bill or note was originally given. This section has been repealed by the Gaming Act, 1922 (12 & 13 Geo. V. c. 19), which enacts (sec. 1): "No action for the recovery of money under the said section shall be entertained in any Court." In view of this provision it would seem unnecessary to deal with *Sutters* v. *Briggs* [1922], 1 A.C. 1, or the other cases decided on the section repealed.

[3] 45 & 46 Vict. c. 61—"Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

[4] *Woolf* v. *Hamilton* [1898], 2 Q.B. 337.

[5] *Ferrier* v. *Graham's Trs.*, 1828, 6 S. 818.

[6] *Christison* v. *Macbride*, 1881, 9 R. 34.

[7] Art Union Act, 1846, 9 & 10 Vict. c. 48.

[8] *Smith's Advertising Agency* v. *Leeds Laboratory Co.*, 1910, 26 T.L.R. 335.

the sale on which the action arose was an illegal proceeding.[1] In *Barclay* v. *Pearson* [2] a particular form of competition had been found to be a lottery. The holder, after the event had been determined, but before the winners had been paid, lodged the money received from the competitors in Court. It was held that the winners could not recover their winnings, but that, in the circumstances, each competitor could recover the amount he had paid.

A contract is not necessarily a lottery merely because it is provided that certain incidents are to be determined by chance. So building or benefit societies are not illegal on the ground that the rules provide that benefits are to be allotted to members by periodical drawings.[3] But where prizes are offered ostensibly for the exercise of skill, the competition may be held to be a lottery, and therefore illegal, if the conditions under which it is conducted shew that the winners owed their success to chance and not to skill or ingenuity.[4]

By the Lotteries Act, 1836 (6 & 7 Will. IV. c. 66), penalties are imposed on the advertisement of, or for the sale of tickets for, any foreign lottery, or lottery not authorised by Act of Parliament. It has been held in England that a person who had obtained a prize in a foreign lottery, though it was legal in the country in which it was held, could not be sued in the English Courts by a party who had bought a share of the ticket.[5]

The Gaming Act, 1845 (8 & 9 Vict. c. 109), precludes action for the recovery of a wager. By the Gaming Act, 1892 (55 & 56 Vict. c. 9), it is provided that any promise to pay any person any sum paid by him in respect of a wager shall be void. But it has been decided that these statutes, on which the English decisions with regard to the enforceability of gambling transactions have turned, are not applicable to Scotland.[6] Thus in Scotland there is no general statutory prohibition of an action founded on a wager.

Common Law. ***Sponsio ludicra.***—Turning to the common law, in the earliest case in the reports an action upon a wager was sustained.[7] But this decision was not followed, and by the end of the eighteenth century the rule was fully established that at common law, and apart from the provisions of any statute, the Courts would not take cognisance of any question arising out of a bet or wager.[8] "Courts of Justice," it was held, "were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard *sponsionibus ludicris*; as to money gained or lost, in which *melior est conditio possidentis*." [9] On this principle it has been decided that the winner of a bet cannot recover from the loser,[10] and that money paid for losses at cards cannot be recovered, even on an allegation that the play

[1] *Christison* v. *Macbride*, 1881, 9 R. 34.

[2] [1893], 2 Ch. 154.

[3] *Sinclair* v. *Provident Association of London*, 1894, 31 S.L.R. 501; *Wallingford* v. *Mutual Society*, 1880, 5 App. Cas. 685.

[4] *Barclay* v. *Pearson* [1893], 2 Ch. 154; *Blyth* v. *Hulton*, 1908, 24 T.L.R. 719. See also *Di Carlo* v. *Macintyre*, 1914, S.C. (J.) 60, a decision upon a local statute.

[5] *Gorenstein* v. *Feldman*, 1911, 27 T.L.R. 457 (Coleridge, J.). See *Macnee* v. *Persian Investment Corporation*, 1890, 44 Ch. D. 306.

[6] *Levy* v. *Jackson*, 1903, 5 F. 1170. For English law, see Chitty, *Contracts*, 17th ed., 794; Leake, *Contracts*, 7th ed., 559.

[7] *A.* v. *B.*, 1676, M. 9505.

[8] *Hope* v. *Tweedie*, 1776, 5 Brown's Supp. 603; *Bruce* v. *Ross*, 1787, M. 9523; affd. 1788, 3 Paton, 107; *Wordsworth* v. *Pettigrew*, 1799, M. 9524.

[9] *Wordsworth* v. *Pettigrew*, *supra*. Would a provision that any difference as to a bet should be settled by arbitration (void in England, *Joe Lee Ltd.* v. *Lord Dalmeny* [1927], 1 Ch. 300) be valid in Scotland, in respect that it does not encroach on judicial time?

[10] *Gordon* v. *Campbell*, 1804, M. App. *voce Pactum Illicitum*, No. 3; *Wordsworth* v. *Pettigrew*, *supra*.

was unfair.[1] It is immaterial that the bet is embodied in a formal deed, stamped, and recorded in the Books of Council and Session.[2] Nor will the Court decide who has won a prize at a race.[3] And as the objection does not lie in any illegality in racing, but on the improper occupation of judicial time in trivial matters, it would appear that no action would be allowed on the question whether a particular competitor had won a prize at an athletic meeting or at an agricultural show.[4] The Courts will take judicial notice of the fact that an action is founded on a gaming transaction, though neither party may take that plea.[5]

Agent, Stakeholder.—On the other hand, if the fact that the race or other event has been decided in a particular way be admitted, the Courts will interfere to protect the rights of parties. Thus an action was allowed to decide the question whether the owner or the nominator of a dog, admittedly the winner at a coursing meeting, was entitled to the prize, on the ground that the question really involved was one of trust or mandate.[6] And the person who had received the stakes at a race meeting was held bound to pay to the owner of the winning horse, there being no question as to the result of the race, and no claim by the parties whose entry-money had contributed to the stakes.[7]

On English authority it is the law that when money has been deposited with a stakeholder to abide the result of a sporting event, it may be reclaimed by the depositor so long as it has not actually been paid to the winner.[8] So where *A.* and *B.* deposited money with the proprietor of a newspaper as the stake in a match between them, and *A.* demanded the return of his deposit after *B.* had won the match, but before he had been paid, it was held that the stakeholder was liable to *A.*, and could not plead in defence that, after receiving *A.'s* demand for repayment, he had paid the whole stake to *B.*[9]

No Illegality in Gaming.—In spite of an isolated dictum[10] it is conceived that there is no illegality in gaming, unless the methods adopted involve a contravention of any of the statutory provisions which have been detailed in the preceding pages. The reason why an action to enforce payment of a bet is incompetent is, not that the contract involved in the bet is a *pactum illicitum*, but that it is a *sponsio ludicra*, and beneath the notice of a Court of Justice.[11] "Horse-racing is not illegal. Nor is betting illegal in the sense

[1] *Paterson* v. *Macqueen*, 1866, 4 M. 602.

[2] *Gordon* v. *Campbell*, *supra*.

[3] *Graham* v. *Pollok*, 1848, 10 D. 646; *O'Connell* v. *Russell*, 1864, 3 M. 89; *Calder* v. *Stevens*, 1871, 9 M. 1074.

[4] *Wilkie* v. *Stanley Ploughing Union*, 1902, 19 Sh. Ct. Rep. 361; *Calder* v. *Stevens*, 1871, 9 M. 1074, opinion of Lord Justice-Clerk Moncreiff.

[5] *Hamilton* v. *M'Lauchlan*, 1908, 16 S.L.T. 341.

[6] *Graham* v. *Pollok*, 1848, 10 D. 646. In the subsequent jury trial in this case (*Gibson* v. *Pollok*, 1848, 11 D. 343) evidence of the "sporting law" applicable to the facts was admitted, and the Lord President (Boyle) charged the jury that they must be guided by it, in the absence of proof of any specific agreement between the parties.

[7] *Calder* v. *Stevens*, 1871, 9 M. 1074. In this case it was held in the Sheriff Court and acquiesced in, that the pursuer, though he might recover the stakes contributed by each competitor, could not recover money offered as an additional prize.

[8] *Diggle* v. *Higgs*, 1877, 2 Ex. D. 422; *Trimble* v. *Hill*, 1879, 5 App. Cas. 342; *Burge* v. *Ashley & Smith Ltd.* [1900], 1 Q.B. 744. The law is not altered in this respect by the Gaming Act, 1892 (*O'Sullivan* v. *Thomas* [1895], 1 Q.B. 698).

[9] *Burge* v. *Ashley & Smith Ltd.*, *supra*.

[10] "Betting and gambling are *pacta illicita*," per Lord Justice-Clerk Moncreiff, *Calder* v. *Stevens*, 1871, 9 M. 1074, at p. 1076.

[11] *Foulds* v. *Thomson*, 1857, 19 D. 803; *Knight & Co.* v. *Stott*, 1892, 19 R. 959; *Traynor* v. *Macpherson*, 1911, S.C. (J.) 54. Betting is not illegal in England, though by statute a bet cannot be recovered (*Thacker* v. *Hardy*, 1878, 4 Q.B.D. 685; *Read* v. *Anderson*, 1884, 13 Q.B.D. 779).

of being prohibited or punishable. It is true that the Courts of Scotland do not entertain actions to determine wagers; it is also true that by the cautious provisions of the Act 1621, c. 11, which is directed against excess in wagering, kirk sessions were given right to the surplus over 100 merks of every racing bet, and by more modern statutes it is an offence to keep a house for betting. But there is no such legal taint in betting as to infect all the contracts which are in any way related to it."[1]

It has been decided in England that if the promise to pay a gaming debt is renewed, in respect of an undertaking by the creditor to give time for payment and to refrain from making public the debtor's default, that undertaking amounts to a new consideration, on which an action may be founded.[2] This principle has not been judicially considered in Scotland; it may be doubtful whether it would overcome the fundamental objection, in Scots law, that the investigation of gaming transactions is a waste of judicial time.

Joint Adventure in Gambling.—If two parties engage in a joint adventure in a gaming transaction, it would appear that the one on whom the loss has happened to fall may recover his share from the other.[3] They are not wagering with each other, because under no circumstances could the one be better or worse off by the event than the other.[4] An I.O.U., given for money lent to meet losses at cards, has been held to be enforceable.[4] And a broker or agent employed to bet may recover his commission and expenditure from his principal;[5] the principal may recover from the agent the winnings which the agent has actually received,[6] on the ground that to assist others in gambling is not an illegal act, and that the rights arising from such assistance are not beneath the notice of the Court. In *Levy* v. *Jackson*[7] a commission agent sued for a balance arising on sums paid by him for the defender on betting transactions, after deducting the amount received on bets which had been won. The defence was that the sums sued for were irrecoverable at common law and under the provisions of the Gaming Act, 1892 (55 Vict. c. 9). It was held that the Act did not apply to Scotland; that at common law the pursuer was entitled to recover what he had paid on the defender's behalf, and a proof on that point was allowed. But in such cases a party employed as a commission agent must prove that in fact he acted as an agent, and made payments to a third party on his principal's behalf, or at least made contracts under which he was liable to a third party. If he can prove this, it is immaterial that his intervention was in furtherance of gambling. But if he disregarded the form of his instructions, with or without the consent of his nominal principal, and in reality acted as the other party to a wager or bet, or to a speculation in the rise or fall in the price of shares or commodities, the transaction becomes a mere *sponsio ludicra*, of which the Courts will not take cognisance. So where an iron-broker sued for an account alleged to be due as the loss resulting on purchases of pig iron made by him on the defender's account, and proved

[1] Per Lord President Robertson, *Knight & Co.* v. *Stott*, 1892, 19 R. 959, 962.

[2] *Hyams* v. *Stuart King* [1908], 2 K.B. 696.

[3] *Mollison* v. *Noltie*, 1889, 16 R. 350, see opinion of Lord Justice-Clerk; *Thwaites* v. *Coulthwaite* [1896], 1 Ch. 496.

[4] *Hopkins* v. *Baird*, 1920, 2 S.L.T. 94.

[5] *Foulds* v. *Thomson*, 1857, 19 D. 803; *Gillies* v. *M'Lean*, 1885, 13 R. 12; *Knight & Co.* v. *Stott*, 1892, 19 R. 959; *Levy* v. *Jackson*, 1903, 5 F. 1170; *Read* v. *Anderson*, 1884, 13 Q.B.D. 779; *Iremonger* v. *Dyne*, 1928, 44 T.L.R. 497; *Weddle, Beck & Co.* v. *Hackett* [1929], 1 K.B. 321.

[6] *Bridges* v. *Savage*, 1885, 15 Q.B.D. 363.

[7] 1903, 5 F. 1170.

that he had the defender's authority to buy on the Glasgow pig-iron market, but failed to prove that he had, in fact, made any purchases on that market for the defender's behoof, or sold to him iron on behalf of another client, it was held that he had proved nothing but a wager on the price of iron, on which he was not entitled to recover.[1] And where a pursuer, suing for the recovery of winnings, was proved to have been aware that he was dealing with a bookmaker, and not with a commission agent, it was held that he could not recover.[2]

Stock Exchange Transactions. In transactions with dealers in commodities, with outside brokers, or with jobbers on a Stock Exchange, the balance of authority in Scotland is that if the forms of an Exchange are observed, so that there is created an obligation on the one party to deliver commodities or shares, on the other to accept them and pay the price, the contract may be the subject of an action, even although it is proved that neither party contemplated any actual transfer.[3] In *Heiman* v. *Hardie*,[4] where there were a series of contracts for the purchase, and also for the sale, of wheat between a party in Leith and a merchant in Berlin, all subject to the usages of the Berlin sworn brokers, and ultimately the merchant closed the transactions and sued for the difference between the price at which the wheat had been sold to him and an average price officially fixed in Berlin, the Court came to the conclusion, on the terms of the contracts, the correspondence between the parties, and evidence of the usage of trade in Berlin, that there was no absolute obligation on either party to deliver the wheat, and therefore that the transaction, as a mere gamble in differences, could not be considered. But in Stock Exchange transactions, carried out by means of contract notes which could be enforced, the right of action has been sustained in all the cases which have come before the Scottish Courts, even in the case of dealings with a party who was not a member of any Stock Exchange, and on the "cover" system, *i.e.*, on a system whereby a certain amount is deposited by the customer, and his liability, in the event of adverse movements in the stock, is limited to that amount.[5]

Loan to Meet Losses. On the assumption that gambling is not necessarily illegal in Scotland, there would seem no reason to doubt that money lent to meet losses at play may be recovered by action.[6] But it is probably irrecoverable if lent to meet losses at a game, or method of gaming, which is penalised by statute.[7]

Definition of Wager.– It would seem difficult, if not impossible, to state any general distinction between a bet or wager, and contracts depending

[1] *Gillies* v. *M'Lean*, 1885, 13 R. 12.

[2] *Hamilton* v. *M'Lauchlan*, 1908, 16 S.L.T. 341.

[3] *Risk* v. *Auld and Guild*, 1881, 8 R. 729; *Newton* v. *Cribbes*, 1884, 11 R. 554; *Shaw* v. *Caledonian Rly. Co.*, 1890, 17 R. 466; *Liquidator of Universal Stock Exchange* v. *Howat*, 1891, 19 R. 128; *Mole* v. *Lupton & Co.*, 1894, 2 S.L.T. 365; *Symonds & Co.* v. *Davis*, 1899, 7 S.L.T. 291; *Johnston* v. *Gordon*, 1899, 7 S.L.T. 294. In *Gillies* v. *M'Lean* (1885, 13 R. 12) and *Heiman* v. *Hardie & Co.* (1885, 12 R. 406), the plea of *sponsio ludicra* was sustained.

[4] *Heiman* v. *Hardie & Co.*, 1885, 12 R. 406.

[5] *Shaw* v. *Caledonian Rly. Co.*, 1890, 17 R. 466; *Cunningham* v. *Lee*, 1874, 2 R. 83. In England more weight has been given to the intention of the parties, and a contract has been held to fall within the provisions of the Gaming Acts although an enforceable obligation has been created, on proof that neither party intended to enforce it (*Forget* v. *Ostigny* [1895], A.C. 318; *Universal Stock Exchange Co.* v. *Strachan* [1896], A.C. 166; *In re Cronmire* [1898], 2 Q.B. 383; *In re Gloss* [1899], 1 Q.B. 794; *Richards* v. *Starck* [1911], 1 K.B. 296).

[6] *Hopkins* v. *Baird*, 1920, 2 S.L.T. 94; *Moulis* v. *Owen* [1907], 1 K.B. 746; *Saxby* v. *Fulton* [1909], 2 K.B. 208.

[7] *M'Kinnell* v. *Robinson*, 1838, 3 M. & W. 434, as explained by Fletcher-Moulton, L.J., in *Moulis* v. *Owen*, *supra*, at p. 767.

on the issue of an uncertain event, such as insurance, bottomry bonds, the purchase of something not yet in existence, or dealings on the Stock Exchange where neither party intends to transfer the shares dealt in. In argument in an early Scottish case it was put that such contracts are sustained from favour to commerce, while no argument of convenience or expediency can support a wager.[1] A definition of a wager, as distinguished from a speculative contract, may be quoted from the opinion of an English judge.[2]

Effect of Illegality. While the primary object of the preceding pages has been to determine what contracts are illegal, the effects of that illegality have necessarily been incidentally considered. Subject to what has been already said, an attempt may now be made to summarise these effects, and to explain the circumstances which involve exceptions to the general rules.

Ex turpi causa non oritur actio.—Where a contract involves an element of illegality, as distinguished from the case where it is merely declared void by statute,[3] the effect is to debar the parties concerned from the right to appeal to Courts of Justice. The effect of the maxims *ex turpi causa non oritur actio* and *in turpi causa melior est conditio possidentis* is, where they are fully applicable, that one wrongdoer may with impunity take any advantage of the others of which the circumstances admit. Where the action is not an attempt to enforce the commission of an illegal act, but is a demand connected with such an act, the general test of whether it is capable of being enforced is whether the pursuer acquires the aid of the illegal act to establish his case. "If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action."[4] It is no objection to the application of the rule that the defender is founding on his own illegal act. "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law, then the Court says he has no right to be assisted."[5]

The necessary consequence of the refusal of judicial assistance in the expiscation of rights resulting from an illegal agreement is that the party who has gained an advantage is entitled to keep it. If a partnership be

[1] *Stewart* v. *Earl of Dundonald*, 1753, M. 9514, 16431.

[2] Hawkins, J., *Carlill* v. *Carbolic Smoke Ball Co.* [1892], 2 Q.B. 484, 490: "A wagering contract is one whereby two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent on the determination of that event, one shall win from the other, and the other shall pay or hand over to him a sum of money or other stake, neither of the parties having any other interest in that contract than the sum at stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore remaining uncertain until the issue of that event is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract." See also opinion of Lord Hunter in *Strang* v. *Brown*, 1923, S.C. (J.) 74, and *Yeudall* v. *M'Quilkie*, 1928, S.C. (J.) 54; opinion of P.O. Lawrence, J., in *London County Reinsurance Co., in re* [1922], 2 Ch. 67; *Lord Ellesmere* v. *Wallace*, 1929, 45 T.L.R. 238 (C.A.). The example of a conditional stipulation, in *Inst.*, iii. xv. 2, *Si Titius Consul factus fuerit, quinque aureos dare spondes?* looks very like a bet on the election of Titius.

[3] See *supra*, p. 550.

[4] Per A. L. Smith, L.J., *Scott* v. *Brown* [1892], 2 Q.B. 724, 734.

[5] Per Lord Mansfield, *Holman* v. *Johnson*, 1775 .1 Cowp. 341,

illegal, one partner may have defrauded the other, but no action of accounting is admissible.[1] Where goods have been supplied for an illegal purpose, there is no action to recover them or their value.[2] Where a scheme to defraud a third party has proved successful, the conspirator who has obtained the profit cannot be legally compelled to share with the others.[3] Where a lease had been granted, on very favourable terms, to a trustee for the granter's mistress, and was challenged by his heir, it was held that although the lease arose out of an immoral and illegal relation, yet as it had been duly completed by possession, and had conferred upon the lessee a real right in the subjects, the Courts would not assist the granter, or anyone taking gratuitously from him, in an attempt to recover property in which he must found on the illegality of his own act.[4]

So, again, if an illegal transaction has resulted in a loss, and that loss has happened to fall on one of two parties equally concerned in the illegality, he cannot have any relief against the others. So a promise to indemnify another for the consequences of committing an unlawful act—for instance, printing a defamatory statement—cannot be enforced.[5] Where a joint adventure was entered into for the purpose of exporting arms and gunpowder to the coast of Africa—an enterprise then illegal under an Order in Council—and the speculation resulted in a loss, it was held that the loss must be borne by the party on whom it had happened to light, one joint adventurer in an illegal scheme having no right of relief against the other, nor any right to enforce an agreement by the other to meet a portion of the expenditure.[6]

But it is not an absolute or invariable rule that a party concerned in an illegal transaction puts himself out of the legal pale. There are certain cases where redress may be competent.

Recovery of Property. In the first place, a party does not lose the ordinary right to the protection of his property because he has used it to promote an illegal purpose, or acquired it by illegal means. If indeed he parts with it absolutely, as by a sale, he cannot recover it, nor can he sue for the price, if the sale was to his knowledge for an illegal purpose.[7] He cannot sue for the price, because that would involve the enforcement of an illegal contract; he cannot reduce the sale without shewing the illegality in which he has been concerned. But if the illegal purpose involves a merely temporary right, as in a case where property is hired or let for improper objects, though the hire or rent cannot be recovered,[8] nor the contract of hire or lease reduced,[9] it is conceived that the illegality of the purpose for

[1] *Fraser* v. *Hill*, 1852, 14 D. 335; *Gordon* v. *Howden*, 1843, 5 D. 698; revd. 1845, 4 Bell, 254; *A. B.* v. *C. D.*, 1912, 1 S.L.T. 44; *Sykes* v. *Beadon*, 1879, 11 Ch. D. 170. But it has been held in England that if the objects of the partnership were not illegal, the mere fact that they were carried out in an illegal manner did not prevent the one partner from suing the other. Thus an accounting was allowed in a partnership to carry on the business of bookmakers, though the plaintiff's statement shewed that it was carried on in contravention of the Betting Act, 1853 (*Thwaites* v. *Coulthwaite* [1896], 1 Ch. 496. See also *Farmers' Mart* v. *Milne*, 1914, S.C. 129; affd. 1914, S.C. (H.L.) 84, narrated *supra*, p. 562).

[2] *Burns* v. *Forbes & Boyd*, 1807, Hume, 694.

[3] *Laughland* v. *Millar, Laughland & Co.*, 1904, 6 F. 413, *supra*, p. 561.

[4] *A.* v. *B.*, 21st May 1816, F.C.; revd. on another ground, and reported as *Duke of Hamilton* v. *Waring*, 1820, 6 Paton, 644. See *Ayerst* v. *Jenkins*, 1873, L.R. 16 Eq. 275; *Phillips* v. *Probyn* [1899], 1 Ch. 811; *Mahmoud* v. *Ispahani* [1921], 2 K.B. 716.

[5] Authorities cited *supra*, p. 567, note 1.

[6] *Stewart* v. *Gibson*, 1828, 6 S. 733; 1834, 12 S. 683; 1835, 14 S. 166; 1840, 1 Robinson, 260.

[7] *Burns* v. *Forbes & Boyd*, 1807, Hume, 694.

[8] *Pearce* v. *Brooks*, 1866, L.R. 1 Ex. 213; *Upfill* v. *Wright* [1911], 1 K.B. 506.

[9] *A.* v. *B.*, 21st May 1816, F.C., narrated *supra*, p. 585; *Taylor* v. *Chester*, 1869, L.R. 4 Q.B. 309.

which the temporary possession of the property was given would not prevent the owner from recovering it when the temporary title had expired. He does not then require to enforce or to set aside a contract entered into for an illegal purpose; he can found on the general law that a party who has no title, or whose title has expired, is bound to restore the property to the true owner, and in such an action it is not necessary for the pursuer to set forth the illegal purpose for which the property was originally transferred. On this point there would seem to be no definite authority.[1] But it has been decided that if property is taken possession of by one who has no title to do so, he cannot defend his usurped possession on the plea that the party from whom he took it obtained it illegally.[2] Mere possession is a sufficient title against a wrongdoer.[3]

Parties not *in pari delicto*.—When the parties to an illegal transaction are not *in pari delicto*, the one who is less blameworthy may found upon the illegality. This rule applies when one party has been in a position enabling him to compel the other to concur in the illegal act. It has chiefly been illustrated in cases where a creditor has obtained a secret preference from the debtor as the price of his concurrence in a composition.[4] Such arrangements are illegal;[5] but, as the creditor who demands a preference, and the debtor who grants it, are not *in pari delicto*, the debtor may recover what he has paid, although in order to do so he must found on the illegality to which he has been a party.[6] In *Arrol* v. *Montgomery*[7] a creditor had acceded to a composition contract, and had obtained from the bankrupt, without the knowledge of the other creditors, two bills. These bills were enforced by third parties, to whom they had been indorsed. It was held that the debtor could recover from the creditor the amount which he had paid, repelling the defence founded on the maxim *in turpi causa melior est conditio possidentis*, on the ground that the bankrupt had been compelled to submit to the creditor's demand. In *Macfarlane* v. *Nicoll*[8] a firm had called a meeting of their creditors, and proposed a composition, which was accepted. *N.*, one of the creditors, acceded to the composition, but secretly obtained from the firm four promissory notes, payable at different dates. The firm were afterwards sequestrated. In an action by the trustee against *N.* it was held (1) that *N.* could not claim in the sequestration on one of the promissory notes which was still in his hands; (2) that the trustee was entitled to recover from him the amount of another note, which had been indorsed to third parties, and paid to them by the bankrupts; but (3) that he could not recover the amount paid on the remaining two notes, which had been paid by the bankrupts to *N.* himself. The distinction drawn between the last two cases was that the payment to indorsees was a payment which the bankrupts could have been compelled to make, the payment to *N.*

[1] See opinion of James, L.J., in *Taylor* v. *Bowers*, 1876, 1 Q.B.D. 291, 298.

[2] *Gordon* v. *Chief Commissioner of Police*, 1910, 26 T.L.R. 645; *Scott* v. *Everitt*, 1853, 15 D. 288. See also *Feret* v. *Hill*, 1854, 15 C.B. 207, where it was held that a lessee who had been ejected might vindicate his right to possession though he was using the subjects for illegal purposes.

[3] *Armory* v. *Delamerie*, 1722, 1 Smith, *L.C.*, 396.

[4] For its application to other circumstances, see opinions in *Harse* v. *Pearl Life Assurance Co.* [1904], 1 K.B. 558; and *Hermann* v. *Charlesworth* [1905], 2 K.B. 123; *Reynell* v. *Sprye*, 1852, 1 De G. M. & G. 660.

[5] *Supra*, p. 562.

[6] *Arrol* v. *Montgomery*, 1826, 4 S. 499; *Macfarlane* v. *Nicoll*, 1864, 3 M. 237. If the secret preference was given by a friend of the debtor, it would appear that the parties would be *in pari delicto*, and neither could sue the other (*Thomas* v. *Waddell*, 1869, 7 M. 558).

[7] *Supra*,

[8] 1864, 3 M. 237.

one for which no legal compulsion could have been used, and which, therefore, was to be taken as a voluntary payment on the bankrupts' part.

Statutes Intended to Protect Class. Where the illegality of a contract depends upon a statutory provision, and the statute in question is construed as intended for the protection of a particular class, a member of that class may invoke the aid of the Court for the recovery of what he has paid under the illegal contract. Thus a loan by a moneylender who has not been registered under the Moneylenders Act, 1900 (63 & 64 Vict. c. 51), is illegal, but as the Act was passed for the protection of borrowers, a party who has deposited securities with an unregistered moneylender may recover them.[1] Where an Order fixed a maximum price for whisky, the Lord Ordinary, holding that the Order was passed to protect purchasers from extortionate charges, decided that a purchaser might recover what he had paid in excess.[2] In England, however, it has been held that such Orders are passed in the general interests of the State.[3]

Bar to Plea of Illegality. If an illegal contract has been followed by actings, and one of the parties pleads its illegality in order to secure some benefit from which the terms of the contract would debar him, the Court will not sustain the plea, although by refusing it they indirectly sustain the illegal contract. In *Bolden* v. *Fogo*[4] an English solicitor entered into a bargain by which he undertook to carry on a litigation in the Scotch Courts for the recovery of an estate, on the condition that the claimant was to incur no liability in the event of failure, but in the event of success the solicitor was to receive £8 for every £1 he had expended. The action failed, and the solicitor sued for the sum of £1,390, consisting partly of expenditure, partly of professional charges. In answer to the defence, founded on the agreement that payment was to be conditional on success, he maintained that it was a *pactum illicitum*. It was held that, even assuming the illegality of the agreement, the pursuer could not take that plea. "To him who pleads and brings before the Court the illegality of this agreement I apprehend the appropriate and conclusive legal answer is—Assume the agreement to be, as you say, illegal, it is the one you acted under, and the only understanding on which you were allowed to act; and the very policy of the law to which you now appeal as discountenancing such agreements is best advanced by holding that if you have no claim under that agreement you have none at all, and have thrown away your money and services in the hope of an illegal profit."[5]

Illegal Purpose Abandoned. There is English authority for the proposition that if money is paid for an illegal object, it may be recovered by action if redemanded before the illegal purpose has been carried out, in whole or in part.[6] Thus, as has already been stated, a stakeholder, though the event in issue be illegal, must restore the stake if a demand is made before he has actually paid it.[7] Where, however, a party had found bail for another who was charged with a criminal offence, and had demanded the deposit of a security to cover his possible liability, it was held that though the contract was illegal (as rendering the security of the bail illusory), yet as it had been

[1] *Phillips* v. *Blackhurst*, 1912, 2 S.L.T. 254.
[2] *M'Carroll* v. *Maguire*, 1920, 2 S.L.T. 108 (Lord Sands).
[3] *Mahmoud* v. *Ispahani* [1921], 2 K.B. 716.
[4] 1850, 12 D. 798.
[5] *Bolden* v. *Fogo*, *supra*, per Lord Justice-Clerk Hope, 12 D., at p. 804.
[6] Pollock, *Contract*, 9th ed., 460.
[7] *Supra*, p. 582.

partly implemented when bail was found, the security could not be recovered.[1] But where money was paid to a matrimonial agency, and certain introductions followed, but no marriage was brought about, it was held that the party was entitled to recover the payment.[2]

Contracts Illegal in Part. The mere fact that a contract contains an illegal provision does not necessarily involve the consequence that it is completely unenforceable. The contract may be divisible. The general rule has been stated as follows: "If the consideration is tainted with illegality, either in whole or in part, all the promises depending on that consideration must fail; but if the consideration be not tainted with illegality, either wholly or in part, then if one of the several promises depending on it be illegal, and the others legal, the legal promises stand."[3] Thus where in an agricultural lease the tenant renounced the right to kill ground game, it was held that though the renunciation was illegal under sec. 3 of the Ground Game Act, 1880 (43 & 44 Vict. c. 47), the lease was not thereby avoided.[4] An obligation to pay an annuity free of income tax, contrary to the provisions of 5 & 6 Vict. c. 35, sec. 103, was sustained, except in so far as the deduction of income tax was concerned.[5] In a contract between a miner and his employer the miner undertook not to leave his work without giving fourteen days' notice, and the employer undertook to pay wages calculated on a basis which was found to be illegal. It was held that the illegality of this latter provision did not in any way affect the validity of the obligation to give notice.[6] Where directors, within their powers, borrowed money, and by the contract bound themselves to do certain things which were *ultra vires*, it was decided that these stipulations were no bar to the recovery of the loan; the only effect of their illegality was that they could not be enforced.[7] The question whether agreements not to carry on a particular trade may be partly binding has been already considered.[8]

Questions with Assignees. Where rights under a contract which are open to the objection that they are tainted with illegality are transferred to an assignee, the general rule is that he takes no better title than his cedent. So where a heritable bond was granted for the price of smuggled goods, and was assigned to a third party who had no notice of its origin, it was held that it was reducible as a *pactum illicitum* at the instance of a trustee for the creditors of the granter.[9] A statutory exception to this rule is provided by the Moneylenders Act, 1911.[10] And it does not apply to bills, promissory notes, or cheques. If granted for an illegal consideration, a bill cannot be enforced by an indorsee who had notice of the illegality.[11] But an indorsee of a bill granted for an illegal consideration may be a holder in due course, provided that he can prove that subsequent to the illegality he has in good faith given value for the bill, and, if so, he holds the bill free from any defect

[1] *Hermann* v. *Jeuchner*, 1885, 15 Q.B.D. 561. Cp. *Kearley* v. *Thomson*, 1890, 24 Q.B.D. 742, where it is pointed out that the limits of the rule are ill-defined. It can hardly be applicable to a scheme contemplating the commission of a serious crime.

[2] *Hermann* v. *Charlesworth* [1905], 2 K.B. 123.

[3] Per A. L. Smith, L.J., *Kearney* v. *Whitehaven Colliery Co.* [1893], 1 Q.B. 700, at p. 714. See argument in *Lord Lovat* v. *Fraser*, 1745, M. 9557; and opinion of Lord Dunedin in *Farmers' Mart Ltd.* v. *Milne*, 1914, S.C. (H.L.) 84.

[4] *Stanton* v. *Brown* [1900], 1 Q.B. 671.

[5] *Blair* v. *Allen*, 1858, 21 D. 15.

[6] *Kearney* v. *Whitehaven Colliery Co.* [1893], 1 Q.B. 700.

[7] *Bank of Australasia* v. *Breillat*, 1848, 6 Moore, P.C. 152.

[8] *Supra*, p. 574.

[9] *Nisbet's Creditors* v. *Robertson*, 1791, M. 9554.

[10] 1 & 2 Geo. V. c. 38. Repealed, but in this respect re-enacted, Moneylenders Act, 1927 (17 & 18 Geo. V. c. 21), sec. 17.

[11] *Duncan* v. *Thomson*, 1776, M. App. *voce Pactum Illicitum*, No. 1.

of title of prior parties, and may enforce payment against all parties liable on the bill.[1]

International Law on Illegal Contracts. Questions of international law with regard to illegality in contract may arise when an action is brought in Scotland either (1) based on a contract illegal in the place where it was made, but legal if made in Scotland; or (2) based on a contract legal in the place where it was made, but illegal according to the law of Scotland.

Contract Illegal where Made, not Illegal in Scotland.—In the first case the authorities do not afford a very definite rule. In *Clements* v. *Macaulay*[2] an action of accounting was raised in the Court of Session, relating to the profits made in a joint adventure entered into in Texas, but between parties who were domiciled in different States, for the purpose of supplying munitions of war to the Government of the Confederate States during the American Civil War. The only point decided was as to the plea of *forum non conveniens*, which was repelled. But the plea that the contract was illegal by the law of Texas and of the United States (on the ground that the Confederate States were rebels and not belligerents) was stated, and the opinions given lead to the conclusion that, given proof of the foreign law, the plea would be sustained in Scotland. And the law is so laid down by the leading authorities on international law.[3]

Contract Legal where Made, Illegal in Scotland.—In the case of a contract which is legal in the place where it was made, but illegal according to the law of Scotland, it is quite clear that the Courts will not lend their assistance to a party who is attempting to infringe the law of this country, though the contract on which he is suing may have been made abroad. So it was held that no action could be allowed for the price of smuggled goods, even though the contract was made in a foreign country.[4]

Different considerations arise where a contract is intended by the parties to be implemented in the country where it is made, and where it is legal. Does the fact that it would have been illegal if made in Scotland preclude action here? This question has not been raised in Scotland in cases where the contract was definitely illegal, but has been considered with reference to arbitration clauses.[5] In *Hamlyn & Co.* v. *Talisker Distillery*[6] a contract contained a clause that any dispute arising under it was to be settled by two members of the London Corn Exchange. In an action raised in Scotland the arbitration clause was pleaded, and it was held in the Court of Session that as the contract was to be performed in Scotland, the arbitration clause was to be considered by the law of Scotland, and, being a reference to unnamed arbiters, was, as the law then stood, not binding. In the House of Lords it was held that the arbitration clause fell to be considered according to the law of England, and that there was no principle upon which, on the footing that it was valid in England, it should be denied effect in an action raised

[1] Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, secs. 30, 38.

[2] 1866, 4 M. 583. As to contracts inconsistent with the revenue laws of a foreign country, see *supra*, p. 565.

[3] Dicey, *Conflict of Laws*, 3rd ed., p. 597, and App. Note 23; Bar, *International Law* (Gillespie's translation), 2nd ed., p. 557; *Ralli* v. *Compania Naviera* [1920], 2 K.B. 287; *Trinidad Shipping Co.* v. *Alston* [1920], A.C. 888.

[4] *Cantley* v. *Robertson*, 1790, M. 9550; *Cullen & Co.* v. *Philp*, 1793, M. 9554; *Reid & Parkinson* v. *Macdonald*, 1795, M. 9555.

[5] *Hamlyn* v. *Talisker Distillery*, 1893, 21 R. 204; revd. 1894, 21 R. (H.L.) 21; *Robertson* v. *Brandes, Schönwald & Co.*, 1906, 8 F. 815; *Johannesburg Municipal Council* v. *Stewart & Co.*, 1909, S.C. 860; revd. 1909, S.C. (H.L.) 53.

[6] *Supra*.

in Scotland. The principle was expressed by Lord Watson: "I am not disposed to hold that Scotch Courts are bound to give effect to every stipulation in a foreign contract, unless it is shewn to be *contra bonos mores*, in the sense of the law which they administer. There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply-rooted and important considerations of local policy that the Court would be justified in declining to recognise them."[1]

Where the objection to the contract lay in some immorality, as that term has been defined by decisions, or was founded on a transaction which by the law of Scotland amounted to a serious crime, or was contrary to public policy, it is conceived that no action would lie in Scotland, though the law of the country where the contract was to be performed might regard the transaction as innocent. But this is a question of degree, of the shade of turpitude attached to the contract by the *lex fori*. In England an agreement to carry out a collusive divorce,[2] an obligation obtained by threats of criminal prosecution,[3] an action on a contract which would have been void by English law on the ground of champerty,[4] a contract with an alien enemy, to be performed in the enemy country,[5] have been held so inconsistent with the principles of English law, that the Courts would not enforce them on the plea that they were legal in the country in which the contract was made. On the other hand, an obligation for a gaming debt, which in England is unenforceable but not illegal, may be enforced there if granted in a country where it is legally enforceable.[6] A decision that a contract for the sale of slaves, made in Brazil at a time when slavery was there legal, could be enforced in an English Court,[7] has been explained as turning solely on the interpretation of a particular statute.[8]

[1] 21 R. (H.L.), at p. 27.
[2] *Hope* v. *Hope*, 1857, 8 De G. M. & G. 731.
[3] *Kaufman* v. *Gerson* [1904], 1 K.B. 591.
[4] *Grell* v. *Levy*, 1864, 16 C.B. N.S. 73.
[5] *Dynamit Action Gesellschaft* v. *Rio Tinto* [1918], A.C. 292.
[6] *Saxby* v. *Fulton* [1909], 2 K.B. 208; *Moulis* v. *Owen* [1907], 1 K.B. 746.
[7] *Santos* v. *Illidge*, 1860, 8 C.B. N.S. 861.
[8] *Dynamit Action Gesellschaft* v. *Rio Tinto* [1918], A.C. 292, at pp. 299, 302.

CHAPTER XXXIV

RIGHTS ARISING ON BREACH OF CONTRACT

The difficult questions which arise in relation to the performance of contractual obligations may be approached most conveniently by considering the remedies which are open to the creditor in the event of non-performance, or of performance which does not satisfy the contractual conditions. It will be convenient to reserve for another chapter the case where the remedy is settled conventionally by a provision in the contract for a penalty or irritancy,[1] and to confine attention at present to the law applicable to contracts where the results of failure to perform have not been provided for by the parties.

General Principles. The primary rights of the creditor in a contractual obligation may be said to be to secure performance by invoking the assistance of the Court to compel it, or, where that remedy is inappropriate, to obtain compensation in damages. But as it is not always possible to secure the fulfilment of an obligation through the instrumentality of a decree of Court, and as an award of damages may be a very imperfect form of redress, the law confers on the creditor, in many cases, the right to adopt measures which may be termed defensive—measures which may enable him to minimise the loss which the default of the debtor threatens to entail, either by rescinding the contract which the other party has failed to implement, or by withholding performance of the obligations which are incumbent on him until those in which he is creditor are performed or secured.

Unity of Contract. The competency of such defensive measures depends on the principle that where in a contract obligations are imposed upon, and undertaken by, each party, these obligations are construed as interdependent and conditional on each other. Where a party undertakes an obligation, and at the same time imposes one, and there is no ground for a distinction between the materiality of the one and that of the other, the normal construction of his obligation is that he obliges himself subject to the implied condition that performance cannot be required from him unless it is given or tendered on the other side.[2] So it has been observed that a claim for

[1] *Infra*, Chap. XXXVI.

[2] Stair, i. 10, 16; Ersk. iii. 3, 86; Bell, *Com.*, ii. 92. The following *dicta* are frequently referred to: "I understand the law of Scotland, in regard to mutual contracts, to be quite clear: 1st, That the stipulations on either side are the counterparts and the consideration given for each other; 2nd, that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance; and, 3rd, that when one party has refused or failed to perform his part of the contract in any material respect, the other is entitled to insist for implement, claiming damages for the breach, or to rescind the contract altogether — except in so far as it has been performed," per Moncreiff, L.J.C., in *Turnbull* v. *M'Lean & Co.*, 1874, 1 R. 730, 738. "Every action on a mutual contract implies that the pursuer either has performed, or is willing to perform, his part of the contract; and it is therefore always open to the defender to say that under the contract a right arises also to him to demand performance of the contract before the pursuer can insist in his action," per Inglis, L.J.C., in *Johnston* v. *Robertson*, 1861, 23 D. 646, 656. See also *Barclay* v. *Anderston Foundry Co.*, 1856, 18 D. 1190, Lord Murray, p. 1195; Lord Cowan, p. 1195; *Graham* v. *United Turkey Red Co.*, 1922, S.C. 533, Lord Justice-Clerk (Scott Dickson),

rent, even assuming the term of payment to have arrived, is not a liquid debt in the sense in which a debt due under a bond is liquid, because rent is not exigible unless the landlord has implemented the material obligations which are incumbent on him under the lease.[1]

Illustrative Cases. The general rule that the obligations under a contract are interdependent or concurrent has been illustrated in the following cases, in all of which the question of interdependence has bulked more largely than that of the materiality of the respective obligations. A restrictive covenant, under which an employee undertakes not to engage in his employer's trade or profession, is dependent on the fulfilment of the employer's obligation to furnish work and pay for the stipulated period, and cannot be enforced if the employee has been wrongfully dismissed.[2] Clauses in a charter-party or bill of lading under which the shipowner secures exemption from the consequences of his negligence are dependent on his observance of his obligation not to deviate from the prescribed route, and cannot afford a defence after deviation, even if the proper route has been regained.[3] Where a landlord enforced a clause entitling him to bring the lease to an end in respect of the tenant's failure to pay rent, it was found that the tenant could not insist on a clause in the lease by which the landlord undertook to take over the sheep stock at his awaygoing.[4] Where in a feu-contract the vassal undertook to lay out certain streets, and the superior agreed to give the vassal an enforceable right to the use of other streets to be formed on his property, it was decided that these were interdependent obligations, and therefore that the superior, who had disponed the remaining part of his property to a third party without imposing on him any servitude or obligation in favour of the vassal, could not enforce the obligation to lay out the streets.[5] In *Dingwall* v. *Burnett*,[6] *A.* agreed to take a lease of an hotel and to purchase the furniture and fittings at valuation. Under a clause in the contract he deposited £50 in bank, in the joint names of himself and the lessor, to account of the price. Thereafter *A.* refused to carry out his bargain, and brought an action to have the lessor ordained to indorse the deposit receipt, on the ground that the object for which the money was deposited—security for payment of the price—was no longer applicable. It was held that as *A.* was in breach he could not insist on the lessor fulfilling an obligation arising out of the contract. In sale, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions,[7] and it has been remarked by a high authority that if a buyer chooses to insist on his strict rights he is not bound

p. 541; Lord Salvesen, p. 545. It has been remarked that the law of Scotland lays exceptional stress on the unity of contracts (*Somerville* v. *B.F. Goodrich Co.*, 1904, 12 S.L.T. 188, per Lord Low), and it may be surmised that the Scotch Courts would not follow the English rule that the obligations in apprenticeship are so completely independent that misconduct by an apprentice does not justify his dismissal (*Waterman* v. *Fryer* [1922], 1 K.B. 499). But this depends on historical considerations, and there seems no ground for holding that there is any real distinction in principle between English and Scots Law. English judicial *dicta* are collected in I. Smith, *L.C.*, notes to *Cutter* v. *Powell*.

[1] Per Lord Fullerton, *Graham* v. *Gordon*, 1843, 5 D. 1207; per Lord Kinnear, *Lovie* v. *Baird's Trs.*, 1895, 23 R. 1.

[2] *General Billposting Co.* v. *Atkinson* [1909], A.C. 118; *Measures Brothers* v. *Measures* [1910], 2 Ch. 248.

[3] *Morrison* v. *Shaw* [1916], 2 K.B. 783; *The Refrigerant* [1925], P. 130; *Cunard S.S. Co.* v. *Buerger* [1927], A.C. 1; *Lord Polwarth* v. *North British Rly.*, 1908, S.C. 1275 (land carriage).

[4] *Marquis of Breadalbane* v. *Stewart*, 1904, 6 F. (H.L.) 23.

[5] *Stevenson* v. *Steel Co. of Scotland*, 1896, 23 R. 1079; affd. 1899, 1 F. (H.L.) 91.

[6] 1912, S.C. 1097.

[7] Sale of Goods Act, 1893, sec. 28.

to pay the price until the whole of the goods are delivered, even where delivery by instalments is the only practicable course.[1]

Separable Obligations. The statement that the obligations of each party under a mutual contract are the counterparts of each other of course does not mean, as is noticed by Lord Stair,[2] that a contract cannot be framed which will entitle one party to demand performance without tendering performance himself. There is no legal principle to preclude an arrangement under which *A.* shall be entitled to demand some particular act or payment from *B.*, irrespective of the question whether he is able to perform his own obligations under the contract between them ; or—a more usual contract—that *A.* shall be entitled to demand performance from *B.* before his own obligations become prestable, and at a time when it may be doubtful whether he can fulfil them or not. Such a contract is clearly inconsistent with any assertion by *B.* of a right to withhold performance until counter-performance is tendered. So in a sale on credit the seller is bound to deliver the goods at once.[3] Delivery of the goods and payment of the price are not concurrent conditions, and the fact that the goods have been delivered does not justify the seller in raising action for the price until the period of credit has expired.[4] In *Carmichael* v. *Dempster* [5] an estate was sold by the proprietrix and her husband. The proprietrix was a minor. The husband undertook that she would ratify the sale on attaining majority. The purchaser, who had granted a bond for the price, suspended a charge upon it on the plea that he was not bound to pay until the sale was ratified. It was held that as the bond bore to be immediately payable, whereas the obligation to ratify the sale was one which could not be implemented until the proprietrix attained majority, the one stipulation was not dependent on the other, and therefore payment of the bond could not be withheld. While this case can doubtless be supported on the ground that there was a clear indication of intention that the one obligation should be fulfilled before the other became exigible, it is a very strong argument for holding obligations to be concurrent that any other construction would leave one party without any available remedy. So if the scheme of the contract be that *A.* should transfer property to *B.*, and that *B.* should give security for its return, or for payment of the price, it will require very clear language to induce the Court to hold that *B.* can insist on delivery before he is ready to furnish the security.[6]

Even when the obligations on each side are exigible at the same time, it is only a general rule that they are mutually conditional. Though from the authorities cited at the beginning of this chapter it is clear that the presumption is that the obligations undertaken by one party are the counterpart and consideration for each other, it is a presumption merely. The contract may really be a congeries of contracts undertaken at one time, but independent of each other. And though "it is a general principle that all the material stipulations in a contract forming a *unum quid* are mutual causes," [7] the fulfilment of one obligation may be dependent on the fulfilment of another, but not necessarily dependent on the fulfilment of all the obligations which

[1] *Hall* v. *Scott*, 1860, 22 D. 413, per Inglis, L.J.C., at p. 420. See also *Angus Brothers* v. *Scott*, 1916, 2 S.L.T. 181.
[2] Stair, i. 10, 16.
[3] *Fleming* v. *Smith & Co.*, 1881, 8 R. 548.
[4] *Crear* v. *Morison*, 1882, 9 R. 890.
[5] 1676, M. 9163.
[6] *Roberts* v. *Brett*, 1865, 11 H.L.C. 337.
[7] Per Lord Neaves, *Turnbull* v. *M'Lean & Co.*, 1874, 1 R. 730, at p. 739.

the contract may impose.[1] In *Pendreigh's Tr.* v. *Dewar*[2] a mill was let for nineteen years. It was provided in the lease that the tenant should lay out £200 on repairs, that the landlord should pay interest at 1½ per cent., and that the principal sum should be repaid "at the expiry of the lease." During the currency of the lease the tenant became bankrupt, and the landlord enforced a conventional irritancy. The tenant then demanded payment of the principal sum of £200, on the plea that the lease had expired. The landlord maintained that as the tenant had not fulfilled his obligations under the lease, he could not demand payment of a sum due to him under it. Neither contention was sustained. It was held that the term "expiry of the lease" meant its expiry at the end of nineteen years, but that the obligation to repay the tenant the sum he had expended in repairs was an independent covenant, and not conditional on the fulfilment of the obligations which the lease laid upon the tenant. It was pointed out by Lord Kinloch that the right of the tenant to recover £200 might quite properly be described as conditional on his performance of a correlative obligation, but that the correlative obligation was to expend that sum in repairs, not to fulfil all the obligations imposed by the lease. So in building contracts on a specification by which each item is separately priced ("measure and value" contracts) the right of the builder to claim payment is dependent on fulfilment of his obligation to produce a building substantially in accordance with his contract, but is not dependent on his exact adherence to the description of each item.[3]

Presumption for Interdependence.- It is clear that two contracts, having no connection with each other except that they are between the same parties and entered into at the same time, may be constituted or recorded in one document. In such a case there is no ground for holding that the right to exact performance of one contract is in any way or in any circumstances conditional on performance of the other. But there is a general presumption that the reason why the parties have not recorded their agreements in separate documents is that they intended them to be dependent on each other. In *Penman* v. *Mackay*[4] a lease conferred on the tenant an option to purchase the subjects "during the currency of this lease." There was also a provision for an irritancy in the event of any assignation of the lease. The tenant assigned the lease. The landlord did not enforce the irritancy, but entered into negotiations, which ultimately proved abortive, for an increase of rent from the assignee. Pending these negotiations the tenant gave notice that he proposed to exercise his right of purchase, and the action was for declarator that the landlord was bound to accept the notice. The Lord Ordinary, holding that there were two contracts—a lease and an option to buy—independent of each other, granted decree. This decision was reversed, on the ground that the tenant's right to purchase was impliedly conditional

[1] The general rule, so far as a rule may be said to exist, may be given in the words of an English judge: "The rule has been established by a long series of decisions in modern times that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way." Tindal, C.J., in *Stavers* v. *Curling*, 1836, 3 Bing. N.C. 353, 368; adopted by Lord Parmoor, *Forrest* v. *Scottish County Investment Co.*, 1916, S.C. (H.L.) 28, 36; by Lord Hunter, *Graham* v. *United Turkey Red Co.*, 1922, S.C. 533, 554.

[2] 1871, 9 M. 1037. See observations on this case in *Marquis of Breadalbane* v. *Stewart*, 1904, 6 F. (H.L.) 23.

[3] Per Lord Parmoor, *Forrest* v. *Scottish County Investment Co.*, 1916, S.C. (H.L.) 28, and Lord Justice-Clerk Alness in *Speirs* v. *Petersen*, 1924, S.C. 428; and see *infra*, p. 606.

[4] 1922, S.C. 385.

on fulfilment of his obligations as lessee, and could not be exercised when, by assigning the lease, he was in breach of one of its material provisions.

When two articles are bought—or, it may be assumed, hired or leased—at the same time, it is a question of intention whether the contracts are separable or dependent whether the seller, if he is unable to supply one of the articles, has any right to insist on acceptance of the other. Evidence of the intention of the parties is not excluded by the fact that it has been found convenient to execute and sign separate written contracts for the sale of each of the articles.[1]

Arbitration Clauses. –When a contract contains an arbitration clause the question has been often mooted whether that clause is so far dependent on the other terms of the contract as to preclude its enforcement by a party who is in breach of some, or all, of those terms. The law on this point has been so far settled by an authoritative decision as to render a full discussion of the prior cases unnecessary. Apart from authority, one would be inclined to say that an arbitration clause was a very clear instance of a separate and independent obligation; that the right of either party to appeal to it is not affected by the fact that he is in default; that the consideration expected and received by *A.* for his consent to forgo his right to appeal to the ordinary tribunals is simply and exclusively a similar abnegation by *B.* On this footing the question in each case is merely whether the terms of the arbitration clause are sufficiently wide to cover the dispute which has arisen. There is no decision at variance with this view of the law, and *dicta* which appeared to be adverse have now, it is submitted, been adequately explained.

In *Johannesburg Municipal Council* v. *Stewart & Co.*,[2] a case where contractors had refused to complete their work, and where it was held that the contract, and therefore the arbitration clause which it contained, fell to be construed by English law, Lord Shaw pointed out that the pursuers averred a case of total repudiation of the contract, added that in a question of admission to proof the pursuer's averments must be taken as true, and stated (p. 56) "as these averments stand, this contract was wholly repudiated. It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated." This dictum, construed as meaning that an averment of breach of contract amounting to repudiation rendered an arbitration clause inoperative, was considered, after two cases where the circumstances made a distinction possible,[3] in *Sanderson* v. *Armour*.[4] A contract for the supply of eggs by instalments was entered into subject to the rules of a Trade Association, which included the undernoted clause.[5] Founding on an alleged failure in quality in the first instalment the buyers refused to take delivery of the second, intimated that they rescinded the contract as repudiated by the sellers, and brought an action for damages. The defenders pleaded the arbitration clause, and, on the merits, denied that they were in breach of contract. In substance the pursuers' case was that on a preliminary question their averments must be taken *pro veritate*; that

[1] *Claddagh S.S. Co.* v. *Steven*, 1919, S.C. 184; revd., on this point, 1919, S.C. (H.L.) 132; *Holliday* v. *Lockwood* [1917], 2 Ch. 47.

[2] 1909, S.C. (H.L.) 53.

[3] *Hegarty & Kelly* v. *Cosmopolitan Insurance Co.*, 1913, S.C. 377; *Scott* v. *Gerrard*, 1916, S.C. 793.

[4] 1921, S.C. 18; affd. 1922, S.C. (H.L.) 117.

[5] "All disputes arising out of contracts subject to these rules shall, on demand by either party, be referred to the arbitration committee of the Association."

in consequence the sellers must be assumed to have repudiated the contract; and that a party who had repudiated his contract was not entitled to appeal to an arbitration clause. This contention was repelled, and the action was sisted pending decision of the question at issue by arbitration. The decision affirmed, with greater authority, what Lord Dunedin had said in a case in the Court of Session:[1] "I think it is perfectly well settled in the law of Scotland that there is nothing wrong in having a general arbitration clause, which may give to the determination of arbiters everything which can be decided either in respect of the carrying out of the contract or in respect of the breach thereof." The case may be taken as deciding that where there is a general arbitration clause its validity is not affected by averments that the party appealing to it is in breach of the contract, or has repudiated it. The case where repudiation of the contract is admitted was reserved, but it is submitted that the grounds of judgment are wide enough to entitle a party, though admitting that he has repudiated his contract, to maintain that the amount of damages should be referred to arbitration, if the particular arbitration clause gave the arbiter the power to assess damages.[2]

Events Eliding Arbitration Clause. A question somewhat different is presented where it is averred that the contract containing the arbitration clause has ceased to be binding owing to the occurrence of events which bring it to an end, on the principle of frustration of the adventure.[3] As the theory is that the contract falls in virtue of an implied condition to that effect, the question whether the contract has been frustrated is one arising under it, and falls within a general clause of arbitration, by which all disputes arising under the contract are refused. It was so decided where the question was whether a contract for the shipment of jute had been brought to an end by regulations which prohibited the export of jute except under licence.[4] In *Hirji Mulji* v. *Cheong S.S. Co.*,[5] however, when a charter-party contained a general arbitration clause, and the ship had been requisitioned for two years, an arbiter had decided that the charterers were bound to accept her when she was released. On appeal, the Judicial Committee decided that the arbiter had no jurisdiction. The period of requisition, in their Lordships' opinion, was sufficiently material to put an end to the contractual obligations on either side. That being so, the contract had automatically ceased to exist, and the arbitration clause had fallen with it. It is submitted that

[1] *North British Rly.* v. *Newburgh & North of Fife Rly. Co.*, 1911, S.C. 710, 718.

[2] The English case of *Jureidini* v. *National British, etc., Insurance Co.* ([1915], A.C. 499) at first sight seems to present difficulties. A policy of fire insurance contained a clause excluding any claim in the event of fraud or arson, and an arbitration clause which provided that any dispute as to the amount of any loss should be referred to arbitration, and that it should be a condition precedent to any right of action upon the policy that the award of the arbiter of the amount of the loss, if disputed, should be first obtained. In answer to an action on the policy the company averred arson, and pleaded that an award by the arbiter must be first obtained. A jury found that arson was not proved, and assessed the amount payable. In an application for a new trial the Court of Appeal decided that the action was excluded by the arbitration clause. The judgment was reversed. From the tenor of the leading opinion (Haldane, L.C.) it might be surmised that he proceeded on the ground that the company, by denying their liability, had repudiated the contract, and that a party who had repudiated a contract could not appeal to an arbitration clause. But it has since been explained that the true *ratio decidendi* was that the clause of reference was a very limited one. To sustain the company's defence would have left no means of ascertaining whether the allegation of arson had been established or not—the Court would be excluded by the arbitration clause, the arbiter could not have decided it without going beyond the matter referred to him. *Woodall* v. *Pearl Insurance Co.* [1919], 1 K.B. 593; *Stebbing* v. *Liverpool Insurance Co.* [1917], 2 K.B. 433; *Sanderson* v. *Armour*, 1922, S.C. (H.L.) 117, Lord Dunedin, at p. 128.

[3] See *supra*, p. 352.

[4] *Scott* v. *Del Sel*, 1922, S.C. 592; affd. 1923, S.C. (H.L.) 37.

[5] [1926], A.C. 497.

this decision is not reconcilable with *Scott* v. *Del Sel.* Lord Sumner refers to that case, but dismisses it as decided upon a ground which was adopted by Lord Cave, L.C., but was not the main ground relied upon by any of the other judges either in the Court of Session or the House of Lords.

If notice by one party that he refuses to carry out his obligations under the contract is not accepted by the other as a ground for the rescission of the contract, but is followed by negotiations, and is averred by one party to have resulted in a new agreement as to the terms on which the contract may be ended, the question whether such a new contract was entered into is clearly outside the widest arbitration clause in the original contract. In *Tough* v. *Dumbarton Waterworks Commissioners*[1] a contract for the construction of a reservoir contained an arbitration clause, and also a provision under which the Commissioners were entitled, in certain events, to take possession of the works and plant and to sell and dispose of them. In an action by the contractor concluding for damages on the ground that the Commissioners had seized his plant and taken the contract out of his hands the defenders averred that the pursuer had voluntarily renounced the contract, and that his renunciation had been accepted. They pleaded the arbitration clause. It was held that the question at issue did not arise under the contract, and was therefore not covered by the clause; it was either, on the pursuer's shewing, an action of damages for wrongful appropriation of his property, or, on the defenders' averments, a question of the meaning of the agreement under which the pursuer renounced the contract and they accepted his renunciation.

Anticipatory Breach of Contract. In the normal case the remedies appropriate to a breach of contract are not available until the time for performance has arrived and performance has not been given. But if one party to the contract intimates, by word or act, that he refuses to implement the obligations he has undertaken, the other is entitled to treat this as a repudiation of the contract, and to avail himself at once of the remedies that may be open, although the time for performance has not arrived, and there has, therefore, been no actual breach. In face of a definite refusal, a party is not bound to wait and see whether the refusal may not be reconsidered. His contract entitles him not merely to ultimate performance at the date when performance becomes due, but to an expectation of performance in the meantime, and to deprive him of this expectation amounts to a breach of the contract. So where *A.* had promised to marry *B.* in two years, and intimated that he did not intend to fulfil his promise, *B.* was entitled to take action at once—not bound to wait until the two years had passed.[2] Where a courier was engaged to enter on his duties on 1st June, and in May the employer wrote to say that he did not require his services, an immediate action for damages was held to be competent, on the ground that the contract had been repudiated.[3] Such repudiation, it has been pointed out, does not amount to a rescission of the contract, because one party to a contract cannot by his own act rescind it, but it puts it in the power of the other party to agree to the contract being rescinded subject to his claim of damages. *A.*, by intimating that he will not perform his contract with *B.*, does not terminate his contractual relations with *B.*; he puts it within the power of *B.* to

[1] 1872, 11 M. 236.

[2] *Whitehead* v. *Phillips*, 1902, 10 S.L.T. 577; *Frost* v. *Knight*, 1872, L.R. 7 Ex. 111. See also *Morison* v. *Morison*, 1902, 10 S.L.T. 324.

[3] *Hochster* v. *De la Tour*, 1853, 2 E. & B. 678.

terminate them.[1] And, if *B.* does exercise his right to terminate contractual relations, he is entitled to damages, even although, at the date of *A.'s* refusal, he was not himself ready to perform. So where an order for railway chairs was given, and the railway company, before the time for delivery, intimated that they would not accept them, it was no answer to the manufacturer's claim for damages that the chairs had not been made, and could not at that time have been supplied.[2]

In cases where the time for performance has not arrived, only a definite and distinct refusal to perform can be treated as a repudiation. Mere expression of unwillingness to perform, or of doubts of ability to carry out the contract, cannot safely be so regarded. Where *A.* had undertaken to rebuild a house of which *B.* was the tenant, on receiving six months' notice from *B.*, it was held that the mere fact that *A.* had on several occasions stated that he had no means to meet the cost of rebuilding did not justify *B.* in assuming that *A.* had repudiated his obligation.[3] In *Thornloe* v. *Macdonald & Co.*,[4] *A.* entered into a contract to supply *B.* with a number of watches at a fixed price. When some had been supplied *A.* wrote that he would supply no more unless an advance in the price was conceded. *B.* treated the letter as equivalent to a repudiation of the contract, and, on a plea of retention, refused to pay for the watches he had already received. It was held that he was not justified in taking this course, on the ground that *A.'s* letter was a mere threat of refusal to perform, not a definite statement that he repudiated his obligations under the contract.

Refusal to Accept Notice of Repudiation. The party who receives intimation that the contract will not be performed is not bound to accept it as final. He may, if he pleases, refuse to rescind the contract, and, when the date of performance arrives, sue for damages calculated on the loss inflicted as at that date. A man who has undertaken a contractual obligation, to be performed in the future, has no right to limit his liability by insisting that a refusal to perform shall be accepted as final. Thus where the seller of railway shares for delivery on 8th January intimated on 28th October that he would not deliver them, and the buyer refused to accept this as final, it was held that the measure of damages was the difference between the contract price and the price ruling on 8th January—not the price ruling on 28th October.[5] In the case of the sale of goods for which there is an available market it has been decided in England that where the buyer accepts an anticipatory refusal to deliver as final he may at once buy the goods and charge against the seller the difference between what he has paid and the contract price, but that if he does not choose to buy, the measure of damages is the difference between the contract price and the price ruling at the date when the contract should have been performed, with an exception in the case where the seller can shew that the buyer acted unreasonably in not buying the goods in order to mitigate the damages.[6]

Subsequent Offer to Fulfil Contract. If a definite refusal to perform is

[1] *Johnstone* v. *Milling*, 1886, 16 Q.B.D. 460, per Lord Esher, M.R., at p. 467; *Hegarty & Kelly* v. *Cosmopolitan Insurance Corporation*, 1913, S.C. 377; *Mohad* v. *Anchor Line*, 1922, S.C. (H.L.) 53, per Lord Sumner, at p. 63.

[2] *Cort* v. *Ambergate Rly. Co.*, 1851, 17 Q.B. 127; *British & Binington* v. *Cachar Tea Co.* [1923], A.C. 48.

[3] *Johnstone* v. *Milling*, 1886, 16 Q.B.D. 460.

[4] 1892, 29 S.L.R. 409. See also *Anderson* v. *Hamilton & Co.*, 1875, 2 R. 355, opinion of Lord Gifford, at p. 367.

[5] *Howie* v. *Anderson*, 1848, 10 D. 355. See also *Michael* v. *Hart* [1902], 1 K.B. 482.

[6] *Melachrino* v. *Nickoll & Knight* [1920], 1 K.B. 693; *Millett* v. *Van Heek* [1921], 2 K.B. 369.

made, and accepted as amounting to a rescission or repudiation of the contract, a subsequent offer of performance, though within the time originally fixed, or within a time which, but for the refusal, would have been reasonable, comes too late. So where land was sold, and the purchaser took objection to the title, and intimated that he proposed to resile unless he received an undertaking, within a certain number of days, that the defect would be cured in a particular way, and the seller refused to give this undertaking, it was decided that he would not afterwards proffer the title which the purchaser had requested. His prior refusal amounted to an intimation that he did not intend to perform his contract, which the purchaser was entitled to take, and had taken, as a repudiation of the contract.[1]

If, on the other hand, a refusal to perform is not accepted as equivalent to a rescission of the contract, the party who made it is entitled to reconsider it, and to tender performance at the appointed time. "The promisee may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as his own: he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it."[2] In *Avery* v. *Bowden*,[3] *A.*, who had chartered a ship to load at a Russian port, intimated to the master, within the running days, that he was unable to provide a cargo, and advised him to leave. This the master refused to do. Before the running days expired war between Russia and Great Britain was declared. It was held that the declaration of war excused *A.* from the obligation to furnish a cargo (on the ground that he could not have obtained it without trading with the subjects of an enemy State), and that as his prior refusal to furnish a cargo, when he had no such excuse, had not been accepted, he was not in breach of his contract.

Without any definite refusal to perform the conduct of one party may be such as to entitle the other to treat it as a refusal, and therefore as a repudiation of the contract, although the time for performance may not have arrived. Subject to the remark that the inference must be one which a reasonable man would draw, every case depends on its own circumstances.[4]

Acts Amounting to Repudiation.—In certain cases, any act by which a party voluntarily puts it out of his power to perform the contract when the time for performance arrives may be treated as equivalent to an immediate refusal to perform it, and therefore as a repudiation of it.[5] Where the owner of a newspaper engaged a manager for a period of five years, and two years afterwards disposed of the paper, it was found that this amounted to a breach of contract on his part, which gave the manager the right to sue for damages for loss of the remaining term of his employment.[6] If the obligation is one prestable on demand, or on the occurrence of a certain event, it is a

[1] *Gilfillan* v. *Cadell and Grant*, 1893, 21 R. 269; and see opinion of Lord Atkinson in *Martin* v. *Stout* [1925], A.C. 359.

[2] Per Cockburn, C.J., in *Frost* v. *Knight*, 1872, L.R. 7 Ex. 111.

[3] 1856, 6 E. & B. 953.

[4] *Carswell* v. *Collard*, 1892, 19 R. 987; affd. 1893, 20 R. (H.L.) 47; *Forselind* v. *Bechely-Crundall*, 1922, S.C. (H.L.) 173.

[5] *North British Rly. Co.* v. *Benhar Coal Co.*, 1886, 14 R. 141.

[6] *Ross* v. *Macfarlane*, 1894, 21 R. 396.

general rule that the obligant must keep himself ready to perform, and that any act by which performance is excluded, though it may not be irremediable, amounts to a repudiation of the contract.[1] Where, however, there is a definite date fixed for performance the obligant does enough if he is ready to perform at that date, whatever he may have done in the interval. In *Smith* v. *Butler*,[2] *A.* agreed to buy the lease of a public-house from *B.*, on the condition that *C.*, a mortgagee, would allow the mortgage to stand; 10th November was fixed as the date for conveyance. On 4th October, at an interview at which all three were represented, *C.* refused his consent. *A.* at once declared the bargain off. At a later period of the same day *B.* obtained *C.'s* consent, and notified the fact to *A.*, who replied that he was no longer bound. In an action by *A.* to recover a deposit it was held that he was not entitled to treat *C.'s* refusal, given more than a month before the date fixed for completion, as a ground for determining the contract. It does not follow, from this case, that a purchaser, where the consent of a third party is required, *e.g.*, in the case of a lease not assignable without the landlord's consent, must, in face of a persistent refusal by that third party, await the day of performance on the chance that the refusal may be reconsidered at the last moment. He will be justified in intimating that he will cancel the contract unless, within a reasonable time, he receives assurance of ultimate completion.[3] And an act apparently so irremediable as the sale of a thing agreed to be sold may be a doubtful case. If one party asserts a contract, and the other disputes its validity, it would appear that the former must keep himself in a position to perform the obligations he has undertaken by the contract he alleges. He is not entitled to treat the denial of the validity of the contract as a definite refusal to implement it.[4]

Effect of Insolvency before Time for Performance.—The insolvency of a party to a contract is not equivalent to a refusal to perform it, and therefore does not give the other the right to rescind. Thus, in the sale of goods, while an unpaid seller may exercise his right of lien, or may stop the goods *in transitu*, if the buyer becomes insolvent, the contract of sale is not rescinded.[5] The seller may resell the goods if he gives notice to the buyer of his intention to do so, and the buyer does not, within a reasonable time, pay or tender the price, but he resells as the holder of a security, and not as a party whose property in the goods has revived on the rescission of the contract of sale.[6] Should the goods resold fetch more than the price for which they were originally sold, the seller, it is conceived, would be bound to account for the surplus to the original buyer or his trustee in bankruptcy.[7] In *Linton* v. *Sutherland*[8] the lease of a sheep farm provided that the landlord should take over the sheep stock on the expiry of the lease at a price to be fixed by valuation. The lease expired at Whitsunday 1888. The tenant, believing that the landlord was *rerum ad inopiam*, called upon him to find security for the price, which was not due until the Martinmas following. As this demand was not complied with, he sold the sheep under a warrant from the Sheriff. He then brought an action against the landlord for the

[1] *Lovelock* v. *Franklyn*, 1846, 8 Q.B. 371; *Synge* v. *Synge* [1894], 1 Q.B. 466; *Omnium D'Entreprises* v. *Sutherland* [1919], 1 K.B. 618.

[2] [1900], 1 Q.B. 694.

[3] *Davis* v. *Nisbett*, 1861, 10 C.B. N.S. 752; *Stickney* v. *Keeble* [1915], A.C. 386.

[4] See opinion of Lord Kinnear in *Harvey* v. *Smith*, 1904, 6 F. 511; *Stickney* v. *Keeble* [1915], A.C. 386.

[5] Sale of Goods Act, 1893, sec. 48 (1). [6] *Ibid.*, sec. 48 (3).

[7] See opinion of Lord Fullerton in *Stoppel* v. *Stoddart*, 1850, 13 D. 61, at p. 75.

[8] 1889, 17 R. 213.

difference between the price obtained and the price which, as he averred, the valuers would have fixed. In support of this claim he argued that, as a seller, he had the right to declare the contract at an end if the buyer was *vergens ad inopiam*, and refused to give security for the price. It was decided that he had no such right; that the mere fact that the buyer had become insolvent was not a breach of contract on his part, nor an act by which he disabled himself from fulfilling his obligation. As was remarked by the Lord Ordinary, the party in breach of contract was the tenant, who, by selling the sheep, had put it out of his power to deliver them should the landlord tender the price.

The insolvency of one obligant, however, may entitle the other to withhold or delay performance of his obligations, though by the original conception of the contract these should have been performed at a time when the obligations of the party who has become insolvent were not yet exigible. Mere insolvency is not a ground for the rescission of a contract, but it may legalise a delay or refusal of performance which would not otherwise be justified. So, in sale, the unpaid seller may exercise a right of lien, or may stop the goods *in transitu*, if the buyer becomes insolvent, even though he has sold on credit and the period of credit has not expired.[1] A servant is not bound to continue his service with an employer who has become bankrupt,[2] and it is conceived that a party who has undertaken to do work is not bound to fulfil his contract if his employer becomes insolvent, though the terms of the contract may be that the work is to be done on credit.[3] In *Arnott's Trs.* v. *Forbes* [4] a feu-contract laid on the vassal the obligation to pay a feu-duty, on the superior the obligation to lay out certain streets. The feu-duty was payable before the obligation to lay out the streets was prestable, but it was held that as the superior had become bankrupt, the vassal might retain his feu-duty until the superior's obligations were implemented, in a question with the holder of a bond and disposition in security from the superior. Bankruptcy also may entitle the debtor of the bankrupt to retain his debt until an illiquid claim of damages against the bankrupt is determined, but this subject will be more conveniently considered in connection with the law of compensation.[5]

Right to Rescind. Up to this point it has not been necessary to treat separately of the right to rescind a contract and the right to withhold or delay performance. Each right depends on the principle that the obligations under a contract are the counterparts of each other, and each is illustrated in the rules relating to the effect of an anticipatory refusal to perform. But in considering the more detailed rules it will be necessary to consider separately the law as to the rescission of the contract on the ground of the other party's failure, and the rights of withholding performance or of retention, which may also arise. The latter point will be considered in the next chapter.

Materiality of Breach. It is not every breach of a contract which will justify rescission. A remedy so drastic requires a breach which is in the circumstances material. A minor breach may give rise to a claim of damages, but to a claim of damages only. "It is familiar law, and quite well settled by decisions, that in any contract which contains multifarious stipulations there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare that the contract is at an end. There are others which do not go to the root of the contract,

[1] Sale of Goods Act, 1893, secs. 41, 44.
[2] *Supra*, p. 363.
[3] See opinions in *Linton* v. *Sutherland*, 1889, 17 R. 213, narrated *supra*.
[4] 1881, 9 R. 89.
[5] *Infra*, p. 626.

but which are part of the contract, and which would give rise, if broken, to an action of damages." [1] Or, as it has been put by Lord Blackburn, the question is whether a particular stipulation goes to the root of the matter, so that a failure to perform it would make the performance of the rest of the contract a different thing from what the other party had stipulated for, or whether it merely partially affects it, so that compensation may be adequately given in damages.[2] The question whether a particular obligation or condition is material is of importance not only in cases where a right to rescind the contract has been claimed or exercised, but also where one party maintains the minor right of refusing to perform the obligations incumbent on him until the other has fulfilled his part. As materiality is a question of degree there may be cases of failure sufficiently material to justify a claim of retention or lien, without amounting to such repudiation as would sanction the rescission of the contract.

Where parties have not expressly indicated their intention as to the materiality of any condition, as in the ordinary contract, where obligations are undertaken by each party, but it is not provided that the performance by one is to be conditional on performance by the other, it is a pure question of construction whether, looking to the whole terms of the contract, one particular provision is or is not material. Fundamentally, no doubt, it is a question of the intention of the parties, but in the absence of any indication of that intention it must be gathered from general considerations. In such a question no absolute rules are possible; the cases may be grouped according as the breach of contract consists in a total or partial failure or refusal to perform, in defective performance, or in failure to perform within a stipulated time.

Total Failure in Performance.—Where there is a total failure of performance, or a refusal to perform, by one party, there is no doubt that the other is entitled to treat the failure or refusal as a repudiation of the contract, and to declare it at an end, except in so far as regards his own claim for damages.[3]

Failure in One of Several Conditions.—The refusal or failure to perform one of several stipulations raises the question of the materiality of that particular stipulation. The following cases may be given as illustrations: in

[1] Per Lord President Dunedin in *Wade* v. *Waldon*, 1909, S.C. 571, at p. 576; adopted by Lord Shaw, *Forselind* v. *Bechely-Crundall*, 1922, S.C. (H.L.) 173, 192. For a similar statement of English law, see opinion of M'Cardie, J., in *Rubel Bronze, etc., Co.* v. *Vos* [1918], 1 K.B. 315.

[2] *Bettini* v. *Gye*, 1876, 1 Q.B.D. 183. Scots law has never adopted in terms the English distinction between conditions and warranties, breach of the former justifying rescission of the contract, breach of the latter only a claim of damages. In Scotland the question is whether there has been a material breach. But though the terminology differs, the principles applicable are often the same, as may be seen by comparing the judgments, on very similar facts, in *Wade* v. *Waldon* and *Bettini* v. *Gye*. And see Leake, *Contracts*, 7th ed., 477; Benjamin, *Sale*, 6th ed., 636. But it is conceived that the difference in the law of sale of goods, pointed out by Lord Chelmsford in *Chapman* v. *Couston, Thomson & Co.* (1872, 10 M. (H.L.) 74), is not affected by sec. 11 of the Sale of Goods Act, 1893. In England, as Lord Chelmsford explains, a warranty as to the quality of the goods (*e.g.*, that a horse is sound), if unfulfilled, will not justify rejection of the article unless there is an express provision to that effect; in Scotland, the right of rejection is implied if the warranty related to some point material to the contract. In *Harrison* v. *Knowles & Foster* ([1917], 2 K.B. 606), Bailhache, J., though with great hesitation, stated that a stipulation with regard to the quality of an article sold cannot be more than a warranty, and therefore cannot justify rescission of the contract of sale, unless the difference between its actual and its promised state amounts to a difference in kind. Assuming this to be correct as a statement of the law of England, it certainly is not applicable to the law of Scotland. In Scotland the question in issue is materiality, and, in particular circumstances, a defect in quality may be as material as a difference in kind.

[3] *Johannesburg Municipal Council* v. *Stewart & Co.*, 1909, S.C. 860; 1909, S.C. (H.L.) 53.

Wade v. *Waldon*[1] the engagement of Wade, a comedian, to perform in a theatre in the following year, contained a clause whereby he undertook to give fourteen days' notice, accompanied with bill matter, before the date at which he was engaged to appear. This notice Wade failed to give, and in consequence the manager of the theatre cancelled his engagement, and declined to allow him to appear. It was held that Wade was entitled to damages. The undertaking to give notice was a merely subordinate part of the contract: failure to implement it might subject the performer to damages, but did not give the manager of the theatre the right to rescind the contract. On the other hand, in *Davie* v. *Stark*,[2] a landlord, in the lease of a shop, undertook that the neighbouring premises should not be used in any business which would compete with that carried on by the tenant. This agreement he violated, by opening a shop which in fact competed; and, in answer to remonstrances, insisted on his right to maintain it. The tenant intimated that he intended to give up the lease before its term had expired, and refused to pay the last term's rent. The majority of the Court were of opinion that the provision as to the absence of competition was a material condition of the contract, and therefore that the conduct of the landlord justified the tenant in repudiating the lease. There was given as an illustration of a condition which would not be material, and would not justify rescission, a provision in the same lease that the house should be fitted with gas-fittings at the landlord's expense. In *Shaw* v. *M'Donell*,[3] a dictionary of English and Gaelic was published by subscription. In the proposals it was stated that it would contain a glossary of proper names and an historical account. When published it contained neither. It was held that the subscribers were entitled to return their copies, and refuse payment of the price. In a contract of sale c.i.f., where the goods were to be carried in a German ship, and war between France and Germany was declared after the date of the contract but before shipment, the seller unjustifiably refused to provide a policy covering war risks. It was decided that his failure was sufficiently material to justify the buyers in a refusal to accept the shipping documents, an intimation that they cancelled the contract, and rejection of the goods when they ultimately arrived.[4] In insurance, where the answers to the queries in the proposal form are not expressly made conditions precedent or declared to be the basis of the contract,[5] their truthfulness is material if the true answer would have led to the refusal of the risk or an increase of the premium, not where the sole result would have been delay until the whole facts in question were ascertained.[6] In a charter-party with provisions for lay-days and demurrage, failure to load within the lay-days is a breach of contract, which will entitle the shipowner not only to demurrage for the detention of the ship, but to damages for any other loss which he has sustained, but it is not a breach so material as to justify the shipowner in declaring the contract at an end.[7] In agency the implied term that the agent must not accept a

[1] 1909, S.C. 571. Contrast *Poussard* v. *Spiers & Pond* (1876, 1 Q.B.D. 410), where it was held that the obligation of an actress to appear on the opening night of a new play was a material condition of the contract, and that her failure, though in the circumstances (illness) not amounting to a breach of contract, entitled the manager of the theatre to cancel her engagement.

[2] 1876, 3 R. 1114.

[3] 1786, M. 9185.

[4] *Birkett, Sperling & Co.* v. *Engholm*, 1871, 10 M. 170.

[5] See *supra*, p. 274.

[6] *Mutual Life Assurance Co.* v. *Ontario Metal Products Co.* [1925], A.C. 344 (omission to mention doctor whom insured had consulted).

[7] *Reidar* v. *Arcos* [1927], 1 K.B. 352. The opinion of Lord Trayner, in *Lilly* v. *Stevenson*, 1895, 22 R. 278, that a charterer has a contractual right to load within the days fixed for demurrage, was considered and disapproved.

secret commission, and an express term that he must not act for trade rivals, are alike material, and the agent in breach of either cannot claim his commission.[1]

Defective Performance. Where a contractual obligation has been performed, but the performance is defective, it may be stated in general terms that provisions as to the character or quality of the work are material terms of the contract, and that the question of the right to rescind depends upon the degree of failure. Without attempting the task of illustrating these statements throughout the field of contract, it is proposed to test their operation in the law of leases, of building contracts, and of sale.

Leases. In leases the question has often been raised whether the failure of the landlord to place, or to maintain, the subjects let in a tenantable condition, or in the condition agreed upon, constitutes a breach of contract so material as to justify the tenant in repudiating the lease. The question is a delicate one, and the decisions do not afford any very definite guidance. Much may depend upon the length of time which the lease has to run. It would appear that a tenant, in a lease for a term of years, has no right to abandon merely because the landlord has failed, in the early years of the lease, to carry out some repairs or alterations which have been agreed upon. Such failure will entitle the tenant to damages, and may justify him in withholding payment of his rent, but not in resorting to the extreme remedy of rescinding the contract.[2] If during the currency of a lease a house becomes uninhabitable, or a farm or shop unfit for the purpose for which it was let, the duty of the tenant is to call the attention of the landlord to the matter. The contractual obligation of a landlord is not of the nature of a warranty that the subjects will always remain in a tenantable condition; it is an obligation to execute repairs on being made aware of their necessity.[3] The tenant, therefore, if an offer of repairs is made, must allow a reasonable time to determine whether these repairs are effectual; he would not be justified in instant repudiation and removal,[4] except, probably, in cases, such as the hire of a furnished house for a particular season, where it was an implied condition of the contract that the house should be fit for immediate occupation.[5] But if the landlord, on being appealed to, refuses to remedy the defect, or if the remedies he applies prove ineffectual, the tenant is entitled to leave, and to claim damages for the loss or inconvenience he has sustained.[6] "I do not know that there is any rule of law governing the relation of landlord and tenant at that stage except this, that both parties must be reasonable, and that if the landlord undertakes to put the house into a habitable condition, the tenant should give him a sufficient opportunity of doing so." [7]

There seems no reason to doubt that a landlord, even where the lease contains no express clause of irritancy, may irritate it on the ground of material breach of contract by the tenant. "Without questioning the doctrine . . . that a lease confers a real right on the tenant, it remains notwithstanding a mutual contract, and is not exempt from the general principle

[1] *Graham* v. *United Turkey Red Co.*, 1922, S.C. 533; *Andrews* v. *Ramsay* [1903], 2 K.B. 635.
[2] *Todd* v. *Bowie*, 1902, 4 F. 435.
[3] *Hampton* v. *Galloway & Sykes*, 1899, 1 F. 501. *Supra*, p. 315.
[4] *M'Kimmie's Trs.* v. *Armour*, 1899, 2 F. 156.
[5] *Wilson* v. *Finch Hatton*, 1877, 2 Ex. D. 336.
[6] *Kippen* v. *Oppenheim*, 1847, 10 D. 242; *Scottish Heritable Security Co.* v. *Granger*, 1881, 8 R. 459; *Webster* v. *Brown*, 1892, 19 R. 765; *Brodie* v. *M'Lachlan*, 1900, 8 S.L.T. 145.
[7] Per Lord Kinnear, *M'Kimmie's Trs.* v. *Armour*, 1899, 2 F. 156, at p. 162.

that no one can take benefit from a mutual contract, and at the same time repudiate the conditions." [1] But while there are numerous cases in which the landlord has been held entitled to irritate the lease on the ground of the tenant's failure to remain in possession,[2] there does not seem to be any instance of a similar judgment on the ground of any other form of failure.

Building Contracts. The law applicable to building contracts, when the builder has departed, more or less materially, from the scheduled conditions, is involved in some doubt. It is complicated by the fact that the breach of contract may be irremediable, but may not be material, in the sense that it may make little or no difference to the value of the building. There is also the complication that such contracts take two forms—a measure and value contract—when the various items in building are separately priced, and the sum to be paid arrived at by summation, and a lump sum contract, where there is no separate pricing of the details of the work. In the most recent English decision,[3] where it was assumed that the defects in the building were remediable at moderate expense, it was decided that the builder might sue for the contract price, subject to deduction of the sum necessary to bring the building into accordance with the contractual conditions. From the opinions it may be inferred, though it was not necessary to decide, that if the defects, though not remediable without destroying the building, were not of substantial importance, the builder might sue for the contract price, subject to deduction of any damages which the employer might have suffered. The employer would not be entitled to reject the building, and call on the builder to remove it. The Court drew a distinction between three cases—(1) failure so substantial as to amount to the erection of a different building ; (2) failure to complete the work ; (3) failure in detail. In the first two cases only could the employer treat the contract as repudiated. But it is by no means clear that this is the law in Scotland.

In *Ramsay* v. *Brand* [4] the contract was for the mason work of a cottage, according to plan and specification, at the lump sum of £79. 10s. The owner refused payment. The Court remitted to an architect to report in what respects the building was disconform to contract, and what sum it would cost to complete it according to contract. The architect, after specifying certain defects, stated that they could be remedied at the cost of £41. Decree was granted for the contract price, under deduction of £41. The Lord President (Robertson) said : " No man can claim the sum stipulated to be paid on the completion of certain specified work unless he has completed that work *modo et forma*, and this applies to building contracts just as much as to other contracts. . . . The builder has no right either to disregard the specification altogether or to modify it as by supplying one material in place of another ; and neither in the case of total departure nor in the case of a partial deviation from the specification will it avail to prove that what has been done is as good as what was promised. Accordingly the rule is, that if the builder chooses to depart from the contract he loses his right to sue for the contract price. But further, losing his right to sue for the contract price, he does not acquire the right to sue for *quantum meruit*, the other

[1] Per Lord Justice-Clerk (Moncreiff) in *Edmond* v. *Reid*, 1871, 9 M. 782.

[2] *Earl of Dalhousie* v. *Wilson*, 1802, M. 15311 ; *Drummond* v. *Macpherson*, 1799, M. App. Tack No. 6 ; *Monro* v. *Miller*, 11th December 1811, F.C. ; *Watson* v. *Douglas*, 13th December 1811, F.C. ; *Edmond* v. *Reid*, *supra*, explaining, or attempting to explain, *Hamilton* v. *Hamilton*, 1845, 8 D. 308.

[3] *Dakin* v. *Lee* [1916], 1 K.B. 566. None of the prior Scotch cases were cited.

[4] 1898, 25 R. 1212, a better report in 35 S.L.R. 927.

party never having agreed to pay according to its value for work which *ex hypothesi* he never ordered. In the application of this rule it suffers a modification which in no way invades the principle. A building contract by specification necessarily includes minute particulars, and the law is not so pedantic as to deny action for the contract price on account of any and every omission or deviation. It gives effect to the principle by deducting from the contract price whatever sum is required to complete the work in exact compliance with the contract." [1]

In *Ramsay* v. *Brand* the Court decided that the defects, being remediable, could be treated as matters of detail. In *Steel* v. *Young*,[2] a measure and value contract, the builder used milled lime instead of mortar cement, with the result that the building could not be brought into accordance with the specification without taking it down and rebuilding. The resulting difference in the value of the building was about £5. It was held, following the principles laid down in *Ramsay* v. *Brand*, that as the defect could not be remedied the builder could not claim the balance of the contract price (£85). An action concluding for payment fell to be dismissed, leaving the builder to establish in a separate action any claim he might have on the principle of recompense.[3]

In *Forrest* v. *Scottish County Investment Co.*[4] certain houses had been built on a measure and value contract, and the builder sued for the balance of the price. The defence was that he had departed from the specification in regard to the provision as to the size of the rybats of the windows. The fact was admitted, and it was explained that the architect had sanctioned the deviation. It was practically impossible to alter the rybats, but the difference in value to the building was negligible. It was ultimately held that the architect had authority to sanction the alteration and had done so. Two of the judges in the Court of Session, differing on this point, concurred in the judgment in favour of the builder on the ground that where the defect was in detail, though not remediable, the builder was entitled to the contract price, subject to any damage which his deviation from plan had caused. In the House of Lords Lord Parmoor, dealing with the case apart from the architect's sanction, was of opinion that in a measure and value contract exact compliance with the specification was not a condition precedent to an action for the price, and that *Steel* v. *Young* was wrongly decided.[5] Lord Wrenbury, however, said, after holding that the architect's authority was sufficient, "Further, if I had found that the contract had not been performed, I could not hold that the builder could sue for the contract price,

[1] There is an obvious *non sequitur* in this opinion, which has contributed to the difficulties of the law. No doubt anyone who undertakes to supply or build anything must perform his contract *modo et forma*; but it does not follow, unless building contracts are to be governed by law peculiar to themselves, that every failure gives the other party the right to rescind. As a general rule he can do so only if the failure is material. The question is not what the builder is bound to do, but what is the remedy for his failure. The Lord President proceeded to point out that if the owner retained the building, any claim by the builder must be based on the principle of recompense. As to this, see *supra*, p. 327.

[2] 1907, S.C. 360. In *M'Morran* v. *Morrison & Co.*, 1906, 14 S.L.T. 578, a case decided three weeks before the decision in *Steel* v. *Young*, and not there referred to, Lord Mackenzie (Ordinary) sustained an action for the contract price in spite of minor though irremediable defects. In *Whyte* v. *M'Conochie*, 1761, M. 9173, where the defects were of a very serious character, and the employer sued for the reduction of the contract, and repetition of all sums that he had paid under it, the builder was given a certain time to rebuild the house.

[3] As to claims on the principle of recompense, see *supra*, p. 327.

[4] 1915, S.C. 115; affd. 1916, S.C. (H.L.) 28.

[5] Lord Parmoor's dictum was accepted as establishing the law in the case of a measure and value contract, by Lord Justice-Clerk Alness in *Graham* v. *United Turkey Red Co.*, *infra*.

and that the building owner could have a remedy in damages. The two things are, to my mind, wholly inconsistent. The builder can sue for the contract price only if the contract has been performed. The building owner can sue for damages only if it has not. The two rights of action cannot co-exist."[1] This seems to ignore, in building contracts, any distinction between a material and a non-material breach.

In *Speirs* v. *Petersen*[2] the builder of a house had failed to provide precautions against damp. He was thus in breach of the implied terms of the contract, though not of any express provision. It was held that his breach was not so material as to deprive him of the right to sue for the balance of the contract price, subject to deduction of the amount which an adequate precaution against damp would cost. The question was considered, but not decided, whether where there has been an actual departure from the specification the ordinary rule applicable to other contracts should be applied, and whether there was any ground for holding that the law of Scotland differed from the law of England as laid down in *Dakin* v. *Lee*.[3] It is submitted that the first of these questions should be answered in the affirmative, the second in the negative. There seems to be no reason why a breach of contract, negligible as regards the injury inflicted on the other party, should rank as material because it is irremediable.

Sale.—In the law of sale the ascertainment of the rights arising on breach of contract has been complicated by the general rule that the *actio quanti minoris* was not recognised by the common law of Scotland;[4] with the result that (apart from the provisions of the Sale of Goods Act, 1893) either where the breach of contract was not material, or where a purchaser desired to retain the article he had bought, he was as a general rule deprived of any right to claim damages for any failure on the part of the seller to supply an article in accordance with the contractual conditions.

Sale of Goods: Common Law. In the contract of sale of goods, according to the law before it was altered by the Sale of Goods Act, 1893, the rescission of the contract, by the rejection of the defective article, was in most cases the only remedy open to the buyer in the event of the goods being disconform to contract. It was held that if the defect was discoverable by immediate inspection, it was the duty of the buyer to examine them within a reasonable time, and, if found to be defective, to reject them. On rejecting them he could claim damages for the failure of the seller to perform his contract; but if he accepted them with or without examination he was held to have condoned any defect in quality, so that he had no claim of damages, and was liable for the full price.[5] The principles of the common law on the subject were authoritatively stated by Lord President Inglis in *M'Cormick & Co.* v. *Rittmeyer*:[6] "When a purchaser receives delivery of goods as in fulfilment

[1] 1916, S.C. (H.L.), at p. 39. See observations on this opinion in a case of agency (*Graham* v. *United Turkey Red Co.*, 1922, S.C. 533).

[2] 1924, S.C. 428.

[3] [1916], 1 K.B. 566; *supra*, p. 606.

[4] As to the *actio quanti minoris*, or *actio æstimatoria*, see *Dig.*, xxi. 1. It is very doubtful when it was first recognised that the law of Scotland did not admit it. It is judicially referred to, in 1865, as a "traditionary maxim of the law" (*Amaan* v. *Handyside*, 1865, 3 M. 526, per Lord Kinloch), and was recognised as an established rule in *Gordon* v. *Hughes* (15th June 1815, F.C.; revd. 1819, 1 Bligh, 287). The editors of the more recent editions of Bell's *Principles* appeal (sec. 99 A.) to the authority of Stair, Bankton, and Erskine, but, except for a doubt expressed by Erskine, the passages referred to seem to have no bearing on the point.

[5] *Watt* v. *Glen*, 1829, 7 S. 372; *Padgett* v. *M'Nair*, 1852, 15 D. 76; *Amaan* v. *Handyside*, 1865, 3 M. 526; *M'Cormick & Co.* v. *Rittmeyer*, 1869, 7 M. 854; *Chapman* v. *Couston, Thomson & Co.*, 1871, 9 M. 675; affd. 1872, 10 M. (H.L.) 74.

[6] 7 M., at p. 858.

of a contract of sale, and thereafter finds that the goods are not conform to order, his only remedy is to reject the goods and rescind the contract. If he has paid the price, his claim is for repayment of the price tendering redelivery of the goods. If he has granted bill for the price, his claim is for redelivery of the bill, in return for the offered redelivery of the goods. If any portion of the goods had before their rejection been consumed or wrought up so as to be incapable of redelivery *in forma specifica*, then the true value (not the contract price) of that portion of the goods must form a deduction from the purchaser's claim for repayment of the price. The purchaser is not entitled to retain the goods and demand an abatement from the contract price corresponding to the disconformity of the goods to order, for this would be to substitute a new and different contract for that contract of sale which was originally made by the parties, or it would resolve into a claim of the nature of the *actio quanti minoris*, which our law entirely rejects. Just as little is the purchaser entitled, while rescinding the contract, to retain the goods in security of a claim of damages for breach of contract." These rules did not apply to cases where the defect in the goods could not be discovered until it was too late to reject them—such cases as latent flaws in machinery or defective seed. In such cases the purchaser had the alternative right to claim damages for the defective quality without returning the article.[1]

Sale of Goods Act.—The following are the provisions of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), with regard to the buyer's right of rejection on the ground of defects in the quality of the goods: "In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."[2] "Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods: but he may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or (*b*) maintain an action against the seller for damages for the breach of warranty. . . ." "(5) Nothing in this section shall prejudice or affect the buyer's right of rejection as declared by this Act."[3] "As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract."[4] "In Scotland, where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim of damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof."[5]

Decisions under Act.—On these provisions the buyer has the right to reject the goods if they exhibit a material defect; if the defect is not material, his remedy, it would appear, is a claim of damages.[6] The Act does not

[1] *Pearce Brothers* v. *Irons*, 1869, 7 M. 571; *Spencer & Co.* v. *Dobie & Co.*, 1879, 7 R. 396; *Fleming & Co.* v. *Airdrie Iron Co.*, 1882, 9 R. 473; *Dick & Stevenson* v. *Woodside Steel and Iron Co.*, 1888, 16 R. 242.

[2] Sec. 11 (2). [3] Sec. 53. [4] Sec. 62 [5] Sec. 59.

[6] *Webster & Co.* v. *Cramond Iron Co.*, 1875, 2 R. 752; *Bradley* v. *G. & W. Dollar*, 1886, 13 R. 893.

attempt a definition of the term "material part." [1] The delivery of a smaller quantity than that ordered,[2] or of a larger quantity,[3] or of the goods ordered mixed with goods of a different description,[4] are all failures of a character sufficiently material to justify rejection. In the case of a sale of machinery it is probably the law that a remediable defect does not justify the seller in rejection. His remedy is to have the defect cured at the expense of the seller.[5]

It has been decided that where part of a consignment of goods is conform to contract and the rest of inferior quality, though not of a different description, the buyer is entitled to reject the whole and treat the contract as repudiated, but is not entitled to keep the part which is conform to contract and reject the rest.[6] But if the goods ordered are sent mixed with goods of a different description, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.[7]

It has also been held, both before [8] and since [9] the Act, that if a buyer rejects the goods, and therefore treats the contract as repudiated, he has no right to retain the goods in security of his claim for damages for the repudiation. But it was held at common law, and there seems to be no provision of the Act inconsistent with the decision, that if the buyer has paid the price, or given a bill for it, he is entitled to intimate rejection and yet to retain the goods until the price is repaid or the bill returned.[10]

An express provision that if any dispute arises under the contract the buyer shall nevertheless take possession and pay the price, and that the dispute shall be referred to arbitration excludes rejection on the ground that the goods are not of merchantable quality.[11] A similar provision for acceptance and payment if no objection is taken within a specified time, excludes rejection, but is no bar to an action for damages.[12]

Effect of Rejection of Goods.—The legal effect of the rejection of goods has been described as "a rescission of the contract of sale on the ground of the seller's non-performance or imperfect performance of his obligations." [13] So a final intimation of rejection involves the consequence that as the contract is rescinded the buyer has no longer the right to the goods which he acquired by the contract, and has therefore no right to use them. They are the property of the seller, and the buyer has no right to use the seller's property without his consent. The legal result of use by the buyer after intimation of rejection depends upon whether the seller has acquiesced in the rescission of the contract. If he has, the rejection stands good, but the buyer is liable

[1] See *Dig.*, xxi. 1, as to what amounted to a material defect in a slave. In *Fewson* v. *Gemmell*, 1903, 11 S.L.T. 153, the Lord Ordinary (Kincairney) expressed the opinion, in the case of a horse alleged to be unsound, that the onus of proof that the defect was material lay on the buyer who proposed to reject it.

[2] Sale of Goods Act, 1893, sec. 30 (1).

[3] *Ibid.*, sec. 30 (2). But the tender of a quantity slightly in excess of that ordered, without any extra charge, is not a sufficient ground for rejection (*Shipton, Anderson & Co.*, v. *Weil*, 1912, 28 T.L.R. 269).

[4] *Ibid.*, sec. 30 (3).

[5] *Morrison & Mason* v. *Clarkson Brothers*, 1898, 25 R. 427, per Lord M'Laren, at p. 437.

[6] *Aitken, Campbell & Co.* v. *Boullen*, 1908, S.C. 490.

[7] Sale of Goods Act, 1893, sec. 30 (3).

[8] *Padgett* v. *M'Nair*, 1852, 15 D. 76. The principle, as explained by Lord Justice-Clerk Hope, is that the buyer who rejects goods never has such possession as would support a lien, he has only custody.

[9] *Lupton & Co.* v. *Schulze*, 1900, 2 F. 1118.

[10] *Melville* v. *Critchley*, 1856, 18 D. 643.

[11] *Leary* v. *Briggs*, 1904, 6 F. 857.

[12] *Beck* v. *Szymanowski* [1924], A.C. 43.

[13] Per Lord M'Laren, *Electric Construction Co.* v. *Hurry & Young*, 1897, 24 R. 312, at p. 321.

for his unauthorised use of the seller's property.[1] If, however, the seller refuses to admit the buyer's justification for rejection (though that rejection may be ultimately found to be justified), it has been held that any further use of the goods by the buyer is equivalent to an acceptance of them, and precludes him from maintaining that the contract is at an end, except in so far as regards his claim for damages. This result was arrived at where the buyer, after intimating a claim to reject which was disputed, broke bulk to an extent further than was requisite for purposes of examination ;[2] where, after intimating rejection of a dynamo, he continued to use it for three months ;[3] and where parties who had been supplied with mechanical stokers had intimated rejection of them, called upon the sellers to remove them, received no reply, and continued to use them for two months.[4] In this last case it was held to be no defence for continued use after rejection that the immediate removal of the stokers would involve the stoppage of the buyer's works, and that they were retained until it was possible to remove them without this expense at the New Year holidays. The result would seem, as the law stands at present, to lay upon the buyer of goods who has intimated rejection, and cannot obtain a definite admission from the seller that his rejection is justified, the obligation to abstain absolutely from any further use of them, no matter what expense or inconvenience such abstention may involve.

Use after Rejection.—It was decided, in *Electric Construction Co.* v. *Hurry & Young*,[5] that if a buyer who had intimated rejection had continued to use the goods he lost not only the right to reject them but also the right to claim damages. As this decision has been authoritatively disapproved [6] it seems unnecessary to discuss it or the cases at which it was followed or distinguished.[7]

No Rejection after Goods Accepted.—Rejection of the goods is too late if the purchaser has already accepted them. He is held to have done so "when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." [8] So where it was a condition of a contract for the supply of a tank, which the purchasers wanted for a tug which they were building for the Admiralty, that the tank should have passed Admiralty tests, and the purchasers, believing, owing to a misunderstanding, that the tests had been passed, built the tank into the tug, it was held that their action in so doing was inconsistent with the ownership of the sellers, and amounted to acceptance, and therefore that when the tank was examined and rejected by the Admiralty the purchasers could not, in a question with

[1] Per Lord M'Laren, *Electric Construction Co.* v. *Hurry & Young*, 1897, 24 R. 312, at p. 322.
[2] *Chapman* v. *Couston, Thomson & Co.*, 1871, 9 M. 675 ; affd. 1872, 10 M. (H.L.) 74.
[3] *Electric Construction Co.* v. *Hurry & Young*, 1897, 24 R. 312.
[4] *Croom & Arthur* v. *Stewart & Co.*, 1905, 7 F. 563. This is the extreme case. It is submitted that where no answer is returned to a letter intimating rejection the buyer is entitled to assume that the seller acquiesces, and that subsequent use of the article should merely give rise to a claim by the seller for hire. And see, as to rejection involving unnecessary expense, *Fleming & Co.* v. *Airdrie Iron Co.*, 1882, 9 R. 473.
[5] 1897, 24 R. 312.
[6] *Pollock* v. *M'Crae*, 1922, S.C. (H.L.) 192.
[7] Followed in *Lupton & Co.* v. *Schulze*, 1900, 2 F. 1118, and in *Croom & Arthur* v. *Stewart & Co.*, 1905, 7 F. 563. Distinguished, and doubted, in *Aitken, Campbell & Co.* v. *Boullen*, 1908, S.C. 490.
[8] Sale of Goods Act, 1893, sec. 35.

the sellers, assert a claim to reject it.[1] Where, however, in answer to complaints by the purchaser, the seller makes attempts to remedy the defect, it would seem that no acts of the purchaser while these attempts are still being prosecuted can be founded on as amounting to acceptance, or as precluding ultimate rejection.[2] An actual resale (or, according to one decision, an attempt to resell [3]) of any material part of the goods would in the ordinary case amount to an act inconsistent with the ownership of the seller, and preclude rejection,[4] but where the goods were perishable, and the buyer, after attempting without success to obtain the seller's instructions, resold, it was found that he had not prejudiced his right to reject.[5]

Reasonable Time for Rejection.—When the case is one merely of delay in examination of the article, without any overt act on the part of the purchaser which admits of being construed as one inconsistent with the ownership of the seller, the right to reject is lost if it is not asserted within a reasonable time, and "what is a reasonable time is a question of fact." [6] Where immediate inspection was possible, delay will throw upon the purchaser the onus of proof that the defect on which he bases his claim of rejection must necessarily have been present when the goods were delivered, and could not have been induced by any cause during the period of delay.[7] In mercantile contracts a party may be presumed to arrange his business on the assumption that the goods he has supplied are accepted if he receives no immediate notice to the contrary, and therefore any failure to examine and reject within a time usual in the circumstances would preclude rejection.[8] But unnecessary delay may bar rejection even in cases where the seller can shew no prejudice. In *Hyslop* v. *Shirlaw* [9] pictures were sold, and the purchaser claimed the right to reject them on the ground that the seller had warranted them as the works of particular artists. There had been a delay of a year and a half. The majority of the Court were of opinion that there had been no warranty, but the main ground of judgment was that in any event the buyer had lost his right to reject by delay. It was pointed out that it was open to him to obtain information on the question whether the pictures were genuine or not at once, and held that his failure in this respect, though it did not appear that the seller was in any way prejudiced, barred him from all remedy. It may probably be stated as a rule that where goods are purchased to be sent to a correspondent abroad, the purchaser is bound to examine them before forwarding them, and if he fail to do so has no remedy in respect of any defect which examination would have revealed, on the ground that he is not entitled to deprive the seller of the opportunity to remedy any defect.[10]

[1] *Mechan* v. *Bow, M'Lachlan & Co.*, 1910, S.C. 758. See also *Woodburn* v. *Motherwell*, 1917, S.C. 533; opinion of Lord President Strathclyde.

[2] *Aird & Coghill* v. *Pullan & Adams*, 1904, 7 F. 258; *Munro* v. *Bennet*, 1911, S.C. 337. Contrast *Morrison & Mason* v. *Clarkson Brothers*, 1898, 25 R. 427.

[3] *Hunt* v. *Barry*, 1905, 13 S.L.T. 34.

[4] *Wallace & Brown* v. *Robinson, Fleming & Co.*, 1885, 22 S.L.R. 830; *Hardy* v. *Hillerns & Fowler* [1923], 2 K.B. 490.

[5] *Pommer & Thomsen* v. *Mowat*, 1906, 14 S.L.T. 373.

[6] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sec. 56. The cases on reasonable time are collected in Brown, *Sale of Goods Act*, 2nd ed., 68.

[7] *Stevenson* v. *Dalrymple*, 1808, M. App. *voce* Sale, No. 5; *Smart* v. *Begg*, 1852, 14 D. 912; *Morrison & Mason* v. *Clarkson Brothers*, 1898, 25 R. 427, opinion of Lord M'Laren, at p. 436.

[8] *Pini & Co.* v. *Smith*, 1895, 22 R. 699.

[9] 1905, 7 F. 875.

[10] *Pini & Co.* v. *Smith*, 1895, 22 R. 699; *Strachan* v. *Marshall*, 1910, 2 S.L.T. 108. Contrast *Magistrates of Glasgow* v. *Ireland*, 1895, 22 R. 818, where, to the knowledge of the seller, immediate inspection was impracticable.

In *Nelson* v. *William Chalmers & Co. Ltd.*,[1] the Court had to consider the effect, on the right of ultimate rejection, of clauses in a shipbuilding contract whereby it was agreed that the property in the ship so far as built should pass to the purchaser on the payment of an instalment of the price. The contract was for the building of a yacht; the price was payable in four instalments, the first being payable "when in frame." The contract contained the following clause: "The right of property in the yacht will pass from the contractors to the owner on payment of the first instalment of the price, subject to the contractor's lien for the balance of the price and extras." The first instalment was paid. When the yacht was tendered for delivery she was not conform to contract. The purchaser refused to accept her, and brought an action concluding for repayment of the instalment paid, and for damages. In defence it was argued that the property in the yacht had, in terms of the contract, passed to the purchaser when he paid the first instalment, that this amounted to acceptance, and precluded rejection. The argument was repelled, on the ground that in the case of a contract for the purchase of an article in course of construction, an ultimate right of rejection was not inconsistent with an intermediate right of property in the buyer.

Obligations of Buyer on Rejection. On the express words of the Sale of Goods Act,[2] it seems clear that the buyer who has rejected goods as disconform to contract is under no obligation to return them. From the terms of the section it would appear that he does enough if he intimates rejection, and states that the goods are at the seller's disposal, and that he is under no general obligation to place the goods in neutral custody. But in *Malcolm* v. *Cross*,[3] where a horse was rejected as unsound, and the seller refused to take it back, opinions were expressed that it was the duty of the buyer either to have the horse placed in neutral custody, or to sell it under a warrant from the Sheriff. The duty of the seller in such circumstances has been expressed by Lord M'Laren as follows: "Now, I consider that pending a decision as to the buyer's claim to reject, the goods must be treated as if in neutral custody, and this whether the buyer be himself the custodier (as he may be under the Act of Parliament), or whether he places them in the custody of a third party. The condition that the party does nothing in relation to the goods which is inconsistent with the ownership of the seller is, in my opinion, especially applicable to the period when the parties are at issue as to the determination of the contract, and this view receives indirect confirmation from the language of the 35th section, where the doing of an act which is inconsistent with the seller's ownership is declared to be equivalent to the acceptance of the goods."[4] The result of the accidental destruction of the article, before rejection has been intimated, has been considered already.[5]

Sale of Heritage. There is no statutory provision as to the right of the purchaser of heritage, or of other subjects to which the Sale of Goods Act, 1893, does not apply, in the event of breach of contract on the part of the seller, and the subject is involved in some obscurity. Where it is possible for the seller to convey the subjects in accordance with his contract a refusal may be met by an action concluding for specific implement.[6] In cases where

[1] 1913, S.C. 441.

[2] Sec. 36. "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

[3] 1898, 25 R. 1089.

[4] *Electric Construction Co.* v. *Hurry & Young*, 1897, 24 R. 312, at p. 322.

[5] *Supra*, p. 541.

[6] See *infra*, Chap. XXXVI.

this is not possible, or where the subjects have been conveyed but do not satisfy the express or implied conditions of the contract, a distinction may be taken between the cases where the seller has failed to furnish the subject which he sold,[1] and those in which he is in default of some collateral stipulation. His failure in respect of time of performance is considered on a later page.

Failure to Convey Subject.—In the former case it would appear that the distinction between material and minor breaches of contract does not hold; in none of the cases relating to the sale of a house subject to an undisclosed reservation of minerals did it appear that the reservation made any difference to the value of the subject.[2] The remedy of the buyer, if the contract has not been followed by a conveyance, is to rescind it, recover any deposit or instalment that he has paid, and claim damages for any loss he has sustained.[3] He cannot (as in England) demand specific implement of the contract with compensation for the defect in title.[4] He is not entitled to enter into possession and retain the price until the defect in title is cured by the negative prescription.[5] Nor can he retain the subjects and claim damages; the authorities seem to establish clearly that where there is no obstacle to rescission the *actio quanti minoris* is not recognised by the law of Scotland.[6] If the defect is a latent bond the seller may be ordained to clear the record.[7]

Rei interventus.—When the defect in title is not discovered until a later stage, and the subjects have been so altered as to make *restitutio in integrum* impossible, the purchaser, it is conceived, has a claim for damages.[8] In *Bald* v. *Scott*[9] a mineral estate had been conveyed, and had been partially worked. A third party established his right to a portion of the estate. The Court had no doubt, apart from the question whether the seller's obligation was limited by a warrandice clause expressed to be from fact and deed, that a claim of damages was open to the purchaser where, as the minerals had been partially worked, *restitutio in integrum* was impossible. In *Louttit's Trs.* v. *Highland Rly. Co.*, a building restriction affecting part of the subjects was discovered after the purchasers had entered into possession and the price had been paid. The Lord Ordinary, treating the case as one of partial eviction, awarded damages. In a reclaiming note at the instance of the purchasers, on the ground that the damages were inadequate, the sellers did not dispute the competency of the action. The Lord President and Lord Adam indicated doubts whether the purchaser of heritable property, while retaining the subjects, could claim damages; Lord M'Laren expressed the opinion that where buildings had been erected and outlay incurred, an action of damages was the appropriate remedy.[10] In *Wood* v. *Magistrates of Edinburgh*,[11] on the other hand, a case where the subjects had been so altered as to make restitution impossible, the Lord Ordinary (Kinnear) stated that a purchaser, holding by the contract, "could have no remedy on the principle of the

[1] *Supra*, p. 313.

[2] *Robertson* v. *Rutherfurd*, 1841, 4 D. 121; *Whyte* v. *Lee*, 1879, 6 R. 699; *Crofts* v. *Stewart's Trs.*, 1926, S.C. 891; revd. 1927, S.C. (H.L.) 65.

[3] *Urquhart* v. *Halden*, 1835, 13 S. 844; *Crofts* v. *Stewart's Trs.*, 1926, S.C. 891; revd. 1927, S.C. (H.L.) 65.

[4] Per Lord Watson, *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 1.

[5] *Aikman* v. *Hepburn*, 1772, M. 14179.

[6] *Hannay* v. *Bargaly's Creditors*, 1785, M. 13334; *Lloyds* v. *Paterson's Creditors*, 1782, M. 13334; *Gray* v. *Hamilton*, 1801, M. App. *voce* Sale, No. 2; Bell's *Prin.*, sec. 893.

[7] *Christie* v. *Cameron*, 1898, 25 R. 824.

[8] Cases in following notes, and *Russell* v. *Harrower*, 1751, M. 16629; *Gordon* v. *Hughes*, 15th June 1815, F.C.; revd. (on another ground) 1819, 1 Bligh 287.

[9] 1847, 10 D. 289.

[10] *Louttit's Trs.* v. *Highland Rly. Co.*, 1892, 19 R. 791.

[11] 1886, 13 R. 1006.

actio quanti minoris." But this opinion was *obiter*, and is in conflict with Lord M'Laren's opinion in *Louttit's Trs.*

Effects of Warrandice.—Where absolute warrandice has been expressly granted, and the action is based upon it, the only appropriate conclusion, where the defect is irremediable, is an action for damages.[1] If a third party establishes a title preferable to that of the seller, and the eviction is therefore total, the purchaser may obtain as damages the value of the subjects as at the date of eviction, though that may exceed the price he paid.[2] It is an undecided question whether he may recover the price, if in the meantime the value of the subjects has fallen.[3] If the eviction is partial, as where a third party establishes a right to part of the subjects, or to a servitude, the purchaser's remedy is limited to the loss he has sustained. Where a servitude of right of way was established over an urban subject, and the purchaser, in an action held to be founded exclusively on the warrandice clause, concluded for repetition of the price, and offered to restore the subjects, the action, in respect that it contained no conclusion for damages, was dismissed as incompetent.[4]

Collateral Obligations.—The seller of heritable property though he has fulfilled his obligation to give the purchaser a valid and unfettered title to the property, may be in breach of some collateral condition of the contract. He may have warranted the subjects as possessing certain special advantages, as are suited for some particular purpose. From the opinions in a case much involved in specialties it would appear that if such warranties are not fulfilled, the purchaser's only remedy is a reduction of the contract, and that he is not entitled to retain the subjects and claim damages.[5]

Materiality of Time for Performance: Supply of Goods.—When the failure is in respect of time of performance, its materiality depends on the nature of the contract. In contracts for the supply or carriage of goods which vary in price from day to day, *primâ facie* stipulations as to the time either of giving or taking delivery are of the essence of the contract. If a contract of sale provides that the goods are to be shipped in a particular month, the presumption is that the condition is material, and that the buyer may reject if it is not observed.[6] Where a buyer agreed to take delivery of a cargo of coals at a particular date, and failed to provide a ship at that date, it was held that the seller was justified in repudiating any obligation to deliver.[7] In a charter-party, if a definite time is fixed for the arrival of a ship, its observance is material.[8] Where a contract provided for the delivery of iron warrants in London on the 23rd November, and the price of iron was then fluctuating, it was held that the purchaser was entitled to resile, on the ground that they were not presented until the 24th, though the fact that they had been dispatched to London was intimated to him.[9] But even in mercantile contracts there is only a presumption that time is of the essence of the contract; it is not an absolute rule that a short delay

[1] *Welsh* v. *Russell*, 1894, 21 R. 769.
[2] Ersk. ii. 3, 30; Bell's *Prin.*, sec. 895.
[3] *Cairns* v. *Howden*, 1870, 9 M. 284.
[4] *Welsh* v. *Russell*, 1894, 21 R. 769.
[5] *Reddie* v. *Syme*, 1831, 9 S. 413; affd. 1832, 6 W. & S. 188.
[6] *Bowes* v. *Shand*, 1877, 2 App. Cas. 455; *Grieve, Son & Co.* v. *König & Co.*, 1880, 7 R. 521, per Lord Shand, at p. 524.
[7] *Shaw, Macfarlane & Co.* v. *Waddell & Son*, 1900, 2 F. 1070.
[8] *Dunford & Elliot* v. *Macleod & Co.*, 1902, 4 F. 912; *Mackenzie* v. *Liddell*, 1883, 10 R. 705; *Nelson & Sons* v. *Dundee East Coast Shipping Co.*, 1907, S.C. 927. The English cases on the materiality of clauses in charter-parties are collected in Maclachlan on *Shipping*, 6th ed., 430 *et seq.*
[9] *Colvin* v. *Short*, 1857, 19 D. 890.

either in giving or accepting delivery of goods will justify repudiation. That course may be justifiable if the market for the goods is subject to sudden fluctuations in price, or if the conduct of the party in delay was such as to cause a reasonable apprehension that he had no intention of fulfilling his contractual obligations;[1] but if neither of these considerations be applicable, a party must wait for a time reasonable in the circumstances before he takes the extreme step of declaring the contract rescinded.[2]

Sale of Heritage.— In a sale of heritage it is undoubtedly a material stipulation that the seller should be able to offer a marketable title, and a definite refusal by the seller to meet well founded objections will justify the purchaser in resiling, with the result that any subsequent offer of a valid title comes too late.[3] There may be circumstances in which the purchaser may resile if a marketable title is not tendered at the term fixed by the contract. In *Kelman* v. *Barr's Tr.*[4] the seller's title stood on missives of sale whereby he had purchased the subjects from a third party. The validity of these missives was the subject of an action in which the seller ultimately obtained decree for implement, but not until six months after the term of entry agreed upon with the purchaser. The purchaser became bankrupt before the term of entry, and his trustee refused to implement the purchase, and rejected a claim of damages lodged by the seller. He was held justified in this course, on the ground that as the seller was unable, at the term of entry, to give a good title, the purchaser (or his trustee in his place) was entitled to resile. It was an element in this case, as indicating an intention that time was to be regarded as a material element in the contract, that the purchase was made with the object of an immediate resale. When that element is absent, it is conceived that a short delay in the tender of a sufficient title would not justify the purchaser in resiling. "When a purchaser means to make it an essential condition of his bargain that his titles must be tendered in a perfect condition by a given day, he must take care to express this condition in the most distinct terms; and, on failure to fulfil that condition, he should immediately declare his bargain to be at an end."[5] That is certainly the law if the seller's title is fundamentally good, and the delay is due to some formalities necessary for its completion.[6] And if an objection to the title is put forward, and ultimately sustained by the Court, the seller is within his rights in then tendering a title to which the objection does not apply.[7] If the purchaser has actually taken unchallenged possession of the subjects, it would appear that he is bound to implement the contract, if a good title is ultimately tendered, even although the title on which he took possession was defective.[8] But delay in the completion of a title may justify the purchaser in intimating that if it is not completed within a fixed time (provided that the time given is, in the circumstances, reasonable) he will resile from the contract.[9]

Contracts for Work.— Where the contract involves work extending over

[1] This was an element in *Shaw, Macfarlane & Co.* v. *Waddell, supra.*

[2] See opinion of Lord M'Laren in *Carswell* v. *Collard*, 1892, 19 R. 987; affd. 20 R. (H.L.) 47.

[3] *Gilfillan* v. *Cadell & Grant*, 1893, 21 R. 269.

[4] 1878, 5 R. 816. See also *Hunter* v. *Carsewell*, 1822, 1 Sh. 248.

[5] *Raeburn* v. *Baird*, 1832, 10 S. 761, per Lord Balgray, at p. 765; as to the construction of a provision for immediate entry, see *Heys & Kimball* v. *Morton*, 1890, 17 R. 381.

[6] *Forbes* v. *Campbell*, 1885, 12 R. 1065 (sale of ship); *Hatten* v. *Russell*, 1888, 38 Ch. D. 334.

[7] *Raeburn* v. *Baird*, 1832, 10 S. 761; *Carter* v. *Lornie*, 1890, 18 R. 353.

[8] *Carter* v. *Lornie*, *supra.*

[9] *Compton* v. *Bagley* [1892], 1 Ch. 313; *M'Neill* v. *Cameron*, 1830, 8 S. 362; *Gilfillan* v. *Cadell & Grant*, 1893, 21 R. 269; *Stickney* v. *Keeble* [1915], A.C. 386.

a considerable period of time, it would appear that failure to complete a particular part of the work within the time fixed would not justify repudiation of the contract. Thus where the contract was for fitting up machinery, it was observed that the fact that the specified time was exceeded would not justify rejection of the machinery. "If the machinery is good, it would be a very unusual course for the employers to refuse to allow it to be put up in their premises because it was not put up within the time stipulated. Such a course would in general be very inexpedient for both parties. Accordingly, it is well understood that if a breach of contract occurs in point of time, that gives rise, not to the rejection of the subject, but to a claim of damages for any loss occasioned by the delay." [1] So in leases the mere fact that the landlord has not executed certain repairs within a stipulated time does not justify the tenant in throwing up the lease.[2] But cases of this class necessarily present questions of degree, and a delay unreasonable in the circumstances would justify rejection.

Time of Payment. Stipulations as to time of payment are not treated as material conditions of the contract, except in very special cases. They were held to be material in a case where a contract for the supply of railway sleepers by instalments contained a provision for payment by bills at specified dates. On these bills being dishonoured, though it was ultimately arranged that debentures should be taken for them, it was held that the contractors were entitled to refuse further supplies.[3] But the case involved the specialties that the party who had failed to pay was, to the knowledge of the other, an undischarged bankrupt, engaged in carrying out a sub-contract with a solvent third party, and that the arrangements as to payment were intended to secure that payments made by that third party should at once be transmitted. So, again, where a contract was for the supply of coals in monthly instalments and with monthly payments, it was held that where the purchaser refused to pay for one instalment unless a claim (ultimately held to be ill-founded) was conceded, he was in breach of a material condition of his contract, and had placed it within the right of the seller to rescind. But this was not a case of mere failure to pay on an appointed day, but of a refusal to pay on a ground which might involve refusal of future payments.[4] Where a dispute regarding a contract for the sale of a number of pieces of cloth was settled, on the basis that the purchaser should have three months to pay for what he had received, and an option to require delivery of what remained, opinions were expressed that the provision for payment at the expiry of three months was a material term of the contract, and that the purchaser could not exercise his option to demand delivery without tendering payment.[5]

In cases where these specialties are not present, delay in payment is not so material as to justify rescission of the contract. This is enacted as a general rule in the Sale of Goods Act, 1893.[6] So in *Linn* v. *Shields* [7] twelve

[1] *Macbride* v. *Hamilton*, 1875, 2 R. 775, per Lord President Inglis, at p. 780. See *Paton & Sons* v. *Payne*, 1897, 35 S.L.R. 112.

[2] *Ante*, p. 605.

[3] *Barclay* v. *Anderston Foundry Co.*, 1856, 18 D. 1190. Contrast *Payzu Ltd.* v. *Saunders* [1919], 2 K.B. 581.

[4] *Turnbull* v. *M'Lean & Co.*, 1874, 1 R. 730.

[5] *Morris* v. *Baron* [1918], A.C. 1, per Finlay, *L.C.*, Lords Dunedin and Parmoor. The point is not noticed in the head-note.

[6] 56 & 57 Vict. c. 71, sec. 10 (1). "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale."

[7] 1863, 2 M. 88.

stacks of corn were sold to be delivered as required, without any express provision as to the term of payment. It was held that the obligation of the buyer was to pay on delivery of each stack, but that his failure to do so was not a breach of contract so material as to justify the seller in repudiating his obligation to deliver the remainder. But where a buyer is not prepared to pay the price at the time fixed for the completion of the contract, the seller is not bound to wait indefinitely. He is entitled, after a time reasonable in the circumstances, to obtain a decree annulling the sale.[1] In leases, mere non-payment of rent does not entitle the landlord to bring the lease to an end; and even if a legal irritancy has been incurred by failure in payment for two years, it may be purged by payment before decree of removing.[2]

Instalment Contracts. Contracts for the supply or carriage of goods by instalments deserve special notice. In such cases there is usually added a provision for payment by instalments, and the question has several times been raised whether the failure to supply one instalment (whether that failure consisted in non-delivery or in defect of quality), or the failure to pay for an instalment supplied, justifies the repudiation of the contract, and the refusal to accept, or supply, further instalments. A study of the English cases leads to the conclusion that there is no material difference in the question presented for decision whether the breach of contract involved is the failure to supply one instalment, the defective quality of the goods supplied, or the failure to pay. That question is whether the conduct of the party in default is such as to indicate that he intends to repudiate his contractual obligations, or, as it was put by Lord Selborne, whether his conduct amounts to a rescission of the contract, assuming that he had the power to rescind at pleasure.[3] Failure less decisive will justify a claim of damages, but will not justify repudiation. Thus where a contract for the supply of steel contained provisions for payment at fixed dates, and at the time when one instalment was due the selling company was in liquidation, but no liquidator had been appointed, and the buyers, acting under the erroneous legal advice that there was no one who could give a receipt, refused to pay, it was held that their refusal was not any indication of an intention to repudiate their obligations, and did not justify the seller in refusing to make further deliveries of steel.[4] The inference that a party in default intends to repudiate his contractual obligations—always a question of construction on the particular facts—will more readily be drawn if the failure is in the initial stage of the contract. Thus if a party has undertaken to supply goods in four instalments, his failure in the first instalment will more easily be held to justify the other party in repudiating than his failure in the third.[5] On the other hand, it would appear that an intention to repudiate will hardly be gathered from any failure in the latter stages of an extended contract, especially if any penal consequences are involved. In *Cornwall* v. *Henson* [6] there was a contract for the sale of land, the price to be payable by instalments, the last being payable in October 1895. Before it was paid the buyer disappeared, leaving no address. The seller attempted to resell the subjects, but, finding no purchaser, let them

[1] *Black* v. *Dick*, 1814, Hume, 699.
[2] *Wright* v. *Wightman*, 1875, 3 R. 68; *Knowles* v. *Bings*, 1826, 4 Sh. 530.
[3] *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*, 1884, 9 App. Cas. 434, at p. 439.
[4] *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*, 1884, 9 App. Cas. 434, explained in *Rhymney Rly. Co.* v. *Brecon, etc., Rly. Co.*, 1900, 69 L.J. Ch. 813. The English cases on sale by instalments are collected in Benjamin on *Sale*, 6th ed., 825.
[5] *Honck* v. *Muller*, 1881, 7 Q.B.D 92.
[6] [1900], 2 Ch. 298.

on lease. In 1898 the buyer reappeared, tendered payment of the last instalment, and demanded possession of the subjects, which, as they were let, could not be given. It was held that he was entitled to damages, on the ground that, his failure being merely in the last instalment of the price, it could not be taken as indicating an intention to repudiate the contract.

It does not appear that the Scots cases relating to instalment contracts justify the statement of any different or more definite rule. In two cases already referred to the inference was drawn, in very exceptional circumstances, that failure in regularity of payments indicated the intention to repudiate the contract.[1] In *Barr* v. *Waldie*[2] an ill-expressed contract was construed as imposing the obligation, on the one part to order, on the other to furnish, 2,500 tons of coal by instalments of about 300 tons per month. After a year the merchant had ordered only 1,071 tons, the coalmaster having fulfilled all orders given. It was held that the continued failure to order the proper number of tons justified the coalmaster in refusing to make any further supplies. In *Dunford & Elliot* v. *Macleod & Co.*[3] a shipbroker undertook to supply tonnage for the carriage of iron from September to December, "in about equal monthly instalments." No ship arrived till the end of October, and it was held that the shipper was entitled to put an end to the contract. In *Govan Rope and Sailcloth Co.* v. *Weir*[4] one party agreed to furnish, the other to order, twenty tons of rope within a specified period, the rope to be delivered as it might be required. At the end of the period only five and a half tons had been ordered. In an action of damages by the seller the purchaser pleaded in defence failure in quality of two instalments. It was held that this defence was relevant, although, on a proof, only one failure was established, and condonation of that failure was proved. Lord M'Laren stated the result of the cases as follows: "I am not sure that the law is clearly settled as to the remedy or remedies open to a purchaser under a continuing contract for the supply of goods at such times as he may require them. If on one occasion the seller should tender goods inferior to contract quality, the purchaser would not in ordinary circumstances be justified in repudiating the whole contract, though he would be entitled to return the particular lot of goods which were objectionable. But if a seller systematically sends goods which are not conformable to contract, and the contract is for successive deliveries, I do not doubt that, when such conduct is persisted in, so as to make it evident that the seller does not intend to fulfil his contract, the purchaser may rescind the contract and refuse to take further deliveries."[5] Where, in a contract for the supply of goods by instalments, one instalment, though alleged to be defective, is accepted subject to a claim of damages for its defective state, the purchaser cannot treat the defect as amounting to a repudiation of the contract, such as would justify him in refusing to accept further instalments.[6]

A clause in a contract providing for the delivery of goods by instalments, to the effect that each instalment is to constitute a separate contract, would

[1] *Barclay* v. *Anderston Foundry Co.*, 1856, 18 D. 1190; *Turnbull* v. *M'Lean & Co.*, 1874, 1 R. 730. See also *Ireland & Son* v. *Merryton Coal Co.*, 1894, 21 R. 989; *Veit* v. *Ireland*, 1896, 33 S.L.R. 526.

[2] 1893, 21 R. 224.

[3] 1902, 4 F. 912. The shipper was, however, held liable in damages, because he had failed to intimate his repudiation of the contract in time, and thereby caused unnecessary loss to the other party.

[4] 1897, 24 R. 368.

[5] *Govan Rope and Sailcloth Co.*, *supra*, 24 R., at p. 373.

[6] *Sanderson* v. *Armour*, 1921, S.C. 18; affd. 1922, S.C. (H.L.) 117.

seem to preclude the buyer from repudiating in respect of an initial failure, or even of failure in several instalments. For there is no legal principle which will justify *A.* in repudiating a contract with *B.*, on the ground that *B.* has not implemented the obligations he has undertaken under a different contract. But this point has not yet been the subject of decision. The clause occurred in *Higgin* v. *Pumpherston Oil Co.*[1] The contract was for the supply of twenty tons of wax, "to be delivered during the next twelve months, in about equal monthly quantities. Each delivery shall constitute a separate contract." The contract was concluded in March 1890. One ton was delivered in September 1890, two tons in February 1891. No more was ordered by the buyer, or tendered by the seller, during that period. In March 1891 the buyer called upon the seller to supply the remaining seventeen tons. The seller refused to supply more than two. In an action of damages at the instance of the buyer the seller was assoilzied, on the ground that his obligation under the contract was to deliver the wax in twelve instalments of about equal amount, and that the conduct of the parties shewed that they had mutually passed from and abandoned their claims as to the instalments during the months when none had been ordered or delivered. With regard to the effect of the clause declaring each delivery a separate contract, the Lord President (Robertson) said: "The effect is that if, for example, the vendor refused to deliver a monthly quantity, the buyer's claim of damages would at once emerge, and his duty would be to buy against the seller the quantity of which he had been disappointed. Again, it is sufficiently plain that unless the parties agreed to a postponement of any monthly delivery or series of monthly deliveries, the one party could not enforce acceptance or the other party demand the delivery of the belated quantity."[2]

Notice that Contract Rescinded.—A party faced with a breach of contract which he regards as material would be well-advised in making a definite intimation to the defaulter that he regards the contract as at an end through his fault, and that he proposes to claim damages. If, in the absence of such intimation, the other party is led to act on the assumption that the contract is still in being, the right to reject may be barred. "A contracting party," it has been observed, "is not entitled to proceed so as to cause unnecessary loss to the other party without any resulting benefit to himself."[3] So where, under a continuing contract for the supply of tonnage at a particular port, the shipowner had so far failed to fulfil his contract as to give the charterers the right to rescind it, it was held that the latter were not entitled, without any intimation of rescission, to refuse cargo to two ships which had been intimated as sent in pursuance of the contract.[4] It is conceived that this is the general rule in cases of failure in quality or timeousness in the supply of goods, and would hold even if the other party had not taken steps in reliance on the contract, on the general principle that parties are presumed to arrange their business on the assumption that their contracts will be carried out, if they have no notice to the contrary. A different rule will prevail where the breach consists in failure in payment at the time agreed.

That, as has been explained,[5] is material in exceptional cases only; where it is, the party who has failed to pay cannot reasonably expect to get

[1] 1893, 20 R. 532.

[2] 20 R., at p. 535.

[3] Per Lord M'Laren, *Dunford & Elliot* v. *Macleod & Co.*, *infra*, 4 F., at p. 920.

[4] *Dunford & Elliot* v. *Macleod & Co.*, 1902, 4 F. 912. See also opinion of Lord President Clyde in *Sanderson* v. *Armour*, 1921, S.C. 18; affd. 1922, S.C. (H.L.) 117. *Bentzen* v. *Taylor* [1893], 2 Q.B. 274; and as to leases, *supra*, p. 604.

[5] *Supra*, p. 617.

further supplies on credit, and the mere failure to intimate that the contract is regarded as rescinded will not preclude a refusal to supply them.[1]

Rescission with Claim for Damages. If one party either expressly refuses to perform his obligations under the contract, or in fact fails to do so, as by tendering an article materially disconform to contract, and the other intimates that the contract is at an end, or that he cancels it, the result, it appears, is properly described by the statement that the former party has repudiated the contract, the latter has rescinded it. Rescission of a contract is not, except in virtue of an express provision to that effect, within the power of one party alone, and therefore the party who refuses or fails to perform his obligations cannot be said to have rescinded it, only to have offered to the other an option to rescind it. The result is, that the party who has repudiated the contract, assuming that the repudiation had no sufficient justification, is liable in damages. The party who wrongfully repudiates his contract may in more simple language be said to have failed to perform it in some material respect. The mere fact that the other intimates that he regards the contract as cancelled does not import that he waives the claim for damages which accrues to every party whose contract has not been performed. "Where two parties are bound together under contract, of course each must perform to the other his mutual stipulations. If one of the parties is in breach of a stipulation of the contract, what is the position of the other? . . . If the stipulation which is broken goes to the root and essence of the contract, the other party is entitled to say, now you have so broken the contract that I am entitled to say that it is at an end through your fault, I shall not perform any more of my stipulations, because you have precluded me, and I shall claim damages." [2]

Effect of Rescission: Accrued Rights.—The principle that failure by one party in a material obligation justifies the other in treating a contract as repudiated is limited to the rescission of those terms of the contract which are still executory. It does not extend to rescission of real rights in property which the party in default has acquired under the contract. In sale, payment of the price is obviously a material provision, and failure entitles the seller to refuse delivery, but does not reinvest him with the property in the goods if that has passed to the buyer.[3] In a feu-contract a declarator of irritancy *ob non solutum canonem* rests on statute, not on general principles of contract.[4] The contract of excambion is exceptional in respect that where one party is evicted he may recover the lands which he has conveyed.[5] In contracts where a real right not amounting to a right of property is conferred a material failure by the party invested with the right may bring it to an end. The application of this in leases has been already considered.[6] Where a pledgee was held to have repudiated his contract by an unauthorised sale it was decided that his right to possession was determined, and consequently that

[1] *Barclay* v. *Anderston Foundry Co.*, 1856, 18 D. 1190.

[2] Per Lord President Dunedin, *Johannesburg Municipal Council* v. *Stewart & Co.*, 1909, S.C. 860, at p. 877; revd. 1909, S.C. (H.L.) 53. See also opinion of Lord President Inglis, *Chapman* v. *Couston, Thomson & Co.*, 1871, 9 M. 675, at p. 681; affd. 1872, 10 M. (H.L.) 74; *Davie* v. *Stark*, 1876, 3 R. 1114; *Dunford & Elliot* v. *Macleod & Co.*, 1902, 4 F. 912; *Duff & Co.* v. *Iron and Steel, etc., Building Co.*, 1891, 19 R. 199.

[3] Stair, i. 14, 2; Bell, *Com.*, i. 257; *Richmond* v. *Railton*, 1854, 16 D. 403. The argument that the property did not pass if the price was not paid was considered and rejected in *Blacklock* v. *Heron*, 1767, M. 14157.

[4] Bell, *Prin.*, sec. 701.

[5] *Earl of Home* v. *Ker*, 1622, M. 3677; *Wards* v. *Balcomie*, 1629, M. 3678; Stair, i. xiv. 1.

[6] *Supra*, p. 605.

the pledger might at once recover the subjects from the party to whom they had been sold.[1] From the opinions it would appear that the same rule would apply to a contract of hire.

Effect of Rescission: Prior Debts.—A material breach of a contract does not entitle the party affected by it to escape liability for debts which have already accrued. It may entitle him to withhold payment until his claim for damages is ascertained, and then to plead compensation in so far as that claim, when ascertained, extends;[2] it does not extinguish the debt. To hold that it did would introduce the element of punishment, foreign to the law of contract. A tenant, though the circumstances may justify him in rescinding the lease or retaining his rent, remains liable for arrears.[3] A servant, dismissed for fault, is entitled to wages for any period of the service which had been completed.[4] An agent for the sale of goods who during a period of years had been honest in some transactions, dishonest in others, was found entitled to commission on those transactions in which he had been honest.[5] In *Graham* v. *United Turkey Red Co.*[6] an action of accounting at the instance of an agent—it was proved that from July 1916 the pursuer had broken the condition that he should not sell for other manufacturers. It was held that although he could not claim commission for the period during which he was in breach of contract his right to commission for his former services was not affected, and therefore that he was entitled to an accounting for the period prior to July 1916.

[1] *Fenn* v. *Bittlestone*, 1851, 7 Ex. 152.
[2] *Infra*, p. 626.
[3] *Christie* v. *Wilson*, 1915, S.C. 645.
[4] *Gibson* v. *M'Naughton*, 1861, 23 D. 358; *Parkin* v. *South Hatton Coal Co.*, 1907, 97 L.T. 98.
[5] *Nitedals Taendstikfabric* v. *Bruster* [1906], 2 Ch. 671.
[6] 1922, S.C. 533.

CHAPTER XXXV

RETENTION AND COMPENSATION

(1) *Retention*

In cases where the creditor in an obligation may desire to maintain the contractual relations, and where, therefore, the rescission of the contract on the ground of the debtor's failure would not be to his advantage, he may find his remedy in withholding performance of the obligations which, under the contract, are incumbent upon him. This remedy may also be applicable in certain cases where the failure of the debtor may not be sufficiently material to justify the rescission of the contract.

Retention where Rescission Incompetent.—It would appear to be established that a failure in the performance of a contract may not be so material as to justify the rescission of the contract, yet may be sufficiently material to entitle the other party to withhold counter-performance. One case to which this principle applies—the insolvency of the debtor in the contract—has been already considered.[1] In other cases it is a question of degree, on which no rule can be laid down, and which has not been illustrated by many decisions. In *Linn* v. *Shields* [2] twelve stacks of corn were purchased, to be delivered as required by the purchaser, and to be paid for on delivery. Three stacks had been delivered, and the purchaser had paid nothing. In an action by him for delivery of the remaining nine stacks it was held that the seller was entitled to refuse to give delivery until the three stacks already delivered were paid for, but observed that the buyer's failure to pay was not in the circumstances a breach of contract sufficiently material to justify the seller in treating the contract as rescinded. So, in leases, there is a degree in failure on the part of the landlord which would not justify the tenant in throwing up the lease, but would entitle him to retain his rent.[3]

Forms of a Right of Retention.—The right of one party to withhold performance of the obligations he has undertaken under a contract until performance of the obligations in which he is creditor is given is usually termed a right of retention. The word is perhaps used widely enough to cover all cases where *A.* refuses to perform his contractual obligations to *B.* on the ground that these obligations are impliedly conditional on the performance of counter-obligations due by *B.* But it is more specially applicable to the case where *A.* does not assert a right to rescind the contract, but maintains, as a precautionary measure, a right to delay performance until the obligations due to him are implemented, or until a claim of damages arising out of the contract is satisfied. The right may result, according to the circumstances of the case, in a claim to delay payment of a debt until

[1] *Supra*, p. 601.

[2] 1863, 2 M. 88.

[3] Cp. *Macdonald* v. *Kydd* (1901, 3 F. 923), where it was held that the failure of the landlord to execute repairs entitled the tenant to retain his rent, with *Todd* v. *Bowie* (1902, 4 F. 435), where, on grounds very similar, the tenant threw up the lease, and was held not to be justified in doing so.

some counter-claim is satisfied, or the claim to retain some particular thing until a debt is paid. In the latter case a right of retention is also spoken of as a lien.

Before considering the cases in which a right of retention or lien is admissible in virtue of obligations arising under a mutual contract, it would seem necessary to deal with the question how far the fact that two parties are mutually indebted — either in monetary obligations or in obligations to do some particular act — affects the right of one or other to enforce the claim in which he is creditor.

Breach of Separate Contracts. — As a general rule, it is no excuse for failure of performance that the other party is in default on another contract. If *A.* and *B.* are seller and purchaser, and also lessor and lessee, *A.* could not refuse to deliver the article sold, on tender of the price, on the plea that *B.* was in default in his obligations arising under the contract of lease. So where a landlord had purchased the tenant's outgoing crop, he was found to have no right to refuse payment on the plea that he had a claim of damages for miscropping and for failure to keep up the buildings, because the obligation of which fulfilment was asked from him arose out of a contract of sale, the obligation of which fulfilment was due to him out of the contract of lease.[1] Desertion by a wife does not entitle the husband to withhold payment of an annuity provided for her by ante-nuptial marriage contract: she is in breach, not of the marriage contract, but of the obligations involved in marriage.[2] In *Asphaltic Limestone Co.* v. *Glasgow Corporation*[3] a company had two separate contracts with a Corporation, each for the paving and maintenance of particular streets. On the company going into liquidation the liquidator adopted one contract and refused to fulfil the other. It was held that he was entitled to do so; and that the Corporation could not refuse to implement its obligations under the contract which was adopted and performed, on the ground that the obligations under the contract which was rejected had not been implemented. From the terms of the judgment it is clear that the same rule would have applied if the company, while remaining solvent, had for any reason failed to execute one of their contracts, but performed the other. Lord M'Laren, after pointing out that the two contracts were independent, said: "What happened was really this: the company, by reason of insolvency, was unable to perform its obligation under the first contract to maintain the road for ten years. It thereby disaffirmed the contract, so far as unexecuted, and became liable in damages for non-fulfilment; but through the intervention of the liquidator the company was able to perform, and did perform, the second contract to the extent of paving the roads, and undertook to maintain these roads for the stipulated term of five years. Now, I do not know of any rule of law which requires that a party who has in part performed one of his contracts should be treated as if he had failed in performance merely because he has refused or failed to perform a different and unconnected contract obligation."[4]

Liquid Debt cannot be Retained in Virtue of Illiquid Claim. — On the same principle a debt which is admittedly due and payable cannot be withheld on the plea of retention in respect of a claim of damages which does not arise directly out of the same contract.[5] So where rent was

[1] *Sutherland* v. *Urquhart*, 1895, 23 R. 284.
[2] *Smith* v. *Smith*, 1866, 4 M. 279.
[3] 1907, S.C. 463.
[4] 1907, S.C., at p. 473.
[5] Ersk. iii. 4. 15; Bell, *Prin.*, sec. 573. *National Exchange Co.* v. *Drew*, 1855, 2 Macq. 103, where the law is laid down by Lord Cranworth, at p. 122. The rule does not hold if the creditor in the liquid claim is bankrupt (see *infra*, p. 626).

demanded the tenant could not oppose a claim of damages founded on an alleged interference by the landlord with the drains. That claim, it was pointed out, was not a claim for a breach of the contract of lease, but for an alleged wrongful act.[1] An action for the price of a subject sold cannot be met by a claim for damages for fraud which had led to the sale; the one claim rests on contract, the other on delict.[2]

The rule is the same when the illiquid claim is founded on a claim under a contract, or for breach of contract, so long as the contract is not the one out of which the debt that is sued for arises; and it makes no difference that the claims arise from two contracts which may be said to be in the same course of dealing between the parties. So the claim of a railway company for charges for goods carried cannot be met by a plea of retention for a claim of damages for injury caused to other goods through the fault of the company.[3] Payment of the price of goods sold and delivered cannot be refused on the ground that goods formerly supplied were disconform to contract.[4] In *Burt* v. *Bell*[5] a law agent sued his client for his professional account. The defence was a claim of damages founded on averments of professional negligence in regard to certain items of the business done. It was held that both parties had treated their relations, not as one continuing contract, but as a series of contracts by which the law agent was employed for separate pieces of business. The plea, so far as stated as a defence to the general account, was therefore repelled, on the ground that there was "no authority for holding that a claim of damages arising out of negligence in one piece of business may be set off against accounts for business done under other contracts of employment."

Sheriff Courts Act, 1913, Rule 55.—By the Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), Sched. I., rule 55, it is enacted: "Where a defender pleads a counter-claim it shall suffice that he state the same in his defences, and the Sheriff may thereafter deal with it as if it had been stated in a substantive action, and may grant decree for it in whole or in part, or for the difference between it and the claim sued on." In spite of the generality of these words it has been decided that the rule was not intended to alter the subsisting law, by admitting, in Sheriff Court actions, illiquid counter-claims which would not have been admissible as defences prior to the Act.[6]

Claims Immediately Verifiable. An illiquid claim has been sustained as a dilatory plea where there were materials for its instant or easy verification, and where, in the opinion of the Court, the ends of justice would be defeated if it were repelled.[7] In *Henderson & Co.* v. *Turnbull & Co.*[8] goods had been carried and delivered, and freight had been paid as for 550 tons. On weighing the goods it appeared that there were only 500 tons. The consignees brought an action concluding, on one version of their case, for the return of the amount of freight applicable to the fifty tons which were missing. To this claim the

[1] *Christie* v. *Birrells*, 1910, S.C. 986.

[2] *Smart* v. *Wilkinson*, 1928, S.C. 383.

[3] *Scottish North-Eastern Rly. Co.* v. *Napier*, 1859, 21 D. 700, explaining *Hunter* v. *Mitchell*, 1858, 20 D. 1353, as a case where proof was allowed of consent.

[4] *Grewar* v. *Cross*, 1904, 12 S.L.T. 84; *Mackie* v. *Riddell*, 1874, 2 R. 115.

[5] 1861, 23 D. 13; contrast *Shortt* v. *Lascelles*, 1828, 6 S. 810, where the law agent's account was taken as a *unum quid*, and a claim for damages allowed in defence.

[6] *Christie* v. *Birrells*, 1910, S.C. 986.

[7] *Munro* v. *Macdonald's Exrs.*, 1866, 4 M. 687; *Ross* v. *Ross*, 1895, 22 R. 461; *Lorie* v. *Baird's Trs.*, 1895, 23 R. 1, as explained by Lord Kinnear in *Sutherland* v. *Urquhart*, 1895, 23 R. 284; *Henderson & Co.* v. *Turnbull & Co.*, 1909, S.C. 510. Contrast *M'Connell & Reid* v. *Muir*, 1906, 14 S.L.T. 79.

[8] 1909, S.C. 510.

shipowners opposed a claim for dead freight. The objection that this counter-claim was illiquid, dead freight being a claim of damages for failure to furnish a cargo, was repelled, on the ground (1) that the one claim was as liquid as the other, and (2) that the consignees' demand, being for a *condictio indebiti*, was an appeal to the equitable jurisdiction of the Court, and would not be granted if it appeared to be equitable that a counter-claim should be received.

Balancing Accounts in Bankruptcy. The rule that a demand for a liquid debt is not relevantly met by a defence founded on an illiquid or unascertained claim does not hold where the pursuer is bankrupt or where it is averred that he is insolvent. Then on the principle of retention, or, as it is more aptly termed in Bell's *Commentaries*, of balancing accounts in bankruptcy, the party who is sued on a claim which he admits to be payable may put forward in defence claims which are not yet due, which involve only a contingent liability, or which are disputed and require to be established by proof.[1] "The doctrine (of retention) has received much extension in cases of bankruptcy and insolvency, where it is practically settled that anyone who has a claim against an insolvent estate is entitled to keep back money which he owes to the estate, and cannot be compelled to pay in full while he only receives a dividend."[2] So the drawer of a bill of exchange which has been discounted, though he is not the direct creditor of the acceptor, is a creditor in the event of being compelled to retire the bill, and on the bankruptcy of the acceptor may plead retention in respect of this contingent liability, in answer to a demand for a separate debt in respect of which the acceptor is his creditor.[3] And, subject to the remark that there is no case where the debtor to a bankrupt estate has been held to be entitled to refuse or delay payment of a debt admittedly due on the ground of a claim of damages for a wrong (*e.g.*, slander) for which the bankrupt is alleged to be responsible, it would seem that any claim may be pleaded in defence in bankruptcy, unless it depends on a contingency so remote as to make it impossible to estimate its present value.[4]

Retention in Mutual Contracts.— Taking the law then to be that in the absence of insolvency a party who is liable in a debt, or debtor in an obligation *ad factum præstandum*, cannot refuse payment or performance merely because he is also the creditor of the party demanding it, we proceed to consider the case in which such a right does arise, on the ground that the respective obligations have arisen out of the same contract, and are dependent or conditional on each other.

Where the conditions of a contract are that one party should perform some service and the other should pay for it, the obligation of the former is to perform the service in accordance with the conditions of the contract, the obligation of the latter to pay the price or hire agreed upon. If the service is defective the hirer or employer may have the right to rescind the contract. But such a right is inapplicable or useless in the case where the service in question consists in work on property belonging to the employer. His remedy is then to withhold performance of his obligation to pay, in security

[1] Bell, *Com.*, ii. 122; *Mill* v. *Paul*, 1825, 4 S. 219, per Lord Glenlee; *Hannay & Son's Tr.* v. *Armstrong Brothers*, *infra*; *Taylor's Tr.* v. *Paul*, 1888, 15 R. 313; *Scott's Tr.* v. *Scott*, 1887, 14 R. 1043, per Lord President Inglis, at p. 1051; *Borthwick* v. *Scottish Widows' Fund*, 1864, 2 M. 595.

[2] Per Lord M'Laren in *Ross* v. *Ross*, 1895, 22 R. 461, 465.

[3] *Hannay & Son's Tr.* v. *Armstrong Brothers*, 1875, 2 R. 399; affd. 1877, 4 R. (H.L.) 43.

[4] See *supra*, p. 237; Bell, *Com.*, ii. 122; Goudy, *Bankruptcy*, 3rd ed., 606.

of his claim for damages for the defective character of the work. His obligation to pay is not extinguished, but postponed, though it may ultimately be extinguished, on the principle of compensation, should it be found that the amount due as damages equals or exceeds the amount due under the contract as the price or hire. The right to withhold payment, in these circumstances, is in effect an exception to the rule that an action for a debt admitted to be due and payable is not relevantly met by the defence that the defender has an illiquid or unascertained claim against the pursuer. That rule admits an exception where the illiquid or unascertained claim arises out of the same contract as the debt which is sued for, and where the enforcement of immediate payment would result in enabling the pursuer to obtain satisfaction of his claim under the contract when he has not implemented the obligation of which that claim is the counterpart.[1] So where a carrier sues for freight,[2] or a storekeeper for storage dues,[3] he may be met by a plea of retention founded on a claim of damages for injury done to the goods by negligent carriage or storage; where a servant sues for wages the employer may meet the action by a claim of damages for the pursuer's failure in the performance of his duties;[4] where a time is fixed for the completion of a contract for work, and is not observed, the employer may refuse payment of the contract price until his claim for damages for delay is established.[5] It has been decided that it is no objection to a plea of retention founded on the failure to implement the conditions of a mutual contract that the condition unimplemented was one merely implied by law and not expressly provided in the contract, and therefore that where no time for the delivery of goods was fixed, the purchaser might found a plea of retention of the price on the failure of the seller to fulfil his implied obligation to deliver within a reasonable time.[6] It has been suggested that the general rule may not apply to the case of a building contract with a provision for payment by instalments, and doubted whether the employer has any right to withhold payment of an instalment in virtue of unliquidated claims against the builder.[7]

It has been laid down that a claim of retention, even in cases where both debts arise out of the same contract, is not the assertion of an absolute right, and that the Court may refuse to give effect to it in cases where the result would be inequitable, or where the conclusion is reached that the plea is put forward merely as an excuse for delay.[8]

[1] See this principle explained, and contrasted with the plea of compensation, in *Johnston* v. *Robertson*, 1861, 23 D. 646, per Lord Benholme, at p. 652; Lord Justice-Clerk Inglis, at p. 656.

[2] *Taylor* v. *Forbes*, 1830, 9 S. 113. But it would appear that if goods are accepted without any reservation, freight cannot be withheld on the ground of the carrier's delay (*M'Donald* v. *Thomson*, 1843, 5 D. 719). The Court founded on *Pillans* v. *Pitt* (1825, 4 S. 350), which seems irreconcilable with *Taylor* v. *Forbes*. But there is probably no absolute rule in cases of retention founded on illiquid counter-claims (see *Stewart* v. *Dennistoun*, 1854, 16 D. 1061).

[3] *Gibson & Stewart* v. *Brown & Co.*, 1876, 3 R. 328.

[4] *Tait* v. *M'Intosh*, 1841, 13 Sc. Jur. 280; *Scottish North-Eastern Rly. Co.* v. *Napier*, 1859, 21 D. 700, per Lord Justice-Clerk Inglis, at p. 705; *Gibson* v. *M'Naughton*, 1861, 23 D. 358 (deserting service); *Sharp* v. *Rettie*, 1884, 11 R. 745.

[5] *Johnston* v. *Robertson*, 1861, 23 D. 646; *Macbride* v. *Hamilton*, 1875, 2 R. 775.

[6] *British Motor Body Co.* v. *Shaw*, 1914, S.C. 922, overruling dictum of Lord President Inglis in *Macbride* v. *Hamilton*, *supra*.

[7] *Field & Allan* v. *Gordon*, 1872, 11 M. 132, opinions of Lords Benholme and Neaves.

[8] *Graham* v. *Gordon*, 1843, 5 D. 1207, per Lord Fullerton; *Ferguson & Stewart* v. *Grant*, 1856, 18 D. 536, per Lord President M'Neill; *Garscadden* v. *Ardrossan Dry Dock Co.*, 1910, S.C. 178, per Lord Ardwall; *Earl of Galloway* v. *M'Connell*, 1911, S.C. 846, opinion of Lord Salvesen. This principle may perhaps explain the decision in *Pegler* v. *Northern Agricultural Implement Co.*, 1877, 4 R. 435, and the opinion of Hope, L.J.C., in *M'Kirdy* v. *Paterson*, 1854, 16 D. 1013.

Retention of Rent. The application of the law of retention of debts, founded on the principle that one party to a contract cannot insist on performance if he is not prepared to perform, as developed in cases between landlord and tenant, presents difficulties such as to preclude any confident statement of the law. The question usually arises in an action by the landlord for payment of rent, met by a plea that the tenant is entitled to retain the rent in respect that the landlord has failed to implement the obligations incumbent on him under the lease: and there is a constant and perplexing tendency to apply the rule that an action for a liquid debt cannot be met by an illiquid claim for damages, though that rule is properly applicable only to cases where the liquid and illiquid claims have different sources, and ought not to rule cases where both parties' claims arise from the one contract of lease. It is only in recent cases that the judgment of the Court has definitely been founded on the mutuality of claims under a contract, though it is difficult to see why that principle should not apply to leases as well as to other contracts.

It may be taken as well established that a tenant is entitled to an abatement or reduction from the rent, and is justified in withholding payment of the current rent until that abatement is allowed and the amount of it fixed, either where the landlord fails to make the whole of the subjects available, or where the tenant, through causes attributable to the landlord or not, suffers a partial eviction. The principle is that the whole rent is not due unless the tenant is put in possession of the whole of the subjects let to him. This ground of judgment was applied where by a contract (held to be a lease) a gas company let to a tenant a piece of ground adjoining their works, with a right to all the tar there to be produced, and the tenant, in answer to a claim for rent, averred that a portion of the tar had been diverted;[1] where a landlord failed to make an access to a quarry,[2] or diverted the water-power from a mill;[3] where, in a lease of shootings[4] or fishings,[5] third parties successfully established concurrent rights: where some of the buildings on a farm were destroyed by accidental fire:[6] and where a lease gave a tenant a right to take peats from a moss, and he was deprived of that right by a sale of the moss to a third party.[7] In view of these authorities it is difficult to understand the decision in *Drybrough* v. *Drybrough*.[8] There a clause in a lease provided that if any portion of the subjects (a brewery) should become untenantable or ruinous the landlord should be bound to rebuild them, or else allow the tenant a "reasonable abatement" of the rent. In an action for rent, the tenant consigned the amount due in bank, and maintained that he was not bound to pay, on the ground that, as he averred, a portion of the subjects had become untenantable or ruinous. It was held that he was bound to pay at once. The decision proceeded mainly on the construction of the clause in the lease above summarised, and so far may be regarded as a case decided on specialties, but the dictum of the Lord Justice-Clerk, that in the absence of the clause referred to the tenant would have

[1] *Kilmarnock Gas Light Co.* v. *Smith*, 1872, 11 M. 58. Possibly the contract should have been regarded as a sale (*Bentley* v. *Metcalfe* [1906], 2 K.B. 548).

[2] *Guthrie* v. *Shearer*, 1873, 1 R. 181.

[3] *Gordon* v. *Suttie*, 1826, 4 Murray, 86.

[4] *Critchley* v. *Campbell*, 1884, 11 R. 475.

[5] *Dougall* v. *Magistrates of Dunfermline*, 1908, S.C. 151.

[6] *Muir* v. *Macintyres*, 1887, 14 R. 470. Earlier cases as to the effect of accidental partial destruction are collected in the opinion of the Lord President, at p. 472, and of Lord Adam, at p. 474.

[7] *Duncan* v. *Brooks*, 1894, 21 R. 760.

[8] 1874, 1 R. 909.

had no right to retain his rent on the ground that a portion of the subjects had become ruinous, must be questioned, in view of the subsequent case of *Muir* v. *Macintyres*.[1]

It is, it is submitted, a very wide extension of the doctrine that a tenant is entitled to an abatement of rent if he does not get possession of the whole of the subjects let, to apply it to the case where a landlord has failed to fulfil his ordinary obligation to place the subjects in a tenantable state of repair. Yet this is the ground on which, in a number of cases, generally relating to agricultural leases, the tenant has been held entitled to retain his rent, on the allegation that the buildings or fences have not been put into tenantable repair, or into the state in which, by the terms of the particular lease, the landlord was bound to place them.[2] This is qualified by the somewhat vague rule that a breach of the conditions of the lease must be definitely averred,[3] by the general principle that the failure must be material,[4] by the rule that the tenant's claim will be unfavourably affected by an offer on record by the landlord to complete the repairs on which the plea of retention is founded,[5] and that it will be more favourably considered if taken in the later years of the lease.[6] Consignation of the rent sued for is no answer to the landlord's claim, where it is held that the plea of retention is ill-founded,[7] but may be ordered as a condition of that plea being sustained.[8] While retention may be allowed, on the principle that full possession has not been given, if pleaded while the repairs have not been executed, it is not a ground for refusal to pay rent becoming due after the repairs have been carried out that the tenant has a claim of damages for loss sustained owing to the landlord's delay in fulfilling his obligations.[9] The tenant's right of retention is in no way enlarged by rule 55 of Sched. I. of the Sheriff Courts Act, 1907 (7 Edw. VII. c. 51).[10]

It is submitted that the theory developed in the cases above referred to, that a failure to execute repairs is equivalent to a failure to give possession, approaches very nearly the region of legal fiction; and that the true principle in dealing with the right of a tenant to retain his rent is that the obligation to pay rent and the obligation to put the subjects into proper repair are the corresponding and concurrent conditions of a mutual contract, and therefore that retention should be allowed unless it can be shewn from the lease that it was intended that the rent in question should be payable before the obligation to repair was completely fulfilled. This principle, explained by Baron Hume in his report of the case of *Bowie* v. *Duncan*,[11] but apparently lost sight of in many of the intervening cases, was developed in *Macdonald*

[1] 1887, 14 R. 470.

[2] *Graham* v. *Gordon*, 1843, 5 D. 1207; *Munro* v. *M'Geoghs*, 1888, 16 R. 93; *Sivright* v. *Lightbourne*, 1890, 17 R. 917.

[3] On the ground of vagueness of averments the claim of the tenant was repelled in *Humphrey* v. *Mackay*, 1883, 10 R. 647; probably also in *Johnston* v. *Inglis*, 1832, 10 S. 260—a case difficult to understand.

[4] *Sharp's Factor* v. *Monboddo*, 1778, M. 10134 (failure of a well); *Davie* v. *Stark*, 1876, 3 R. 1114, per Lord Justice-Clerk, at p. 1119; *Macdonald* v. *Kydd*, 1901, 3 F. 923, per Lord Moncreiff, at p. 928; *Christie* v. *Birrells*, 1910, S.C. 986.

[5] *M'Rae* v. *Macpherson*, 1843, 6 D. 302; *Dods* v. *Fortune*, 1854, 16 D. 478.

[6] *Bowie* v. *Duncan*, 1807, Hume, 839.

[7] *Dods* v. *Fortune*, 1854, 16 D. 478; *Drybrough* v. *Drybrough*, 1874, 1 R. 909; but it is an element, in doubtful cases, in favour of the tenant's claim (*Earl of Galloway* v *M'Connell*, 1911, S.C. 846).

[8] *Clark* v. *Finlay*, 1823, 2 S. 480; *Cumming* v. *Williamson*, 1842, 4 D. 1304.

[9] *Christie* v. *Birrells*, 1910, S.C. 986.

[10] *Christie* v. *Birrells*, *supra*. The rule is quoted *supra*, p. 625.

[11] 1807, Hume, 839.

v. *Kydd*.[1] There, in the third year of a lease for nineteen years, the tenant withstood a claim for rent, on the ground that the subjects had not been placed in a tenantable state. It was held that he was entitled to retain his rent. The ground of judgment was put tersely by Lord Trayner:[2] "The claim which is sought to be enforced by this action is a claim for rent, and payment of rent is the obligation on the defender under the contract of lease. But the contract imposed obligations on both parties—the landlord and the tenant. The tenant's obligation is to pay the rent, the landlord's obligation is to give a tenantable subject. Now, I am disposed to put my judgment simply upon the application of the general rule that where a person seeks to enforce the terms of a contract against another, he is excluded from doing so if it can be shewn that he is in default himself in the obligation that the contract puts on him." This exposition of the principle involved in such cases was expressly adopted as the *ratio decidendi* in *Earl of Galloway* v. *M'Connell*,[3] where, again, the tenant's right to retain was sustained; and it may perhaps be regarded as a point now determined that where the instalment of rent sued for has arisen for a period during which the landlord's obligations were, to a material extent, not implemented, the tenant may meet the action by a plea of retention.

Tenant cannot Retain Rent for Damages for Failure in the Past. Where, however, the facts are that the landlord has fulfilled his obligations, but has not fulfilled them in time, it seems to be settled that the tenant cannot refuse to pay his rent on a plea of retention in security of his claim of damages for the delay.[4] This seems inconsistent with the general rule, which, it is submitted, is established by the decisions cited on a previous page, that an illiquid claim is a relevant defence to a claim which is liquid, provided both arise out of the same contract. The reason has been given that the rent is payable at a fixed time, and the damages are not due till liquidated. But this would apply to any contract, besides being open to the reply that damages for breach of contract are due when the breach is committed, though they are not payable until their amount is ascertained.

Once the damages due to the tenant have been assessed, he must pay his rent, although the defect of which he complains has not been remedied. He cannot retain rent which is due in security of a claim for loss which he may sustain in the future.[5]

Special Lien. Another instance of retention founded on the mutuality of contractual obligations is found in the right of special lien, as applicable to contracts of employment. Where *A.* places his property in the hands of *B.* for the purpose of work which *B.* has undertaken to perform, *A.*, as already explained, may withhold payment of the sum he has agreed to pay for the work if the defective character of the work vests him with a claim of damages. He is not bound to perform his obligation of payment until *B.* has fulfilled his obligation of adequate performance of the work undertaken. *B.*, in such a case, has a correlative right, if he has duly fulfilled his contract so far as the character of his work is concerned, to withhold delivery of the

[1] 1901, 3 F. 923.

[2] 3 F., at p. 927.

[3] 1911, S.C. 846. See also *Haig* v. *Boswall-Preston*, 1915, S.C. 339; *Fingland & Mitchell* v. *Howie*, 1926, S.C. 319.

[4] *Guthrie* v. *Shearer*, 1873, 1 R. 181, per Lords Cowan, Benholme, and Neaves; *Stewart* v. *Campbell*, 1889, 16 R. 346; *Christie* v. *Birrells*, 1910, S.C. 986, where the rule is stated by Lord Mackenzie as fixed. See, however, *Davie* v. *Stark*, 1876, 3 R. 1116, and *Governors of Daniel Stewart's Hospital* v. *Waddell*, 1890, 17 R. 1077.

[5] *Christie* v. *Wilson*, 1915, S.C. 645.

article until the counter-obligation of payment is fulfilled. He has a right of retention or lien over the article on which he has performed work in security of his claim for payment.

On the authorities in Scotland this right of lien, in so far as it is a special lien, inferring a right to retain an article only for work done on or in relation to it, and not a general lien, inferring the more extensive right to retain for a balance due on prior transactions, is a general principle of law, founded on the consideration that the obligation of the workman to return the article, and of the employer to pay for the work, are concurrent conditions of the contract, so that fulfilment of the one cannot be demanded unless fulfilment of the other is given or tendered. So, in *Harper* v. *Faulds*,[1] speaking of the right of a bleacher to retain goods until paid his charge for bleaching them, the Lord President said: "I conceive it to mean the right of refusing delivery of a subject until the counter-obligations under which the subject was lodged be performed." In the question of the right of an accountant to retain books and documents placed in his charge, for the purpose of collecting debts, in security of his charge for that work, Lord Gifford, in answer to the argument that an accountant was not entitled to the lien of a law agent, stated the law as follows:[2] "I agree that this is not a case of lien. It is simply the case of the retention of a subject put into a person's hands for a special purpose, and resolves itself into a case of the relative duties of parties under a contract." Where a potato dealer hired ground from a farmer for the purpose of growing potatoes, under a contract whereby each did part of the necessary work, it was held, when the dealer became bankrupt at a time when the potatoes were in pits, that the farmer was in possession of them, and had, on the general principle of mutuality of contract, a right to retain them in security of his claim for the hire of the ground.[3]

On these principles it is the general rule, apart from any question of custom of trade, or the law affecting any particular class of employment, that the party who has been placed in possession of an article belonging to another in order that he may do some work upon it is not bound to return it until he is paid for his work. This has been illustrated in the case of a bleacher,[4] a storekeeper,[5] a ship-carpenter,[6] a carrier by land or sea.[7] The lien does not cover the expenses incurred in an action for the price,[8] and is subject to the equitable control of the Court, so that if the price to be paid for the work is disputed, and the owner of the article consigns the amount claimed, the article must be given up.[9]

In spite of one adverse decision,[10] it may be regarded as established that if a party is put in possession of an article on a contract of employment, he has a right of lien over it for a debt arising out of that employment, though he may have done no work on the article itself, but merely used it as an instrument in the work for which he was employed.[11]

[1] 1791, Bell's *Octavo Cases*, 440; M. 2666. See Bell, *Com.*, ii. 92.
[2] *Meikle & Wilson* v. *Pollard*, 1880, 8 R. 69, at p. 71.
[3] *Paton's Tr.* v. *Finlayson*, 1923, S.C. 872.
[4] *Harper* v. *Faulds*, 1791, Bell's *Octavo Cases*, 440; *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.
[5] *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404.
[6] *Ross & Duncan* v. *Baxter & Co.*, 1885, 13 R. 185; *Garscadden* v. *Ardrossan Dry Dock Co.*, 1910, S.C. 178.
[7] Bell, *Prin.*, secs. 1423-25.
[8] *Garscadden* v. *Ardrossan Dry Dock Co.*, 1910, S.C. 178. [9] *Garscadden, supra.*
[10] *Brown* v. *Sommerville*, 1844, 6 D. 1267, reversing judgment of Lord Cuninghame (Ordinary), Lord Moncreiff dissenting.
[11] *Meikle & Wilson* v. *Pollard*, 1880, 8 R. 69; *Robertson* v. *Ross*, 1887, 15 R. 67; *Findlay* v. *Waddell*, 1910, S.C. 670.

Lien for Claim of Damages. A lien over property obtained under a contract of employment may be exercised not merely for the sum due as payment for the work done, but for a claim of damages for a breach of the contract by the employer. In *Moore's Carving Machine Co.* v. *Austin*,[1] *A.* was employed by a company as its agent for two years for the sale of a certain machine. A show machine was placed in his possession. The company terminated *A.'s* engagement (thereby committing a breach of contract) and sold the show machine. *A.*, it was decided, had a right to retain the machine in security of his claim of damages. "The law," said the Lord Ordinary (Kyllachy), "implies a right of retention, *inter alia*, in all cases where property comes into possession of another than the proprietor under a contract which creates rights *hinc inde*."

Possession as Contrasted with Custody.—In order to entitle a party to exercise a right of retention over an article on which he has done work he must have been entrusted with the possession of it, and not merely with its custody. It is hard to draw any line between possession and custody, but the decisions seem to establish that a servant, though he may have the physical possession of an article belonging to his employer, has not the legal possession on which a right to retain it in security of his wages or salary may be founded. So an ordinary servant,[2] a commercial traveller,[3] the manager of a branch business,[4] and the secretary of a company,[5] have no right to articles placed in their hands in these capacities on which they can found a right of retention. In the case last cited the secretary, whose claim of lien was rejected, was an accountant carrying on a general business, and the books and papers which he claimed to retain were kept by him in his own office. It was argued that the case was indistinguishable from that of a factor on an estate, who had been found, in *Robertson* v. *Ross*,[6] entitled to retain the estate documents in security of his salary and outlays. There is obviously no distinction in principle, viewing the case as a question of possession; but the Court were of opinion that the case of the factor on an estate was a special one, and that the doctrine under which his right of retention was sustained would "hardly bear the strain of extension by analogy to different cases."[7] The subsequent case of *Findlay* v. *Waddell*,[8] where an accountant employed to audit a company's books was entitled to a lien, indicates the general distinction between a party who obtains books or papers for a particular piece of work for which they are necessary instruments, and a party who has them because he holds an office under which, in the ordinary course of business, he is their natural custodier. The former has possession and a right to retain, the latter only custody, on which no right of retention can be founded.

No Lien over Heritage. The doctrine of lien founded on possession under a contract of employment has no application to heritable property. So it

[1] 1890, 33 S.L.R. 613. See also *Glendinning* v. *Hope & Co.*, 1911, S.C. 209; revd. 1911, S.C. (H.L.) 73, where the debt in respect of which the lien was exercised was a claim of damages. But where the buyer of goods intimates rejection on the ground that they are disconform to contract he has no right to retain them in security of his claim for damages—*Padgett* v. *M'Nair*, 1852, 15 D. 76; *Lupton & Co.* v. *Schulze*, 1900, 2 F. 1118, and see *supra*, p. 610.

[2] *Burns* v. *Bruce*, 1799, Hume, 29.

[3] *Dickson* v. *Nicholson*, 1855, 17 D. 1011.

[4] *Clift* v. *Portobello Pier Co.*, 1877, 4 R. 462.

[5] *Gladstone* v. *M'Callum*, 1896, 23 R. 783; *Barnton Hotel Co.* v. *Cook*, 1899, 1 F. 1190.

[6] 1887, 15 R. 67.

[7] Per Lord Kinnear in *Barnton Hotel Co.* v. *Cook*, 1899, 1 F. 1190, at p. 1193.

[8] 1910, S.C. 670.

was held that a contractor could not prevent the opening of a railway for traffic, on the plea of a lien over it for the sums due to him under the contract.[1] And a tenant cannot insist on continuing in possession after his lease has expired, on the ground that he has claims against the landlord.[2]

General Lien. A general lien is a right to retain possession of an article obtained under a contract of employment, not merely for claims arising from that particular contract, but for a balance due under a course of dealing between the parties.[3] It would seem eminently desirable, in connection with this right, to use the term "lien" and not "retention," to distinguish it from the wider right of retention which belongs to a party who has a title of ownership in a particular subject but is under an obligation to transfer it.[4]

It was at one time in controversy whether the law of Scotland recognised, from the mere fact that one party was in possession, legitimately, of property belonging to another, a right in the possessor to retain it until all debts due to him by the owner were paid, even though the possession was originally obtained for a special purpose under the provisions of a contract. The affirmative was maintained, with much learning, by Professor More in a note to his edition of Stair's *Institutes*.[5] His contention, to which the earlier cases lend a certain amount of support, was that as the law allowed to a creditor the right of arresting his debtor's property when it was in the hands of a third party, of poinding it when in the hands of the debtor himself, it ought to recognise a corresponding right of retention when the property in question was in the hands of the creditor, and when, therefore, neither arrestment nor poinding was open to him. Professor Bell refused to admit that such a right formed any part of the law;[6] and it may now, on the authorities, be definitely rejected.[7] In *Harper* v. *Faulds*[8] a bleacher claimed the right to retain articles sent to him to be bleached, in a question with the trustee in the sender's bankruptcy, in security of a bill granted in his favour by the bankrupt. The Court, taking the case on the footing that neither custom of trade nor special agreement was proved, and that the case for the bleacher involved the assertion of a general right of retention by a creditor for any debts which might be due to him, decided by a majority that no such right was recognised. The authority of the case was recognised, and the same doctrine emphasised, in *Brown* v. *Sommerville*.[9] In *Laurie* v. *Denny's Tr.*[10] a grain merchant failed when certain grain belonging to him was in the hands of a storekeeper. The storekeeper claimed the right to retain it in security of a general balance due to him by the bankrupt, including storage charges for the particular grain in question, and for other grain which had been previously stored and for which the storage dues had not been paid. The trustee, admitting the claim so far as it related to the storage dues for the particular parcel of grain, disputed any right to retain for the general balance. On a proof it was held that no usage of trade applicable to the particular case was established. It was also shewn that the course of dealing had been that the charges for storage had not been paid as each parcel of

[1] *Castle-Douglas, etc., Rly. Co.* v. *Lee*, 1859, 22 D. 18.
[2] *Turner* v. *Turner*, 1811, Hume, 854.
[3] Bell, *Prin.*, sec. 1431; *Com.*, ii. 101.
[4] See *infra*, p. 639.
[5] Note Q (published in 1832).
[6] *Principles*, sec. 1431 (4th ed., published in 1839).
[7] Cases *infra*, and *Stevenson* v. *Lobly*, 1824, 3 S. 291; *Stewart & Fletcher* v. *Macgregor & Co.*, 1829, 7 S. 622; *Hamilton* v. *Western Bank*, 1856, 19 D. 152; *Smith* v. *Aitkman*, 1859 22 D. 344.
[8] 1791, Bell's *Octavo Cases*, 440.
[9] 1844, 6 D. 1267.
[10] 1853, 15 D. 404.

grain was taken from the store, but at irregular intervals and by payments to account. The argument for the storekeeper, as summarised by the Lord President (M'Neill), was "this broad ground, that a party had a right to retain goods which had come into his possession on any legal title, in security of any debt due to him by the owner of the goods." On a full consideration of the authorities, and incidentally of the views maintained by Professor More, it was decided that the case of *Harper* v. *Faulds* [1] established that no such right was recognised by the law of Scotland. In *National Bank* v. *Forbes* [2] the same question was raised in another form. *A.* borrowed £500 from *B.*, and assigned to him a policy of insurance on his life. The assignation was expressly in security of the loan. Subsequently *A.* borrowed a further sum of £700, for which he granted a bond, but did not assign the policy. On *A.'s* death his estates were sequestrated, and the proceeds of the policy formed the fund *in medio* in a multiplepoinding. *B.* claimed to be ranked and preferred for the whole sum due to him, on the ground that though he had no express assignation of the policy in security of his second advance, he had a right of retention over it for any debt that might be due to him by *A.* The rejection of this claim was founded on the principle that mere possession gives no general right of retention. "Now, in every case of retention, the first and most important inquiry is, what is the title on which the party has attained the possession which he proposes to hold till his debt is paid? for this title of possession furnishes the precise measure of the right of retention. If the title of possession be unlimited, as a title of property, the party is entitled to retain till every debt due by the party demanding delivery of the subject is paid. If his title be limited, he can retain only for the payment of that particular debt which is secured by his possession." [3]

Lien on Usage of Trade.—A general lien is, then, an exception to the rule that possession of property obtained on a limited title gives the possessor no right to retain it except for claims arising under the contract on which he obtained it. In the professions and trades in which a general lien is recognised it is an implied term of the contract of employment that all property placed in the hands of the party employed are subjected to a lien, varying in scope and extent according to the particular trade, but covering in all cases a balance arising on a previous course of employment. It is probably founded on usage of trade, or, in certain well-established cases, on rules of law originally derived from such usage.[4] In the case of a party who carries on a trade ancillary to the manufacture or distribution of goods it is perhaps necessary to prove that a general lien is recognised in that particular trade. Thus where the proof of custom failed, a general lien was denied to a storekeeper [5] and a scourer; [6] whereas, on proof of usage, it has been admitted in the case of bleachers,[7] packers,[8] and calico printers.[9] But it may yet be held that where the practice in any particular trade is that goods are sent according to the convenience of the senders, and the charge for work done on them is settled at regular intervals, there is an implied contract that each parcel as sent is subjected to a lien for the balance due

[1] 1791, Bell's *Octavo Cases*, 440. [2] 1858, 21 D. 79.
[3] *National Bank*, *supra*, per Lord Justice-Clerk Inglis, 21 D., at p. 85.
[4] Bell, *Com.*, ii. 105.
[5] *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404.
[6] *Smith* v. *Aikmans*, 1859, 22 D. 344.
[7] Bell, *Com.*, ii. 104; *Aberdeen & Smith* v. *Paterson*, 1812, Hume, 127; *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.
[8] *Strong* v. *Philips & Co.*, 1878, 5 R. 770. [9] *Mitchell* v. *Heys*, 1894, 21 R. 600.

for that particular settlement.[1] It is, at all events, sufficient to indicate such a contract, that the trader has brought to the knowledge of his customers, by advertisement or by notice, that these are the terms on which he receives the goods.[2] Proof that a usage in a particular trade in England has been judicially established is material, but not conclusive, in the question whether the same trade enjoys a general lien in Scotland.[3]

General Lien in Mercantile Agency. It may probably be regarded as an integral part of the law of mercantile agency, in the widest sense that can be given to that term, that the agent has a general lien over all property in his possession belonging to the principal for the general balance in his favour on an accounting between them, without proof of any usage in the particular class of agency. This has long been settled in the case of a mercantile factor or agent for the purchase or sale of goods.[4] In *Miller* v. *Hutcheson*[5] it was extended to the case of a livery stablekeeper and auctioneer, whose course of business was to make advances to the owners of horses consigned to him for sale. He had a lien over the horses for his general balance, in a question with the trustee in the owner's bankruptcy, though no custom of trade was proved, on the ground that he was in the position of a "commercial agent." In *Glendinning* v. *Hope & Co.*[6] the question was the right of a stockbroker. He had been employed to purchase shares, and was in possession of a transfer. He asserted a right to retain it, in security of a claim of damages arising out of a subsequent transaction. The Lord Ordinary (Mackenzie) held that there was sufficient proof of usage on the local Stock Exchange to warrant the conclusion that stockbrokers had a general lien which would cover the claim contended for. The Second Division were of opinion that the proof of usage failed, and that there was no other ground in law on which the stockbroker's case could be maintained. In the House of Lords it was decided that proof of usage was not necessary, and that a stockbroker fell within the rule of law which confers a general lien on mercantile agents or factors. The law was put as follows by Lord Kinnear: "The principle which I take to be very well settled in the law of Scotland is that every agent who is required to undertake liabilities or make payments for his principal, and who in the course of his employment comes into possession of property belonging to his principal over which he has power of control and disposal, is entitled, in the first place, to be indemnified for the moneys he has expended or the loss he has incurred, and, in the second place, to retain such properties as come into his hands in his character of agent until his claim for indemnity has been satisfied."[7]

While the lien of a factor or mercantile agent may be extended by analogy to similar cases, there is no such rule with regard to the lien of a law agent. It is a special and exceptional right, which is not to be extended.[8] So accountants,[9] or the factor on an estate, not being a law agent,[10] have no general lien.

[1] *Handyside* v. *M'Intosh*, 1805, Hume, 651; *Strong* v. *Philips & Co.*, 1878, 5 R. 770 (opinion of Lord Justice-Clerk).

[2] *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718 (notice on receive notes); *Kirkman* v. *Shawcross*, 1794, 6 Term Rep. 14 (advertisement).

[3] *Strong* v. *Philips & Co.*, 1878, 5 R. 770. For English law, see Smith, *Mercantile Law*, 12th ed., 784.

[4] Bell, *Com.*, ii. 109; *Prin.*, sec. 1445.

[5] 1881, 8 R. 489; *Crockart's Tr.* v. *Hay & Co.*, 1913, S.C. 509.

[6] 1911, S.C. 209; revd. 1911, S.C. (H.L.) 73.

[7] *Glendinning, supra*, 1911, S.C. (H.L.), at p. 78. Applied and followed in *Crockart's Tr.* v. *Hay & Co.*, 1913, S.C. 509, 520.

[8] Per Lord President Dunedin in *Macrae* v. *Leith*, 1913, S.C. 901, 905.

[9] *Findlay* v. *Waddell*, 1910, S.C. 670; *Fulwell's Tr.* v. *Morrison*, 1901, 9 S.L.T. 34.

[10] *Macrae* v. *Leith*, 1913, S.C. 901.

The detailed effects of a right of general lien in particular vocations, such as that of a factor, a banker, a law agent, an innkeeper, or a carrier, seem to belong to the law of rights in security, and it is not proposed here to discuss them.

Debts Covered by General Lien.—It is a general principle in cases of lien that, as the right to a lien rests upon an implied term in a contract inferred from usage of trade, it can cover only debts incurred in the course of the trade in question, and can extend only over property which has come into the possession of the person who asserts it in the course of his trade or business. The lien of a law agent, covering his professional charges, does not cover advances made to the client.[1] A trader, such as a bleacher, who has a general lien for a balance due for bleaching goods, cannot claim to extend it to debts which may be due to him on other grounds.[2] No lien can be asserted over an article of which possession has been obtained not contractually, but by a mere mistake,[3] or by a wrongful and unauthorised act.[4] In *National Bank* v. *White & Park*[5] *A.* was the law agent of the proprietor of lands and also of a prior bondholder. On behalf of the latter he was in possession of the title-deeds. A postponed bondholder, desiring to exercise his power of sale, called upon *A.* to deliver the title-deeds. *A.* asserted a right of lien for a business account due to him by the proprietor. It was held that as he did not hold the titles as agent for the proprietor, he could have no lien for a debt due to him in that capacity. So where a person exercises two separable vocations, in one of which only he is entitled to a general lien, that lien will not extend to property of which he has obtained possession in the course of his other vocation.[6] A banker has a lien as a monetary agent; he has none as a mere depositary, and therefore he cannot claim to retain property deposited by his customer merely for safe custody.[7]

Contract Inconsistent with Lien.—A right of retention or lien, special or general, which is founded on possession obtained under a contract, and rests upon an implied condition of that contract, will be excluded if the express contractual terms are inconsistent with the right to retain. But this will not readily be inferred from the terms of a document in the nature of a receipt. So where *A.* had obtained an assignation of a bond, in security of a debt due by *B.*, had received payment of that debt, and had undertaken to sign a discharge or assignation of the bond when required, it was held that this undertaking did not preclude him for asserting a right of retention over the bond for debts subsequently incurred by *B.*, in a question with the trustee on the bankruptcy of the latter.[8] In *Robertson's Tr.* v. *Royal Bank*[9] negotiable bonds were lodged with a bank and a receipt for them was given stating that they were held "for safe keeping on your account, and subject to your order." The terms of this receipt, it was decided, did not exclude the bank's right of lien for advances made to the depositor. But where money is deposited for a specific purpose, and that purpose fails, the depositary cannot retain the money, on a plea of retention or compensation, to meet a

[1] *Christie* v. *Ruxton*, 1862, 24 D. 1182; *Wylie's Exrx.* v. *M'Jannet*, 1901, 4 F. 195.
[2] *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.
[3] *Louson* v. *Craik*, 1842, 4 D. 1452.
[4] *Shepherd's Tr.* v. *Macdonald, Fraser & Co.*, 1898, 5 S.L.T. 296.
[5] 1909, S.C. 1308.
[6] *M'Call & Co.* v. *Black & Co.*, 1824, 2 Sh. App. 188, opinion of Lord Gifford, at p. 200.
[7] *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787.
[8] *Colquhoun's Tr.* v. *Diack*, 1901, 4 F. 358.
[9] 1890, 18 R. 12.

debt due to him by the depositor.[1] Where horses were entrusted to a trainer, on an arrangement under which the owner was entitled to race them whenever he pleased, it was found that this condition implied that the trainer had no lien over them for his charges.[2] If the contract expressly provides that the article in question is to be returned before the charges in respect of work done upon it are payable, it seems clear, in a question between the parties themselves, that there could be no answer to an immediate demand for its return.[3] But it may be doubted whether such terms are so inconsistent with a lien as to preclude the party who had done work on the article from asserting a lien in the event of the employer's insolvency.[4] And if, as a matter of fact, the return of the article is not demanded until the claim for payment becomes due, the right of lien will attach.[5] The right of a banker or stockbroker to a general lien over negotiable securities is not excluded by the fact that they were originally pledged for a specific advance.[6]

Rights Involved in Lien : Bankruptcy.—The actual effect of a right of lien depends primarily on the nature of the thing over which it is exercised. If that has no commercial value, as in the case of title-deeds retained by a law agent, or a transfer or share certificate retained by a stockbroker, the only advantage obtained by the party exercising the lien is that the inconvenience resulting from the want of the documents may induce an immediate settlement of his claim. There is probably no right to sell documents which are not negotiable instruments, but merely the titles or adjuncts of a right, even if they happen to have a commercial value.[7] The effect of a lien over a subject of this character in the event of the bankruptcy (or liquidation) of the owner has been considered with reference to the lien of a law agent over documents. He cannot refuse to deliver them to the trustee in sequestration or to the liquidator, but is entitled, in delivering them, to a reservation of any right he may possess.[8] A liquidator is entitled to an order on the law agent to produce papers held under his lien, and compliance with this order, though it does not prejudice the lien, does not establish any right to a preference in the liquidation, and leaves it in the option of the liquidator, should he be of opinion, on inspection, that the papers are unnecessary, to leave them in the law agent's possession.[9] If the trustee or liquidator takes possession of the papers, he does not thereby admit the validity of the agent's claim to a lien,[10] but, assuming that to be established, the agent is entitled to a preferential ranking, and his preference extends to the whole estate, not

[1] Stair, i. 13, 8; *Middlemass* v. *Gibson*, 1910, S.C. 577. And see *infra*, p. 654.

[2] *Forth* v. *Simpson*, 1849, 13 Q.B. 680.

[3] *Fisher* v. *Smith*, 1878, 4 App. Cas. 1. Cp. *Fleming* v. *Smith & Co.*, 1881, 8 R. 548.

[4] Bell, *Com.*, ii. 92, 100, where it is stated that it is understood that by the law of Scotland where credit is given insolvency will revive the lien.

[5] *Glendinning* v. *Hope & Co.*, 1911, S.C. 209; revd. 1911, S.C. (H.L.) 73; *Kerr* v. *Beck*, 1849, 11 D. 510 (waiver of promise by law agent to return title-deeds).

[6] *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12; *Jones* v. *Peppercorne*, 1858, Johnson, 430; *In re London and Globe Finance Corporation* [1902], 2 Ch. 416.

[7] Bell, *Com.*, ii. 108; *Ferguson & Stuart* v. *Grant*, 1856, 18 D. 536, opinion of Lord Curriehill; *Glendinning* v. *Hope & Co.*, 1911, S.C. (H.L.) 73, per Lord Kinnear, at p. 81.

[8] *Skinner* v. *Henderson*, 1865, 3 M. 867. The liquidator of a company, in the event of a refusal to deliver papers, may proceed under sec. 174 of the Companies (Consolidation) Act, 1908. See *Weir & Wilson Ltd.* (*Liquidator of*) v. *Turnbull & Finlay*, 1911, S.C. 1006. Production under this section is without prejudice to the lien.

[9] *Donaldson & Co. Ltd.* (*Liquidator of*) v. *White & Park*, 1908, S.C. 309. Cp. *Findlay* v. *Waddell*, 1910, S.C. 670; Goudy on *Bankruptcy*, 3rd ed., 600.

[10] *Rennie & Webster* v. *Myles*, 1847, 9 D. 619; *Lochee Sawmill Co.* (*Liquidator of*) v. *Stevenson*, 1908, S.C. 559; *Weir & Wilson Ltd.* (*Liquidator of*) v. *Turnbull & Finlay*, 1911, S.C. 1006.

merely to the proceeds of the subjects to which his papers relate.[1] And it would seem that the right to a preference is not affected by the fact that the papers turn out to be valueless.[2] But if the papers in question are the titles of heritable property, and the law agent could not have asserted his lien over them in a question with a bondholder on that property (having acted as agent for both borrower and lender in the constitution of the bond), the mere fact that the trustee has called for and received the titles does not give the agent a right to a preferential ranking on the general estate, though it would probably entitle him to a preference on any surplus which the estate in question might produce after the claim of the bondholder was satisfied.[3] The preference obtained by an agent, when the papers are taken by a trustee in bankruptcy, and no objection to his lien can be substantiated, would seem to be a right to have his account ranked as part of the necessary charges of the sequestration, and therefore in preference to all unsecured creditors, ordinary or preferential.[4] Should the assets consist of heritable subjects of which the agent holds the title-deeds, he is entitled to a preference over bondholders on such estate, whether their bonds are prior or posterior in date to his acquisition of the titles,[5] unless he is precluded by the fact that he had acted as agent for the bondholder as well as the bankrupt.[6] By statute, however, he cannot acquire any such right of lien in a question with a bondholder after the date on which the bond was recorded.[7]

Sale under Lien.— When the subject held under a lien has an ordinary commercial value, and the holder is a mercantile factor or agent, he is entitled to realise it to meet his debt.[8] As the lien of a banker or stockbroker is of the nature of the factor's lien, it is probable that he has the same right to realise negotiable securities, though where a banker had given a receipt for securities, in which they were stated to be held for safe-keeping, Lord M'Laren expressed the opinion that though the terms of this receipt did not exclude a right of lien, they were inconsistent with any right to realise the securities.[9] A petition by a storekeeper for authority to sell grain for storage dues has been before the Court without objection to its competency, though, as it was decided that the storekeeper was not entitled to the lien he claimed, it was not necessary to express any opinion on the point.[10] But it may be doubted whether a party employed to do work on a specific article, *e.g.*, a watchmaker employed to mend a watch, has any right to sell it on the ground that his charges for mending it have not been paid. The lien of a seller of goods for the price is wider than other rights of lien, and involves a statutory right to resell the article.[11]

[1] *Skinner* v. *Henderson*, 1865, 3 M. 867; *Train & M'Intyre* v. *Forbes*, 1925, S.L.T. 286 (O.H., Lord Constable).

[2] See opinion of Lord Dundas in *Donaldson & Co. Ltd.* (*Liquidator of*) v. *White & Park*, 1908, S.C. 309, 311.

[3] *Lochee Sawmill Co.* (*Liquidator of*) v. *Stevenson*, 1908, S.C. 559; *Drummond* v. *Muirhead & Guthrie Smith*, 1900, 2 F. 585.

[4] Bankruptcy Act, 1913, sec. 117. No other section is applicable. In *Miln's Judicial Factor* v. *Spence's Trs.*, 1927, S.L.T. 425, the Lord Ordinary (Fleming) decided that trustees, who had surrendered documents to a judicial factor under reservation of their lien, were postponed to the expenses of the constitution and administration of the factory, including the remuneration of the factor.

[5] *Campbell & Clason* v. *Goldie*, 1822, 2 S. 16.

[6] *Drummond* v. *Muirhead & Guthrie Smith*, 1900, 2 F. 585.

[7] Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. V. c. 27), sec. 27.

[8] Bell, *Com.*, ii. 91; *Scott's Tr.* v. *Stewart, Primrose & Co.*, 17th December 1814, F.C.

[9] *Robertson's Tr.* v. *Royal Bank*, 1890, 18 R. 12, at p. 20.

[10] *Gibson & Stewart* v. *Brown & Co.*, 1876, 3 R. 328.

[11] Sale of Goods Act, 1893, secs. 39, 47, 48.

Equitable Control of Lien. A right of retention or lien is one which is subject to the equitable control of the Court.[1] If the debt is disputed, and the amount claimed consigned, the article must be given up.[2] But a law agent whose account is not disputed is not in general bound to surrender title-deeds on an offer of caution.[3] In *Parker* v. *Brown & Co.*[4] a storekeeper's claim for storage rent for a parcel of maize was disputed on the ground of an alleged claim of damages for improper storage. The owner, alleging that the grain was deteriorating, brought an action in the Sheriff Court for warrant to sell it and consign the price in the hands of the Clerk of Court, subject to the rights of parties. The storekeeper, it was found, was not entitled to object to this, on the plea that under his lien he had the right to keep the maize.

Possession Acquired after Bankruptcy. No lien or right of retention can be maintained on possession obtained after the bankruptcy of the debtor.[5] In *Dickson* v. *Nicholson*[6] it was held that a commercial traveller was not entitled, in the knowledge of his employer's insolvency, to collect debts due to his employer and apply them to meet a balance of salary due to him, in a question with the trustee in the employer's sequestration. And it would seem very doubtful whether a party could in effect confer a security for a prior debt, within sixty days of his bankruptcy, by handing to the creditor property over which he could assert a lien.[7] This may be sustained if the property or goods were sent in the ordinary course of business. So where a bleacher received goods at intervals, and held them subject to a lien for his general balance for bleaching, the mere fact that the particular parcel he held at the date of the owner's sequestration had been received by him within sixty days of bankruptcy did not render the right of lien reducible under the Act 1696, c. 5. But the decision was expressly limited to the case where the goods in question were received in the ordinary course of business.[8] The same principle has been applied in the case of an auctioneer. If he is employed to conduct a sale by a party to whom he has made advances in the ordinary course of business, he may set off the amount received at the sale even although the seller becomes bankrupt within sixty days.[9]

Retention on Real Right of Property. A right of retention, distinguishable from a right founded on possession under a contract, and of wider scope in the rights it confers, is recognised in the case where a party holds property under a title apparently unqualified, but subject to a personal obligation to transfer it. This usually occurs either where an owner has entered into an agreement to sell, but the property in the thing sold has not passed to the buyer, or where a conveyance has been made in absolute terms subject to a separate or latent obligation to reconvey. In either case it is recognised as a general rule that the party who holds the title of property is not bound

[1] *Ferguson & Stuart* v. *Grant*, 1856, 18 D. 536; *Garscadden* v. *Ardrossan Dry Dock Co.*, 1910, S.C. 178, per Lord Ardwall, at p. 180.

[2] *Garscadden, supra*; *Craig* v. *Howden*, 1856, 18 D. 863.

[3] *Ferguson & Stuart* v. *Grant*, 1856, 18 D. 536.

[4] *Parker* v. *Brown & Co.*, 1878, 5 R. 979.

[5] Bell, *Com.*, ii. 89.

[6] 1855, 17 D. 1011; *see Stevenson, Lauder & Gilchrist* v. *Dawson*, 1896, 23 R. 496.

[7] See opinions in *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.

[8] *Anderson's Tr.* v. *Fleming, supra.*

[9] *Crockart's Tr.* v. *Hay & Co.*, 1913, S.C. 509, distinguishing *Craig's Tr.* v. *Macdonald, Fraser & Co.*, 1902, 4 F. 1132. Contrast *Morton's Tr.* v. *Fifeshire Auction Co.*, 1911, 1 S.L.T. 405 (dealings held not to be in the ordinary course of an auctioneer's business in displenishing sales).

to fulfil his obligation to convey or transfer it until all claims due to him by the creditor in that obligation have been met. *A.*, who is the owner of property which he has agreed to convey to *B.*, has a right of retention over that property in security of all claims against *B.*, whether or not these claims have any connection with the contract under which *A.*'s obligation to reconvey was undertaken. In such a case the whole relations between *A.* and *B.* are looked upon as if they formed one contract, and the obligation to transfer is treated as conditional on the performance of all counter-obligations. The right of retention is not founded on possession of the subject it is proposed to retain, but is inferred from the absolute character of the title; and therefore if *A.* has obtained an unqualified conveyance from *B.*, he can found a right of retention of the property conveyed even although *B.* has remained in possession of it.[1]

This doctrine, which does not appear to have been present to the minds of Lord Stair or Erskine in dealing with the law of retention,[2] is stated by Professor Bell in the case of a right in security: "The doctrine, indeed, may be laid down generally that in all cases in which one holds an absolute conveyance of property, whether heritable or moveable, under a personal obligation to restore it on payment of certain debts, it will subsist as a good security, not only to cover a specific debt, but under a general stipulation in the back-bond to restore on payment of all advances it will be effectual to cover every sum advanced previous to the demand of a reconveyance, and this not only against creditors, but against purchasers also." [3]

This form of a right of retention has been illustrated chiefly in cases of rights in security, and in the law of sale.[4]

Securities by *ex facie* Absolute Title.—Where a security is constituted by a conveyance, assignation, or transfer which is in form absolute, and the fact that it is in security is either left as a private understanding, or embodied in a separate deed, the legal result is that the right of property in the subject conveyed passes to the recipient, and the inference from that result is that the party who has thus obtained a right of property holds it not merely for the debt in security of which it was constituted, but for any other debt which may become due. This may happen by a conveyance of heritable or other property in terms of an absolute disposition,[5] by an assignation in unqualified terms of an incorporeal right,[6] by the transfer of a bill of lading, or of a delivery order for goods in a store, followed by intimation to the storekeeper.[7] In the last two cases the result is not to pledge the goods, but to transfer them absolutely subject to an obligation to reconvey them, and the transferee holds his right in the goods not merely as a security

[1] See opinion of Lord Deas in *Nelson* v. *Gordon*, 1874, 1 R. 1093.

[2] Stair, i. 10, 16; Ersk. iii. 4, 20. It is illustrated in an early case *Earl of Bedford* v. *Lord Balmerino*, 1662, M. 9135.

[3] Bell, *Com.*, i. 724.

[4] For other illustrations of absolute title qualified by an obligation to convey, see *Glass* v. *Hutton's Creditors*, 1794, M. 2587 (property held *pro indiviso*; *Smith* v. *Harrison & Co.'s Tr.*, 1893, 21 R. 330, and *Jaffray's Tr.* v. *Milne*, 1897, 24 R. 602 (fixtures put up by tenant, with a right to remove them).

[5] Bell, *Com.*, *ut supra*; *Riddel* v. *Niblie's Creditors*, 1782, M. 1154; *Maitland* v. *Cockerell*, 1827, 6 S. 109; *National Bank* v. *Forbes*, 1858, 21 D. 79; *Nelson* v. *Gordon*, 1874, 1 R. 1093, opinion of Lord Deas; *National Bank* v. *Union Bank*, 1885, 13 R. 380; revd. 1886, 14 R. (H.L.) 1.

[6] *Russell* v. *Earl of Breadalbane*, 1831, 5 W. & S. 256; *Colquhoun's Tr.* v. *Diack*, 1901, 4 F. 358; *Robertson's Tr.* v. *Riddell*, 1911, S.C. 14, opinion of Lord Salvesen.

[7] *Hamilton* v. *Western Bank*, 1856, 19 D. 152.

for the debt then contracted, but for any subsequent claim he may have against the transferror.[1]

The right of retention has been said to arise " from the shape of the title, from its character as an absolute divestiture of the party granting it, and out of the very circumstance that the formal or legal title is absolute in him, with a mere personal obligation to apply it only in a particular way." [2] So the implication of a right of retention will not be displaced by an undertaking, in the back-bond or other qualifying obligation, to reconvey the subjects on receiving payment of a particular and specified debt,[3] or on demand.[4] But there is nothing in the nature of an *ex facie* absolute title to justify the holder in breaking the contract under which he obtained it. If he has obtained it in furtherance of a particular object he cannot disregard his instructions, and claim a right to retain the property in security of other debts.[5] And even where the absolute title is given in security, a provision in the back-bond that it is to cover debts not exceeding a certain sum will preclude the creditor from maintaining, in a question with the trustee in the debtor's bankruptcy, that the form of his title gives him the right to retain for any debts that may be due by the bankrupt.[6]

The right of the holder of property on a title *ex facie* unqualified to retain it in security of other obligations due by the grantor is so far limited by receipt of intimation that the grantor's right to demand a reconveyance has been transferred to a third party, that he cannot retain for advances he has made subsequent to the receipt of that intimation. This qualification of the rights flowing from an absolute title was established, though not without much difference of judicial opinion, in *National Bank* v. *Union Bank*.[7] There the National Bank obtained from *A.* a disposition of lands, qualified by a back-bond which stated that the lands were to be held in security of all advances made, or to be made, to the firm of *M. & Co.*, of which *A.* was a partner. *A.* subsequently assigned the reversionary right to the Union Bank, in security of an advance, and the Union Bank intimated this assignation to the National Bank. Thereafter the latter bank made further advances to *M. & Co.* On the bankruptcy of *M. & Co.* the question was raised whether the National Bank was entitled to retain the subjects for advances made after intimation had been received of the assignation of the reversionary right to the Union Bank. In the Court of Session the majority of the whole Court sustained the claim of the National Bank, on the ground that when they obtained a disposition *ex facie* unqualified they acquired, in the absence of any agreement to the contrary, a right to retain the subjects until all claims due to them by the grantor were satisfied, and that this right could not be abrogated or trenched upon without their consent. This judgment

[1] *Hamilton* v. *Western Bank, supra*; *Hayman & Son* v. *M'Lintock*, 1907, S.C. 936. In *Alston's Tr.* v. *Royal Bank* (1893, 20 R. 887) the Lord Ordinary (Low) held that the right of retention was limited to cases where property had been transferred by written conveyance, and was therefore not applicable to a deposit of negotiable securities. The point was not determined in the Inner House.

[2] Per Lord Ivory, in *Hamilton* v. *Western Bank, supra*, 19 D., at p. 163. See also opinions of Lord Kyllachy (Ordinary) and of Lord M'Laren, in *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740.

[3] *Ballenny* v. *Barbarn*, 1808, M. App. *voce* Compensation, No. 5; *Russell* v. *Earl of Broadalbane*, 1831, 5 W. & S. 256.

[4] *Colquhoun's Tr.* v. *Diack*, 1901, 4 F. 358.

[5] *Stewart* v. *Bisset*, 1770, M. App. *voce* Compensation, No. 2.

[6] *Anderson's Tr.* v. *Somerville & Co.*, 1899, 36 S.L.R. 833. See also *Robertson* v. *Duff*, 1840, 2 D. 270.

[7] 1885, 13 R. 380; revd. 1886, 14 R. (H.L.) 1; *Hopkinson* v. *Rolt*, 1861, 9 H.L.C. 514; *Deeley* v. *Lloyd's Bank* [1912], A.C. 756

was reversed in the House of Lords, on the ground that the true nature of the transaction, and not the form of the title, must be considered, and that, considering the absolute title as a security, the National Bank had acquired no right to make advances in reliance on it after they had received notice that the subjects no longer belonged to their debtor.

The bankruptcy of the debtor has a similar effect. The property in question passes to the trustee, and the holder of an *ex facie* absolute conveyance cannot plead a right to retain it for advances subsequently made to the bankrupt.[1]

Retention in Sale : Common Law. The principle of retention as the right of the owner of property who has contracted to convey it was applied to the case of sale of goods, before the common law on that subject was altered by the Sale of Goods Act, 1893. The theory that a seller of goods, so long as they were undelivered, and while therefore his legal position was that of an owner of the goods subject to a personal obligation to deliver them, could exercise a right of retention over them for any debt which might be due by the purchaser, seems first to have been mooted in *Mein* v. *Bogle & Co.*[2] There a parcel of sugar had been sold, and delivery was demanded by the trustee in the purchaser's bankruptcy. This was resisted by the seller, on the ground that he was not bound to deliver until the bankrupt paid for some sugar he had bought on a previous occasion. There was the specialty in the case that the price for the sugar of which delivery was asked was only partly paid, but the Court, in sustaining the seller's contention, expressly stated that they proceeded on the ground that he had a right of retention over the sugar in security of his general balance against the bankrupt. *Mein* v. *Bogle & Co.* was mainly relied upon, in the subsequent case of *Melrose* v. *Hastie*,[3] as establishing the distinction, in the words of Lord Fullerton, "between the right of retention held by a proprietor not divested by actual delivery, and the right of lien held over the property of another by a possessor on a limited title, and for a special purpose." In *Melrose* v. *Hastie* the principle of retention, which had been applied in *Mein* v. *Bogle & Co.* to the purchaser's trustee in bankruptcy, was applied in a question with a sub-purchaser. *A.* had sold goods, which were in a bonded store, to *B.*, had been paid the price, and had granted a delivery order for them. *B.* resold to *C.*, who paid the price. Neither *B.* nor *C.* intimated their rights to the keeper of the store. In these circumstances, on *B.'s* bankruptcy, it was held that *A.* was the undivested owner of the goods, and was entitled to retain them, in a question with *C.*, for a general balance due to him by *B.* on other transactions. The principle applied was that *A.*, as owner, could refuse to implement his obligation to deliver to *B.* until all his claims against *B.* were satisfied, and that *C.* took no higher title than his author. This rule was expressed by Lord President Inglis in a subsequent case, contrasting the right of retention, as applied in Scotland, with the lien of a seller for the price, as established in England :[4] "The course of the argument suggested occasionally

[1] *Callum* v. *Goldie*, 1885, 12 R. 1137 ; *Morton's Tr.* v. *Kirkhope*, 1907, 15 S.L.T. 203.

[2] 1828, 6 S. 360. It is expressly noted in the report that no authorities were cited, but it is clear from the statement of the argument that though no particular case may have been cited, there was a general reference to the cases establishing that an *ex facie* title of ownership implies a right to retain.

[3] *Melrose* v. *Hastie*, 1851, 13 D. 880. The Court (seven judges) were divided—four to three. An appeal to the House of Lords was taken, but was lodged too late (17 D. (H.L.) 4).

[4] *Black* v. *Incorporation of Bakers*, 1867, 6 M. 136, at p. 140. See also *Robertson's Tr.* v. *Baird*, 1852, 14 D. 1010 ; *Wyper* v. *Harveys*, 1861, 23 D. 606 ; *Distillers' Co* v. *Russell's Tr.*, 1889, 16 R. 479.

an identity between the seller's right of retention in Scotland and the seller's lien in England, which it is impossible to pass without notice. The seller of goods in Scotland (notwithstanding the personal contract of sale) remains the undivested owner of the goods whether the price be paid or not, provided the goods be not delivered; and the property of the goods cannot pass without delivery, actual or constructive. The necessary consequence is that the seller can never be asked to part with the goods till the price is paid. Nay, he is entitled to retain them against the buyer and his assignees till every debt due and payable to him by the buyer is paid or satisfied. . . . The seller's right of retention thus being grounded on an undivested right of property, cannot possibly be of the nature of a lien, for one can have a lien only over the property of another. In England, on the other hand, the property of the goods passes to the buyer by the personal contract of sale, and the seller's rights thereafter in relation to the undelivered subject of sale (whatever else they may be) cannot be the rights of an undivested owner."

Mercantile Law Amendment Act.—In 1856 the seller's right of retention, in a question with a sub-purchaser, was limited by sec. 2 of the Mercantile Law Amendment (Scotland) Act (19 & 20 Vict. c. 60), which provided that the seller of goods should be bound to make delivery to a sub-purchaser on payment of the price and performance of the obligations and conditions of the contract of sale, and should not be entitled to retain the goods for any separate debt or obligation alleged to be due by the original purchaser. This section, however, is repealed by the Sale of Goods Act, 1893 (sec. 60, Sched. I.), and leaves an undecided question of some difficulty. What is the extent of a seller's right of retention under the provisions of the Act?

Sale of Goods Act.—Under the Sale of Goods Act, 1893, where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred (sec. 17 (1)). It is clear, then, that undelivered goods while still in the hands of the seller may either be his property or the property of the buyer. In the latter case the seller can have no right of retention founded on property, for he has no longer the property in the goods on which such a right of retention must rest. His rights over the goods are the rights of lien and stoppage *in transitu* provided by the Act, but these rights are available only when the price has not been paid or tendered. But if the property in the goods has not passed to the buyer, there is no express provision limiting the right of retention for all debts due by the buyer, which a seller who had not parted with the property in the goods possessed at common law, and which was illustrated by the decision in *Melrose* v. *Hastie*.[1] The Act provides (sec. 39 (2)): "Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer." It may be argued that this provision implies, though it does not directly enact, that the unpaid seller can have no higher or wider rights over the goods when the property has not passed to the buyer than he possesses when it has. Still, the express saving by sec. 61 of the rules of bankruptcy relating to contracts of sale, and the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, would lead to the conclusion that, in cases where the property in the goods has not

[1] 1851, 13 D. 880, narrated *supra*, p. 642.

passed to the buyer, the seller's common law right of retention survives, and therefore that he may retain them for any debt due by the buyer.

The provisions of sec. 40 of the Sale of Goods Act may be of importance in this connection. It provides: "In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party." On a similar provision of the Mercantile Law Amendment (Scotland) Act, 1856,[1] it was held that this entitled the seller to arrest or poind the goods while in his own hands for a separate debt.[2] But in the Sale of Goods Act this section is in a part of the Act under the sub-title "Rights of Unpaid Seller against Goods," and, on the established construction of such sub-titles,[3] the general words of the section are probably limited to the case of a seller who is unpaid.

(2) *Compensation*

Statutory Rule.—Compensation is the term used in the law of Scotland for the right to set one claim against another, with the result that if equal in amount both are extinguished, if not equal the larger claim is extinguished *pro tanto*. The term set-off is sometimes used as a synonym for compensation, though it is properly applicable only to the law of England.[4] Whether compensation was known to the common law of Scotland seems doubtful;[5] it has been part of the statute law since 1592. The Act 1592, c. 143, enacts: "that ony debt *de liquido in liquidum* instantly verified be writ or aith of the party before giving of the decreete be admitted by all judges within this realme by way of exception, but not after the giving thereof in the suspension or reduction of the same decreete."

Does not Operate *ipso facto*.—In spite of the opinion of Lord Stair[6] it is established law that compensation does not operate *ipso facto*, *i.e.*, that a debt cannot in any subsequent question be regarded as having been extinguished by the fact that the debtor had a claim against the creditor in which compensation, if pleaded, would have been sustained.[7] Nor does the mere statement of the plea, in defence to an action, extinguish the debt, if an impediment to its extinction by compensation arises before the plea is considered. So where to an action for calls by a company still carrying on business the shareholder pleaded compensation on a debt due by the company to him, and the company went into liquidation before the action was heard, it was held that the liability for calls was not extinguished, and that the plea of compensation remained open to the objection that sums due on a call cannot be compensated in the liquidation of a company.[8]

Prescription of Compensable Debts.—It follows from the principle that compensation does not take effect until pleaded and sustained that a debt may prescribe although, during the years of prescription, a demand for payment might have been met by a plea of compensation.[9] If the result be

[1] 19 & 20 Vict. c. 60, sec. 3. Repealed by the Sale of Goods Act, 1893, sec. 60, Sched. I.
[2] *Wyper* v. *Harveys*, 1861, 23 D. 606.
[3] *Inglis* v. *Robertson & Baxter*, 1898, 25 R. (H.L.) 70.
[4] In England set-off is allowed on illiquid claims on which compensation could not be pleaded in Scotland, except in bankruptcy (see Leake, *Contracts*, 7th ed. 753).
[5] See excerpt from records in Bell, *Com.*, ii. 120; *Fowler* v. *Brown*, 1916, S.C. 597.
[6] Stair, i. 18, 6. As to the civil law, see Pothier, *Obligations*, sec. 635.
[7] Ersk. iii. 4, 12; Bell, *Prin.*, sec. 575; *Com.*, ii. 124.
[8] *Cowan* v. *Gowans*, 1878, 5 R. 381.
[9] *Carmichael* v. *Carmichael*, 1719, M. 2677.

that the debt is extinguished by the negative prescription of forty years, it cannot thereafter be founded on.[1] If the result be merely, under one or other of the shorter prescriptions, to limit the methods and alter the onus of proof, it would seem that the debt, though it may be established in another action, cannot, until established, be founded on in defence, on the ground that it is no longer a liquid or instantly verifiable debt.[2]

But though the co-existence of mutual claims has no legal effect until compensation has been pleaded and sustained, yet if it is sustained it dates back to the period when the concourse of debtor and creditor took place, with the result that no interest is due *ex lege* from that date.[3] This holds even if the debt due to *A.* was not originally liquid, and could not therefore have been pleaded if action had been taken by *B.* If the course of events be that *A.*'s claim is liquefied and then sustained as a ground for compensation against *B.*'s claim, *B.* cannot demand interest for the time following the date when his debt to *A.* was first incurred. "The liquefaction draws back just as the compensation draws back to the date of concourse."[4]

Without action or decree parties who have cross-accounts may set one debt against the other. But it is doubtful whether a debt can be extinguished by an agreement to compensate unless that agreement is entered into in writing.[5]

Effect of Decree.—Compensation must be pleaded before decree. If a debtor allows decree to pass against him, when he might have put forward a plea of compensation, he is bound to pay his debt, and establish his counterclaim in another action.[6] In the case of a decree *in foro* this is plain on the terms of the Act 1592, c. 143, and on the general principle that a defender is bound to state all competent defences. But the rule holds even in the case of a decree in absence. So where a debt due by *A.* to *B.* was arrested in the hands of *A.*, and decree in absence in an action of furthcoming was allowed to pass, it was found that *A.* could not afterwards plead that the debt arrested was compensated by a debt due by *B.* to him.[7] It is probably the law that though a man allow decree in absence to pass against him, he can still plead compensation in the event of the bankruptcy of his creditor.[8] And the general rule does not apply when the debt against which compensation is pleaded is a decree for expenses. There is then no earlier opportunity of pleading compensation, and the fact that a decree for expenses has been pronounced is not a bar to the plea.[9]

Debts in Compensation must be Liquid.—In a pure question of compensation arising between parties who are both solvent, the debts in respect of which compensation is pleaded must be liquid. A debt is liquid "when it is actually due and the amount ascertained, *cum certum an et quantum debeatur*."[10] So a party, sued upon a debt for which he admits liability,

[1] *Carmichael* v. *Carmichael, supra*; Bell, *Com.*, ii. 123. But former decision allowed a plea of compensation on a prescribed debt (*Gordon* v. *Hay*, 1705, M. 2675).

[2] *Baillie* v. *M'Intosh*, 1753, M. 2680 (quinquennial prescription of rents); *Galloway* v. *Galloway*, 1799, M. 11122 (triennial); but see Bell, *Com.*, ii. 123.

[3] *Cleland* v. *Stevenson*, 1669, M. 2682; *Campbell* v. *Carruthers*, 1757, M. App. *voce* Tack, No. 1.

[4] *Inch* v. *Lee*, 1903, 11 S.L.T. 374, per Lord Kyllachy (Ordinary).

[5] *Cowan* v. *Shaw*, 1878, 5 R. 680.

[6] Stair, i. 18, 6; Ersk. iii. 4, 19; *Anderson* v. *Schaw*, 1739, M. 2646; *Paterson's Creditors* v. *M'Aulay*, 1742, M. 2646.

[7] *Cuninghame* v. *Wilson*, 17th January 1809, F.C.; see *Downie* v. *Rae*, 1832, 11 S. 51.

[8] *Barclay* v. *Clerk*, 1683, M. 2641; *M'Laren* v. *Bisset*, 1736, M. 2646.

[9] *Fowler* v. *Brown*, 1916, S.C. 597.

[10] Bell, *Com.*, ii. 122.

cannot plead in defence a right to set off the present value of a debt due to him by the pursuer but not yet payable,[1] or a claim under which the pursuer's liability is only contingent,[2] or a claim of damages arising from a separate contract or from other relations between them.[3] A defence resting on a claim which is disputed is in general irrelevant.[4] But it may fall within the ambit of the maxim *Quod statim liquidari potest pro jam liquido habetur*, and decree for the debt sued upon may be withheld until the amount due on the counter-claim is settled. On this point no rule can be stated; it is a question of the circumstances of each case whether the pursuer whose claim is admitted is bound to await the settlement of accounts. "In practice we sometimes allow counter-claims not yet constituted to be held *pro jam liquido* when they admit almost of immediate ascertainment. But it is always a question of circumstances, and of sound judicial discretion and equity, in what cases that should be allowed."[5] In such a case it is an element in favour of the defender that he has already taken action to constitute his claims,[6] against him that the claims he puts forward are of old standing which might have been established by reasonable diligence.[7] Where a defender disputes the pursuer's claim, and also alleges illiquid counter-claims, it is again a question of judicial discretion whether the counter-claims should be admitted to proof, or whether they must be established in a separate action.[8]

The effect of bankruptcy in entitling a debtor to retain his debt, in virtue of an illiquid claim due by the creditor to him, has been already considered.[9]

Concursus debiti et crediti.— In order to found a plea of compensation, or, in the case of bankruptcy, of compensation or retention, the parties must have been debtor and creditor in the same legal capacity, or, in other words, there must have been *concursus debiti et crediti*; that *concursus* must have existed before bankruptcy of either party; and the plea must not be inconsistent with the good faith of the contract under which either claim arose. These rules, which involve the most important questions in the law of compensation, may be considered in their order in so far as they have not arisen incidentally in earlier parts of this work.[10]

Concursus debiti et crediti, in questions of compensation or retention in bankruptcy, means that the parties are at the same time debtor and creditor, and debtor and creditor in the same capacity. So a party who was sued for his private debt could not set off a debt due to him as an executor.[11] *A.*, who was indebted to *B.*, was not entitled to plead compensation in respect of a debt due by *B.* to a trust in which *A.* was the sole beneficiary.[12] But where two persons carried on business in partnership as bankers and as linen-drapers under different firm names, it was held that there was no such

[1] Ersk. iii. 4, 15; Bell, *Com.*, ii. 122.

[2] *Paul & Thain* v. *Royal Bank*, 1869, 7 M. 361. [3] *Supra*, p. 624.

[4] *Blair Iron Co.* v. *Alison*, 1855, 18 D. (H.L.) 49; *Earl of Strathmore* v. *Ewing*, 1832, 6 W. & S. 56; *Sim* v. *Laudy*, 1868, 41 Sc. Jur. 136.

[5] Per Lord Cuninghame, *Logan* v. *Stephen*, 1850, 13 D. 262, 267. See cases cited *supra*, p. 625, note 7.

[6] *Munro* v. *Macdonald's Exrs.*, 1866, 4 M. 687; *Ross* v. *Ross*, 1895, 22 R. 461.

[7] *Hamilton* v. *M'Queen*, 1845, 7 D. 295.

[8] *Johnston* v. *Robertson*, 1861, 23 D. 646; see opinion of Lord Benholme, at p. 654; *Stuart* v. *Stuart*, 1869, 7 M. 366.

[9] *Supra*, p. 626.

[10] As to the right of a party who has dealt with an agent to plead compensation on a debt due by the agent, in a question with the principal, see *supra*, p. 131. As to compensation in questions with assignees, see *supra*, p. 429.

[11] *Stuart* v. *Stuart*, 1869, 7 M. 366. [12] *Johnston* v. *Johnston*, 1875, 2 R. 986.

separation of interest as to preclude compensation between a debt due to one firm and a debt due by the other.[1] Where a party was debtor to several persons jointly and severally it was decided that he could not meet his liability by pleading compensation on a debt due by one of them.[2] A banker, who has granted a deposit receipt expressed to be payable to either of two persons, is bound by the terms of the receipt, and cannot refuse payment to one payee on the plea of compensation with a debt due by the other.[3]

Compensation in Question with Executor. There is no such separation of interest between the estate of a party deceased and his estate in the hands of his executors as to preclude a creditor of the deceased, who has obtained possession of the executry funds under a contract with the executors, from insisting on the right to compensate his debt. An executor is not a trustee for creditors, but *eadem persona cum defuncto*. This principle, established by a decision of the House of Lords on a question of diligence,[4] has been held to imply that rights of compensation are not affected by the death of one of the parties and the confirmation of his executor. In *Mitchell* v. *Mackersy*[5] the law agent of the deceased was employed by the executor to ingather the estate. Within six months of the death it appeared that the estate would prove insolvent, though no proceedings for sequestration were taken. It was held that the law agent, in a question with the executor, was entitled to use the money he had ingathered to meet an account due to him by the deceased. A previous case,[6] in which a similar claim by a banker in whose hands the executry funds were lodged had been repelled, was overruled, or at least not followed, on the ground that it was inconsistent with the principles laid down by the House of Lords in *Globe Insurance Co.* v. *Mackenzie*,[7] which had not been brought to the notice of the Court. An executor who is himself a creditor of the deceased is entitled to pay himself—in other words, to compensate his debt with the debt due by himself as executor—if six months have expired since the death of the deceased, and no diligence has been used by creditors.[8] Whether he has the right to pay himself at once, in a question with other creditors and in an estate which proves insolvent, was held to be an open question in *Elder* v. *Watson*,[9] and is practically settled in the negative by the opinions given in *Salaman* v. *Sinclair's Tr.*[10]

[1] *Williams' Tr.* v. *Inglis & Co.*, 13th June 1809, F.C. See *Mitchell* v. *Canal Basin Co.* (1869, 7 M. 480), where conflicting opinions were given on the question whether, if one firm consisted of *A.*, *B.*, and *C.*, and another firm of *A.* and *B.*, a debt due to the latter firm could be met by a debt due by the former, on the ground that *A.* and *B.* were, as partners, individually liable for all the debts of each firm.

[2] *Burrell* v. *Burrell's Trs.*, 1916, S.C. 729. The decision proceeded on the authority of a passage in Lindley on *Partnership* (8th ed., p. 350). It seems difficult to reconcile it with *Dobson* v. *Christie*, 1835, 13 S. 582, which was not cited.

[3] *Anderson* v. *North of Scotland Bank*, 1901, 4 F. 49; *Allan's Exr.* v. *Union Bank*, 1909, S.C. 206.

[4] *Globe Insurance Co.* v. *Mackenzie*, 1849, 11 D. 618; affd. 1850, 7 Bell's App. 296; see also *Stewart's Tr.* v. *Stewart's Exrx.*, 1896, 23 R. 739.

[5] 1905, 8 F. 198. In this case, so far as appears from the report, no action had been taken by creditors. Question, whether compensation could be allowed if creditors had raised an action against the executor within six months of the death, which would seem to preclude any preference to an individual creditor. See A. S., 28th February 1662; Bell, *Com.*, ii. 83 Ersk. iii. 9, 45; *Taylor & Ferguson* v. *Glass's Trs.*, 1912, S.C. 165, opinion of Lord President Dunedin.

[6] *Gray's Trs.* v. *Royal Bank*, 1895, 23 R. 199.

[7] 1849, 11 D. 618; affd. 1850, 7 Bell's App. 296.

[8] Stair, iii. 8, 73; iii. 9, 44; *M'Dowal's Creditors* v. *M'Dowal*, 1744, M. 10007; *Globe Insurance Co.* v. *Mackenzie*, 1849, 11 D. 618, per Lord Fullerton, at p. 638; affd. 1850, 7 Bell's App. 296.

[9] 1859, 21 D. 1122, 1128. Erskine's opinion is in the negative, on the terms of A.S., 28th February 1662 (iii. 9, 45).

[10] 1916, S.C. 698.

Compensation in Partnership. The complicated questions which arise when the law of compensation has to be applied to debts due to or by a firm, and debts due by or to an individual partner, depend mainly on two principles of law: (1) that the firm, and not the individual partners, is the creditor in debts due to the firm; (2) that each individual partner is a debtor in all the debts due by the firm.[1] The application of these principles to the various possible cases may be seen by considering the effect of claims made by or against the firm and by or against an individual partner.

If the firm sues for a company debt, the debtor cannot plead compensation in respect of a debt due to him by an individual partner. There is no *concursus debiti et crediti*, because the partner is not the creditor in the debt which is sued for, the firm is not the debtor in the debt which it is proposed to set off.[2] So if the firm and the individual partners are bankrupt, the debtor of the firm must pay to the trustee in the firm's sequestration, and rank on the estate of the bankrupt partner for the debt which that partner owes as an individual.

If a claim is made against the firm, compensation is pleadable on a debt due by the creditor to an individual partner.[3] Two grounds have been suggested to support this rule: (1) that in such cases an assignation by the partner to the firm may be implied, which would make the firm at the same time debtor and creditor; (2) that as the partner is debtor in debts due by the firm, no assignation is necessary; there is *concursus debiti et crediti* between the firm debt in which he is debtor and his individual claim in which he is creditor. On this principle it was held by Lord Kinloch as Lord Ordinary that in such a case the plea of compensation might be taken by the firm, even although the individual partner concerned refused his consent.[4] If the firm is dissolved, and an individual partner is sued directly for a firm debt, he has clearly a right to plead compensation on a debt due to him as an individual by the party who sues him.[5]

Where a partner of a firm is sued for a debt on which he is privately liable as an individual, he is not entitled to refuse payment on the plea of compensation by a debt due by the pursuer to the firm, because, as an individual partner, he is not the creditor in debts due to the firm. Where, however, the firm is dissolved, but not bankrupt, each partner becomes the creditor in a *pro rata* share of the debts due to the dissolved firm, and to that extent may set off the debt he has thus acquired against the debt for which he is sued.[6] In *Heggie* v. *Heggie*,[7] *A.* and *B.* were partners in the firm of *X. & Co.* *C.* was in debt to the firm for more than £300. The firm was dissolved. Thereafter *C.* became the creditor of *A.* for £150. It was proved that *A.* and *B.* were entitled to share equally in the assets of the dissolved firm, and held, in an action by *C.* against *A.*, that the defender might plead compensation, in respect that he was now the creditor to the extent of one-half in the debt due by *C.* to the firm, and therefore was the creditor of *C.* to an amount greater than he was sued for.

[1] See Bell, *Com.*, ii. 553; *Mitchell* v. *Canal Basin Co.*, 1869, 7 M. 480.

[2] Bell, *Com.*, *ut supra*; *Morrison* v. *Hunter*, 1822, 2 S. 68.

[3] *Scott* v. *Hall & Bisset*, 13th June 1809, F.C.; *Salmon* v. *Padon & Vannan*, 1824, 3 S. 406; *Hill* v. *Lindsay*, 1847, 10 D. 78, per Lord Ordinary Cuninghame, at p. 83; *Thomson* v. *Stephenson*, 1855, 17 D. 739; *Mitchell* v. *Canal Basin Co.*, 1869, 7 M. 480.

[4] *Raleigh* v. *Hughson & Dobson*, 1861, 23 D. 352. It was not necessary to decide the question in the Inner House, but doubts were indicated.

[5] *Lockhart* v. *Ferrier*, 1842, 4 D. 1253.

[6] *Oswald's Tr.* v. *Dickson*, 1833, 12 S. 156; *Heggie* v. *Heggie*, 1858, 21 D. 31.

[7] *Supra.*

Where a partner sues for a private debt, he may be met by a claim against the firm in which the party whom he sues is creditor, because, as the partner is a debtor in all debts due by the firm, there is *concursus debiti et crediti* between the debt for which he sues and the debt, primarily due by the firm, on which compensation is pleaded against him. In *Russell* v. *M'Nab*[1] a firm and its partners were sequestrated. The trustee in the bankruptcy of one of the partners sued M'Nab on a debt due by him to that partner. It was held that M'Nab was entitled to plead compensation in respect of a debt due to him by the firm. It was observed from the bench that the principle on which the case had been decided was, that the rights of payment and of compensation were commensurate; and that as a partner was liable in payment of the debts of the company, so compensation on such debts was pleadable against him.

In *Mitchell* v. *Canal Basin Co.*[2] the principles above stated were recognised, and a further question was mooted, though not decided. *A.*, *B.*, and *C.* were partners in the firm of *X. & Co.* The firm and each of the partners were sequestrated. *A.* and *B.*, without *C.*, were partners in a separate firm of *Y. & Co.* This firm was dissolved, but solvent, and among its assets was a debt due by *D.* This debt *A.* and *B.*, as the partners in the firm of *Y. & Co.*, assigned to the trustee in the firm of *X. & Co.*, who was also the trustee on their individual estates. An action for payment raised by the trustee against *D.* was met by a plea of compensation on a debt due to him by the firm of *X. & Co.* The plea was sustained. It was held that the trustee, as he was suing for a debt due to *A.* and *B.*, could be met by a debt for which *A.* and *B.*, as partners of the firm of *X & Co.*, were liable. The question was raised whether an action by the firm of *Y. & Co.*, as a solvent and going concern, could have been met by compensation on the debt due to *X. & Co.*, in respect that the individual partners of *Y. & Co.* (*i.e.*, *A.* and *B.*) were individually liable for that debt, because they were also partners in the firm of *X. & Co.*, and therefore liable for his debts. The majority of the Court were of opinion that in that case no compensation would have been pleadable, in respect that the creditor would not have been *A.* and *B.* as individuals, but their firm of *Y. & Co.* as a firm.

***Concursus* before Bankruptcy.** When payment of a debt is demanded by a trustee in bankruptcy, and the defence is compensation, the condition of its admissibility is that the *concursus debiti et crediti* must have arisen before the bankruptcy. This precludes the acquisition, by a debtor to a bankrupt estate, of claims against the bankrupt, and a plea of compensation founded on such claims,[3] as well as a plea founded on subsequent transactions with the bankrupt.[4] But it is no objection that the debt on which compensation is pleaded was, at the time of bankruptcy, merely a contingent liability. So where a bill of exchange which had been accepted by the bankrupt was discounted with a bank by an indorsee, and, after the bankruptcy, retired by him, it was held that he might plead compensation on a debt due by him to the bankrupt, although at the time of the bankruptcy he had no direct and enforceable claim.[5] "I think," said Lord Gifford, "that the law may be stated with correctness as broadly as this—that compensation, or retention to the effect of ultimate compensation, may be pleaded after bankruptcy in

[1] 1824, 3 S. 63.
[2] 1869, 7 M. 480.
[3] Bell, *Com.*, ii. 123; *Cauvin* v. *Robertson*, 1783, M. 2581.
[4] *Meldrum's Trs.* v. *Clark*, 1826, 5 S. 122.
[5] *Hannay & Son's Tr.* v. *Armstrong Brothers*, 1875, 2 R. 399; affd. 1877, 4 R. (H.L.) 43.

the same way as before it, provided the debt pleaded on has not been acquired after bankruptcy for the purpose of producing compensation. The defenders do not come under this exception. Their contingent liability on the bills was incurred before the bankruptcy, and their again becoming the holders was a direct consequence thereof, and not a mere device for producing compensation." [1]

Again, there can be no compensation between debts incurred by a party before his bankruptcy and liabilities incurred to the trustee as representing the bankrupt's estate. The bankruptcy interposes a bar, by creating a separation of interests, to the *concursus debiti et crediti*.[2] So where in an action between a creditor and a trustee for the creditors of the debtor decree for expenses was pronounced in favour of the trustee, it was held that the creditor (who had acceded to the trust deed) could not plead compensation in respect of the debt due to him by the bankrupt.[3] In *Asphaltic Limestone Co.* v. *Corporation of Glasgow* [4] the company, at the date of its liquidation, had two separate contracts with the Corporation. One of these the liquidator declined to carry out; the other he implemented, and thereby acquired a claim for the contract price. The contention of the Corporation that they were entitled to retain that price in security of their claim of damages for breach of the other contract was repelled, on the ground that the damages were due by the company and the price was due to the liquidator, and that there could be no retention or compensation between a debt due before bankruptcy and a debt arising thereafter.

Compensation in Leases. The principle that compensation is not pleadable between debts arising before bankruptcy and debts arising after it raises some difficult questions in cases between landlord and tenant. At the end of a lease the tenant may have claims against the landlord either for compensation for improvements or for the price of subjects which the landlord has taken over at valuation, and the landlord may have opposing claims for arrears of rent or for damages for failure by the tenant to implement the conditions of the lease. The rights of compensation or retention in such cases, which may be asserted either against the tenant himself or against a trustee for his creditors, present some narrow and involved questions.

First may be considered a claim for compensation for improvements. In cases under the Small Landholders (Scotland) Act, 1911, it is expressly provided that "if a landholder either renounces or is removed from his holding, the landlord shall be entitled to set off all rent due or to become due against any sum found to be due to the landholder or to the Board for improvements made on the holding." [5] In cases under the Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10), there is no similar provision for a right of set-off, but, under sec. 15, all claims by either party are to be determined by arbitration, and, on the ordinary principles of the law of compensation, claims when so determined can be set off against each other. In cases where neither of these Acts applies, as in urban leases, or where the tenant's claim is under some clause in the lease giving him a right which the Agricultural Holdings Act would not confer, it would seem

[1] *Hannay & Son's Tr.*, *supra*, 2 R., at p. 417. This point was abandoned in the House of Lords.

[2] Bell, *Com.*, ii. 123; cases in following notes, and *Kerr* v. *Dundee Gas Co.*, 1861, 23 D. 343. As to the right of a landlord who has taken over the crop or stock of a bankrupt tenant to plead compensation in respect of arrears of rent, see *infra*, p. 653.

[3] *Mill* v. *Paul*, 1825, 4 S. 219.

[4] 1907, S.C. 463.

[5] 1 & 2 Geo. V. c. 49, sec. 23.

that the landlord has at common law the right to set off against a sum found due to the tenant any claims which he may have against him arising out of the lease. The claim for arrears of rent, being a liquid claim, is clearly compensable. Illiquid claims of damages will give the landlord the right to retain until they are liquidated, on the ground that they arise out of the same contract as the claims in which the tenant is creditor. In *Lovie* v. *Baird's Trs.*[1] the landlord was bound to pay for grass, fallow land, and farmyard manure at the expiry of the lease. The amount due was settled by arbitration, and the tenant sued for payment. It was held that the landlord was entitled to resist immediate payment on the plea of a claim on his part for arrears of rent and interest on improvement expenditure. On the assumption that the landlord's claim was illiquid, the Court decided in favour of his plea of retention, on the ground that the claims on either side were the correlative obligations under the same contract. "The claims here on the one side and on the other are mutual claims arising under the obligations of the lease. The landlord is bound to pay the sum which is sued for in this action, and so equally is the tenant bound to pay his rent and to perform the other prestations according to the averments on record. I think the question is just whether one party to the contract is to be entitled to instant payment while at the same time he is refusing to implement his own part of the contract. I think that he is not."[2] In this case the tenant was solvent, but his bankruptcy would make no difference. The trustee could not enforce a debt due to the bankrupt estate under the contract of lease without allowing all claims due by the bankrupt under the same contract to be set off.

A tenant's claim for the value of subjects which the landlord has taken over at the end of a lease may depend on other considerations. Taking the case where the tenant is solvent, the decision in *Sutherland* v. *Urquhart*[3] seems to lead to the conclusion that if the landlord takes over the waygoing crop (and the same principles would apply to any other subject taken over, *e.g.*, the sheep stock), the price which he is bound to pay is not a debt incurred under the contract of lease, but under a separate contract in which he is the purchaser and the tenant the seller. Therefore, although the landlord would be entitled to set off against this price any liquid claim, such as arrears of rent, on the ordinary principles of compensation, he has no right to set off illiquid claims, such as a claim for damages for miscropping. In *Sutherland* v. *Urquhart*[4] the lease provided that at its expiry the grain crop should be valued in August, and the proprietor should be at liberty to take possession of it. The tenant left as at Whitsunday, the value of the corn crop was fixed by valuators under a submission to which landlord and tenant were parties, and the landlord took possession of it. It was held that he could not refuse instant payment of the price on the plea of a claim of damages for miscropping, because his illiquid claim arose under the contract of lease, the liquid claim of the tenant under the contract of sale, and the case therefore fell under the rule that a claim of damages arising under one contract is not a relevant defence to an action for payment of a liquid debt arising under another.[5]

Bankruptcy of Tenant. When the tenant is bankrupt it is quite clear, on the principle of retention or balancing of accounts in bankruptcy,[6] that

[1] 1895, 23 R. 1.
[2] *Lovie* v. *Baird's Trs.*, 1895, 23 R. 1, per Lord Adam.
[3] 1895, 23 R. 284. [4] *Supra.* [5] See p. 624. [6] *Supra*, p. 626.

the landlord is entitled to set off any claim which he may have against the bankrupt, liquid or illiquid, in answer to a claim for a debt due by him to the bankrupt. But the question arises whether the debt is due to the bankrupt or to the trustee on the bankrupt's estate. Has it arisen before the bankruptcy, though possibly not exigible until after it, or has it arisen subsequently to the bankruptcy? In the latter case it is a debt due to the trustee, which cannot be compensated by a debt due by the bankrupt. Certain cases are fairly clear. All claims for meliorations are debts due to the bankrupt under the lease, and therefore admit of compensation. On the other hand, if there is no provision in the lease entitling or obliging the landlord to take over property belonging to the tenant, such as the dung and straw, the waygoing crop, or the stock on a sheep farm, and by arrangement with a trustee for the tenant the landlord does take over the subjects, he has incurred a debt to the trustee subsequent to the bankruptcy, against which he cannot plead compensation on any debts which were due by the tenant before it.[1] The difficult cases arise when the lease does contain provisions by which the landlord is entitled, or obliged, to take over property belonging to the tenant.

In the case of an obligation on the part of the landlord to take over the tenant's property, it is decided that the trustee in the tenant's sequestration cannot insist upon its fulfilment without founding on and recognising the lease, and that he thereby entitles the landlord to set off any claims arising under the lease.[2] In *Craig's Tr.* v. *Lord Malcolm* the lease of a sheep farm laid the landlord under the obligation to take over the sheep stock at valuation. Immediately after the expiry of the lease the tenant was sequestrated. Under a submission between the landlord and the trustee the sheep stock was valued. The landlord refused to pay for it, on the ground that arrears of rent exceeding the price were still unpaid. To this the trustee objected that as the price of the sheep stock was a debt due to the estate after sequestration, it could not be met by a debt due by the bankrupt. It was held that as the right of the trustee to insist on the purchase of the sheep stock was a right derived solely from the lease, he could not enforce it without entitling the landlord to set off any claims arising under the same contract.

On another principle the same result is arrived at in the case where the landlord takes over buildings erected by the tenant. These, when affixed to the land, become the property of the landlord, subject to a right in the tenant to remove them. The right to remove them, or to demand payment for them, is a right arising under the lease, and neither the tenant nor his trustee in bankruptcy can exercise that right except on condition of satisfying the landlord's counter-claims under the lease.[3] So in *Jaffray's Tr.* v. *Milne*,[4] a case between the landlord and the trustee in a trust-deed for the benefit of the tenant's creditors, the trustee's claim was partly for the value of buildings, partly for dung and straw which the landlord had taken over, and the landlord's claim was one of compensation in respect of arrears of rent. It was held that the two items of the trustee's claim presented different considera-

[1] *Taylor's Tr.* v. *Paul*, 1888, 15 R. 313. Cp. *Sutherland* v. *Urquhart*, 1895, 23 R. 284, narrated above.

[2] *Craig's Tr.* v. *Lord Malcolm*, 1900, 2 F. 541. As to such a claim when the lease is brought to an end before its term, see *Marquis of Breadalbane* v. *Stewart*, 1903, 5 F. 359; revd. 1904, 6 F. (H.L.) 23.

[3] *Smith* v. *Harrison & Co.'s Tr.*, 1893, 21 R. 330; *Jaffray's Tr.* v. *Milne*, 1897, 24 R. 602. The same principle would seem to apply to growing crops (*Chalmers' Tr.* v. *Dick's Tr.*, 1909, S.C. 761).

[4] 1897, 24 R. 602.

tions, and that with regard to the claim for buildings the landlord's right to compensate was clearly good, because that claim could only arise in virtue of the lease.

The remaining case is where the landlord exercises an option to take over moveable subjects, *e.g.*, dung and straw, in virtue of a right to take them over provided in the lease, and the tenant is bankrupt. In that case it is conceived that the law is that the landlord cannot set off arrears of rent in a question with the trustee in the tenant's sequestration unless he has entered into possession before the sequestration, but may do so in a question with a trustee in a private trust-deed for the benefit of the tenant's creditors. The distinction depends on the right conferred by a clause in a lease obliging the tenant to leave moveable property at his removal. Such a clause confers no right of property, or real right in security, on the landlord in the subjects to which it refers. They remain subject to the diligence of the tenant's creditors, and may be poinded.[1] And as the act and warrant in favour of a trustee in bankruptcy is equivalent to a poinding, and also transfers to him all the property of the tenant, it follows that any subsequent sale to the landlord is not a sale of the tenant's property in virtue of the provisions of the lease, but an independent sale of property which has been attached by, and which belongs to, the trustee in the sequestration. The trustee is not bound to fulfil the tenant's contract to leave the subjects provided for in the lease (though his failure to do so will give the landlord a claim in the sequestration for damages for breach of contract), and he could therefore sell these subjects to anyone he pleased, in spite of a provision in the lease whereby the tenant was bound to leave them. If he sells them to the landlord, the price is a debt arising after the sequestration, which cannot be compensated by a debt due before it.[2] The landlord is practically in the same position as any other creditor of the bankrupt to whom the trustee may happen to sell property which forms part of the trust-estate, and who cannot maintain that he has a right to compensate the price by his claim on the bankrupt estate. If, however, before the sequestration, the landlord has taken possession of the subjects, he has then acquired a real right in them; all that passes to the trustee is the claim for the price, and that claim, as it arises before the sequestration, may be met by claims at the landlord's instance.[3] And a trustee in a trust deed granted for the benefit of the tenant's creditors is not in the position of a trustee in sequestration. He takes the estate subject to the relative obligations, and therefore, unless it can be shewn that he and the landlord have made a separate bargain,[4] or the landlord is barred on the ground that he was a party to the trust deed, and had lodged a claim as an ordinary creditor,[5] the tenant's moveable property is transferred to the landlord in implement of the obligation to transfer it contained in the contract of lease, and all claims arising under that contract may be set against the price.[6]

Clauses Excluding Compensation. A debt may be incurred under circumstances inferring an obligation on the creditor not to exercise his right to

[1] *Stewart* v. *Rose*, 1816, Hume, 229; *M'Gavin* v. *Sturrock's Tr.*, 1891, 18 R. 576; *Hart* v. *Baird*, 1897, 5 S.L.T. 172.

[2] *Forbes' Tr.* v. *Ogilvy*, 1904, 6 F. 548; *Hart* v. *Baird*, *supra*.

[3] *Davidson's Tr.* v. *Urquhart*, 1892, 19 R. 808; *Torrance* v. *Traill's Trs.*, 1897, 24 R. 837, a case of steelbow.

[4] As in *Taylor's Tr.* v. *Paul*, 1888, 15 R. 313.

[5] *Maclean's Tr.* v. *Maclean's Tr.*, 1850, 13 D. 90.

[6] *Jaffray's Tr.* v. *Milne*, 1897, 24 R. 602, contrasted with *Forbes' Tr.* v. *Ogilvy*, 1904, 6 F. 548.

plead compensation when a claim is made against him by the debtor. In *Reid* v. *Bell*,[1] a son-in-law, under an arrangement by which certain property was transferred to him, agreed to pay to his father-in-law £100 yearly "for maintenance." Subsequently litigation on other questions arose between them, and the son-in-law became creditor under decrees for expenses. It was found that he could not refuse to pay the annuity on the plea of compensation, as, in a question between the parties, the annuity was alimentary, whether it would have been attachable by the annuitant's other creditors or not. And it is a general principle that where money is deposited for a special purpose, the implied obligation is that it is to be returned if that purpose cannot be carried out, or if a balance remains after it is carried out, and non-fulfilment of this obligation is not justified by a claim of compensation, retention, or lien, in respect of a separate debt due by the depositor.[2] In *Middlemas* v. *Gibson*,[3] *A.* had deposited £100 with his law agent, with the declared object of effecting a composition with his creditors. The creditors refused to accept the composition, and *A.* was sequestrated. The law agent, being called upon to repay, claimed a right to deduct an account against *A.* arising on other transactions. This claim the Court rejected, on the ground, as put by Lord Kinnear, that "it is well-settled law that specific appropriation is an absolute bar both to the plea of compensation and to the plea of retention, and here it is perfectly clear that the money was put into the pursuer's hands for a specific purpose, and that that purpose has failed."

Acquisition of Debts. In certain cases it is stated, as a ground for the rejection of a plea of compensation, that the debt has not been acquired *in bona fide*, but for the purpose of pleading compensation.[4] But the cases are all examples either of the rule that an illiquid or disputed claim cannot be set up as a defence to an admitted debt, or that claims arising before bankruptcy cannot be met by claims arising or acquired after it. Between solvent parties, and claims liquid and undisputed, there would seem no reason why a debtor should not acquire a debt due by his creditor, and plead compensation thereon. Whether he can do so within sixty days of the other's bankruptcy is an unsettled question, the answer to which would probably depend upon whether the claim on which compensation is pleaded was acquired in the ordinary course of business.[5]

Company Law. Debts Set against Calls. It is an established rule that a shareholder in a company, who is also a creditor of the company, cannot set off his debt against calls due by him after the company is in liquidation.[6] It is immaterial that he has pleaded compensation in an action for calls prior to the liquidation.[7] It would seem doubtful whether an arrangement with the directors that any future calls should be set off against the debt due to the shareholder would be binding on the liquidator,[8] and practically certain that such an arrangement, if valid at all, would require to be in writing.[9]

[1] 1884, 12 R. 178.

[2] Stair, i. 18, 6; Ersk. iii. 4, 17; Bell, *Prin.*, sec. 574; *Campbell* v. *Little*, 1823, 2 S. 484; *Hendry* v. *Grant & Jamieson*, 1868, 5 S.L.R. 544; *M'Gregor* v. *Alley & M'Lellan*, 1887, 14 R. 535; *Middlemas* v. *Gibson*, 1910, S.C. 577.

[3] 1910, S.C. 577.

[4] *Finlayson* v. *Russell*, 1829, 7 S. 698; *Munro* v. *Hogg*, 1830, 9 S. 171; *Lawson* v. *Burman*, 1831, 9 S. 478.

[5] Bell, *Com.*, ii. 123. And see *supra*, p. 639.

[6] *Cowan* v. *Gowans*, 1878, 5 R. 581; Buckley, *Companies Acts*, 10th ed. 396.

[7] *Cowan* v. *Gowans*, *supra*.

[8] *Cowan* v. *Shaw*, 1878, 5 R. 680; *Property Investment Co. of Scotland* (*Liquidator of*) v. *Aikman*, 1891, 28 S.L.R. 955; *Property Investment Co. of Scotland* (*Liquidator of*) v. *National Bank*, 1891, 28 S.L.R. 884.

[9] *Cowan* v. *Shaw*, *supra*.

CHAPTER XXXVI

SPECIFIC IMPLEMENT: INTERDICT

Scots and English Law. The law of Scotland recognises, as a general rule, that a party who has contracted for a particular object is entitled to the assistance of the Court to secure that object; by a decree *ad factum praestandum* if the obligation he has secured is an obligation to do something; by a decree of interdict if the obligation is of a negative character.[1] It goes further in these respects than the law of England. "The laws of the two countries" (*i.e.*, England and Scotland) "regard the right to specific performance from different standpoints. In England the only legal right arising from a breach of contract is a claim of damages: specific performance is not matter of legal right, but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it. But in Scotland the breach of a contract for the sale of a specific subject, such as landed estate, gives the party aggrieved the legal right to sue for implement, and although he may elect to do so, he cannot be compelled to resort to the alternative of an action of damages unless implement is shown to be impossible, in which case *loci facti subit damnum et interesse*." [2]

Obligations to Pay Money.—There is probably one general exception to the rule that a decree for specific performance is an ordinary remedy in Scotland—the case of an obligation to pay money. A decree *ad factum praestandum*, when extracted, is a warrant for the imprisonment of the party who fails to implement it, and imprisonment for debt was abolished by the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34).[3] Its abolition was held not to preclude imprisonment on failure to comply with an order for the consignation of money in Court.[4] And a contract with a company to take up and pay for debentures may be enforced by an order for specific performance.[5] A trustee in bankruptcy has no right, unless he can point to some specific provision of the Bankruptcy Act, to an order ordaining the bankrupt to hand over sums of money.[6] With these exceptions it is conceived that an order for specific performance is not within the remedies open to

[1] Stair, i. 17, 16; Bell, *Prin.*, sec. 29. For English law, see Fry, *Specific Performance*, 6th ed.

[2] Per Lord Watson, *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 1, at p. 9. So where a tenant sued for possession of the subjects let, or alternatively for damages, and used inhibition on the dependence of the action, it was held that the landlord could not insist on the recall of the inhibition in order to enable him to complete a sale of the estate, even on an offer to consign the amount sued for as damages. The tenant had the right to select his remedy (*Seaforth's Trs.* v. *Macaulay*, 1844, 7 D. 180).

[3] Sec. 4: "With the exceptions hereinafter mentioned, no person shall . . . be apprehended or imprisoned on account of any civil debt."

[4] *Mackenzie* v. *Balerno Paper Mill Co.*, 1883, 10 R. 1147.

[5] Companies (Consolidation) Act, 1908, 8 Edw. VII. c. 69, sec. 105. In other cases it has been held in England that specific performance of an obligation to lend money will not be decreed (*South African Territories* v. *Wallington* [1898], A.C. 309).

[6] *Bannatyne* v. *Thomson*, 1902, 5 F. 221.

the creditor in a debt. The question whether an obligation to give security, undertaken in a bond, could be enforced by a decree *ad factum præstandum*, was considered a doubtful one in *Stark* v. *A. B.*,[1] but the necessity for a decision was obviated by a minute by the creditor departing from the conclusions to that effect.

Contracts Specifically Enforceable. Apart from the case of an obligation to pay money, the general rule is that an obligant must do specifically what he has undertaken. Thus a decree *ad factum præstandum* is competent in implement of a contract for the sale of a specific thing,[2] or estate;[3] of an obligation to build houses of a particular class;[4] to rebuild premises destroyed by fire;[5] to place a tenant in possession of subjects let;[6] to execute, or concur in executing, a formal and probative deed embodying a prior agreement.[7] A party who has undertaken to subscribe for shares in a company may be ordained to do so;[8] the purchaser of shares may be ordained to take the appropriate steps to have his name placed on the register, and that of the seller removed.[9] An arbiter who has accepted office may be compelled to proceed in the arbitration[10]—the jurisdiction to pronounce such an order resting with the Court of Session alone.[11] Where heritable subjects had been conveyed in security by an *ex facie* absolute disposition, and the feu-duty exceeded the rental, it was held that the creditor was entitled to decree that the debtor should be ordained to accept a reconveyance.[12] It was decided that the owner of an entailed estate, who had agreed to sell it, "subject to the ratification of the Court," was bound to execute a disposition, and to present a petition to the Court for its sanction.[13]

Leases.—There is ample authority for the statement that a tenant may be ordained to enter into and remain in possession of the subjects let;[14] to keep a house heated and aired;[15] not to carry on any particular business in a shop.[16] In cases where a landlord has a right of hypothec he may obtain an order ordaining the tenant to plenish the subjects, but it is an undecided question whether the order can be enforced in any way except as a prelude to a removing.[17] Probably a decree ordaining a tenant to follow any particular method of cultivation would not be granted.[18] But a landlord is entitled, by application to the Sheriff, to obtain a remit to men of skill and authority to enter on and cultivate the lands in accordance with

[1] 1840, 2 D. 1199.

[2] *Sutherland* v. *Montrose Shipbuilding Co.*, 1860, 22 D. 665, per Lord Cowan, at p. 671; *Purves* v. *Brock*, 1867, 5 M. 1003; *Henry* v. *Morrison*, 1881, 8 R. 692; Sale of Goods Act, 1893, sec. 52.

[3] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 1; *Petrie* v. *Forsyth*, 1874, 2 R. 214.

[4] *Middleton* v. *Leslie*, 1892, 19 R. 801; *M'Kellar* v. *Dallas's Ltd.*, 1928, S.C. 503.

[5] *Clark* v. *Glasgow Assurance Co.*, 1850, 12 D. 1047; revd. 1854, 1 Macq. 668; *Marshall* v. *Callander, etc., Hydropathic Co.*, 1897, 24 R. 712.

[6] *Seaforth Trs.* v. *Macaulay*, 1844, 7 D. 180.

[7] *Erskine* v. *Glendinning*, 1871, 9 M. 656 (lease); *Corbett* v. *Robertson*, 1872, 10 M. 329 (conveyance); *Whyte* v. *Whyte*, 1913, 2 S.L.T. 85 (execution of deed by Clerk of Court); *Wight* v. *Newton*, 1911, S.C. 762 (lease).

[8] *Beardmore* v. *Barry*, 1928, S.C. 101; affd. 1928, S.C. (H.L.) 47.

[9] *Stevenson* v. *Wilson*, 1907, S.C. 445, per Lord President Dunedin, at p. 455.

[10] *Sinclair* v. *Fraser*, 1884, 11 R. 1139.

[11] *Forbes* v. *Underwood*, 1886, 13 R. 465.

[12] *Clydesdale Bank* v. *M'Intyre*, 1909, S.C. 1405.

[13] *Stewart* v. *Kennedy*, 1889, 16 R. 421; affd. 1890, 17 R. (H.L.) 1.

[14] Stair, ii. 9, 31; Ersk. ii. 6, 39; *Robertson* v. *Cockburn*, 1875, 3 R. 21.

[15] *Whitelaw* v. *Fulton*, 1871, 10 M. 27.

[16] *Whitelaw* v. *Fulton*, *supra*.

[17] *Horn* v. *M'Lean*, 1830, 8 S. 329; *M'Dougall* v. *Buchanan*, 1867, 6 M. 120, opinion of Lord Cowan (in the negative).

[18] *Davidson* v. *Macpherson*, 1889, 30 S.L.R. 2; *Hendry* v. *Marshall*, 1878, 5 R. 687.

their recommendation.[1] A tenant would seem to be entitled to a decree ordaining the landlord to execute repairs.[2]

Pretium affectionis. —It is probably the law, though there is no actual decision, that the party who asks for a decree *ad factum præstandum* in implement of a contract of sale must aver a *pretium affectionis*—some reason for demanding the particular article sold, rather than other articles of the same kind and value. Failure to implement a contract for the supply of goods which may be easily obtained elsewhere is a ground for a claim of damages, not for a decree ordaining delivery under the sanction of imprisonment.[3]

Exception to General Rule. An action for specific performance may fail (1) from the nature of the obligation it is proposed to enforce; (2) from the impossibility of performance; (3) from the impossibility of enforcing the decree; (4) from the fact that in the circumstances the enforcement of such a decree would involve exceptional hardship.

Contracts not Enforceable. -So far as any general statement of principle is possible, it may be said that the Court will not give decree of specific implement where the enforced performance of an obligation would be an undue restraint on personal liberty. So contracts to enter into partnership;[4] to accept and pay for board and lodging;[5] to perform services involving technical, artistic, or literary skill,[6] cannot be specifically enforced. A person appointed to act as law agent, though for a definite period, cannot insist on his services being received.[7] Parties who are holding a horticultural show cannot be compelled to receive the exhibits of a competitor.[8] An employer cannot be compelled to retain a servant or workman in his employment,[9] nor can a person who has been employed to render services insist on his services being actually received.[10] It has been held in the Sheriff Court that a contract to build a ship could not be specifically enforced,[11] but this, in view of the cases where an obligation to build has been so enforced,[12] seems very doubtful. An obligation to form a road justifies an application for a decree for specific implement, with an alternative crave for the construction of the road at the sight of a reporter appointed by the Court, and at the defender's expense.[13]

Where Performance Impossible. It is a general rule that a decree *ad factum præstandum* will not be pronounced where the circumstances make it impossible for the defender to fulfil his obligation, although the impossibility may have arisen from his own default. The object of a decree is to enable the pursuer to secure his right, not to punish the defender. So if *A.* has

[1] *Brock* v. *Buchanan*, 1851, 13 D. 1069.
[2] *Jenkins* v. *Gascoigne*, 1907, S.C. 1189.
[3] *Sutherland* v. *Montrose Shipbuilding Co.*, 1860, 22 D. 665, per Lord Cowan, at p. 671; *Davidson* v. *Macpherson*, 1889, 30 S.L.R. 2, per Lord Young, at p. 6; *Union Electric Co.* v. *Holman*, 1913, S.C. 954, per Lord President Dunedin, at p. 958.
[4] *Macarthur* v. *Lawson*, 1877, 4 R. 1134.
[5] *Kerrigan* v. *Hall*, 1901, 4 F. 10.
[6] *Lumley* v. *Wagner*, 1852, 1 De G. M. & G. 604 (contract to sing at concert).
[7] *Cormack* v. *Keith & Murray*, 1893, 20 R. 977, opinion of Lord M'Laren.
[8] *Cocker* v. *Crombie*, 1893, 20 R. 954.
[9] *Cooper* v. *Henderson*, 1825, 3 S. 619; *Mason* v. *Scott's Trs.*, 1836, 14 S. 343, per Lord Moncreiff (Ordinary).
[10] *Macmillan* v. *Free Church*, 1861, 23 D. 1314, per Lord Deas, at p. 1345; *Skerret* v. *Oliver*, 1896, 23 R. 468.
[11] *Glasgow and Inveraray Steamboat Co.* v. *Henderson*, 1877, 1 Guthrie, 184.
[12] *Supra*, p. 656. And see *Sutherland* v. *Squair*, 1898, 25 R. 656.
[13] *Northern Lighthouses Commissioners* v. *Edmonston*, 1908, 16 S.L.T. 439.

contracted to convey property to *B.*, and has subsequently, and in breach of his contract, conveyed it to *C.*, *B.*'s remedy, in a question with *A.*, is an action of damages, and not a demand for specific implement.[1] If the owner of lands has come under an obligation which cannot be performed except on the lands, he may remain liable after he has parted with them, but a decree *ad factum præstandum* is not a competent remedy.[2] So where a tenant has undertaken to build or repair, and has failed to do so during the period of his tenancy, an action calling on him for specific implement after that period is incompetent, in respect that his right to be on the lands, or to erect buildings, or execute repairs there, has determined, and that he cannot be assumed to have contracted to do anything which he has no right to do.[3] In *Sinclair* v. *Caithness Flagstone Co.* the lessor in a mineral lease brought an action against the lessees, concluding (first) for decree ordaining the defenders to execute certain works of construction and repair. The lease had expired. It was held that the conclusion for specific implement was incompetent, and was not saved by an offer to allow the defenders access for the purpose of the work. The law was explained by Lord Kinnear, with whom the other judges concurred, as follows:[4] "In so far as regards the first-mentioned conclusion, I am of opinion that the action is incompetent. The pursuer seeks that the defenders shall be ordained to execute certain operations in terms of the lease, but the lease came to an end at Martinmas 1895, and the tenants' right to occupation, and the corresponding right of the landlord to require them to occupy the subjects and execute works came to an end with it. If the tenants have failed to perform their obligation for the proper working of the quarries, the landlord's remedy is an action of damages; but I know of no authority in support of the pursuer's claim to require his tenants, after the termination of a contract of lease, to re-enter the subjects, which, by the contract, they are bound to quit, in order to perform, after their possession has come to an end, obligations which were applicable only to the period of their possession, and which they are alleged to have already broken. They cannot be liable to a decree for specific performance except in virtue of their contract. They have contracted to work in a certain way for a definite term which is exhausted. If they have failed, they may be liable in damages for a breach of their contract which they committed while it still subsisted. But they have made no contract to do anything after the lease has expired. It appears to me, therefore, that in so far as it concludes for a decree for specific implement, the action must be dismissed."

While it is a valid objection to a demand for a decree *ad factum præstandum* that the decree, if pronounced, could not possibly be obeyed, it is no objection that the charge following on a decree has been so long delayed that compliance with it has become impossible. So where a party was ordained to erect a house, and the creditor in the decree took no steps to enforce it for some time, and then charged the defender to erect it within fifteen days, suspension of this charge, on the plea that erection of a house within fifteen days was impossible, was refused. It

[1] *Petrie* v. *Forsyth*, 1874, 2 R. 214; *Macarthur* v. *Lawson*, 1877, 4 R. 1134, opinion of Lord President Inglis.

[2] *Waterson* v. *Stewart*, 1881, 9 R. 155.

[3] *Sinclair* v. *Caithness Flagstone Co.*, 1898, 25 R. 703; *Faill* v. *Wilson*, 1899, 36 S.L.R. 911. In view of the opinions expressed in the House of Lords in *Matthey* v. *Curling* [1922], 2 A.C. 180, these cases may require reconsideration.

[4] *Sinclair* v. *Caithness Flagstone Co.*, *supra*, 25 R., at p. 706.

was observed that the remedy of the suspender was to move for a prolongation of the time.[1]

It would appear not to be a sufficient objection to the enforcement of a decree in absence ordaining the defender to deliver a certain article that the article in question had been attached by the diligence of creditors. In *Rudman* v. *Jay & Co.*,[2] *R.* had obtained furniture on hire-purchase, and had failed to pay the instalments. A decree of cessio had been pronounced against him, and the furniture had been attached by his landlord under sequestration for rent. The furniture dealers obtained a decree in absence, ordaining *R.* to deliver the furniture, and enforced it by his imprisonment. *R.*, averring that his arrest had been carried out maliciously, brought an action of damages. It was held that the defenders, having merely carried out lawful diligence, had committed no actionable wrong. The question whether a decree *ad factum præstandum* would be granted in such circumstances, if opposed, was of course not raised, but from the opinion of Lord Ardwall it would appear to be a legitimate means of bringing pressure on a debtor to fulfil his obligation, by assistance of his friends or in any other competent way.

Where Decree Unenforceable.—It is generally a good objection to an action for specific implement that the decree, if pronounced, could not possibly be enforced. As the only method of compelling obedience to a decree *ad factum præstandum* is the imprisonment of the defender, it would seem that where the defender is a corporate body, which cannot be imprisoned, an action concluding for the performance by such a defender of some act which cannot be performed vicariously must be incompetent because futile, unless an alternative conclusion for damages in the event of non-performance be added. This principle was given effect to in *Gall* v. *Loyal Glenbogie Lodge*.[3] There a member of a friendly society had been expelled by his local branch. He appealed to a Superior Court of the society, and obtained an order for reinstatement, with which the local branch refused to comply. Founding on sec. 68 of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), which provides for the settlement of disputes in such societies by a domestic tribunal, and declares that applications for the enforcement thereof may be made to the Sheriff Court, he brought an action against the local branch with conclusions that the defenders should be ordained to reinstate him to all the rights and privileges of membership. The action was dismissed as incompetent. It was held that the act demanded could be done only by the local branch as a body, not by its officials; that the imprisonment of all the members of the branch was "out of the question"; that, consequently, there were no means of enforcing the decree, and that a Court would not pronounce a decree which could not be enforced. Doubts have been suggested as to whether it is in any case competent to pronounce a decree *ad factum præstandum* against a company or corporate body,[4] but it is conceived that such a decree would be competent either where the act in question could be done

[1] *M'Kellar* v. *Dallas's Ltd.*, 1928, S.C. 503.

[2] 1908, S.C. 552.

[3] 1900, 2 F. 1187. A conclusion for payment of benefits would make such an action competent (*Collins* v. *Barrowfield Oddfellows*, 1915, S.C. 190). And an order for the specific performance of a statutory duty, under section 91 of the Court of Session (Scotland) Act, 1868, may be pronounced against a corporate body (*Sons of Temperance Friendly Society*, 1926, S.C. 418).

[4] Per Lord Kinnear, *Lochgelly Iron and Coal Co.* v. *North British Rly. Co.*, 1913, 1 S.L.T. 405, 414. No such difficulty seems to be felt in England (Fry, *Specific Performance*, 6th ed., 56).

by officials,[1] or where, in the event of non-compliance, an officer of the Court could be empowered to do some equivalent act.[2]

Exceptional Hardship Involved.—In exceptional cases a decree *ad factum præstandum* may be refused, in circumstances where it would generally be competent, on the ground that the hardship to the defender involved in compliance would be out of all proportion to the benefit to be obtained by the pursuer. It has been laid down that the Court will not, as a rule, order specific performance where it would be hard on the person required to perform, and where complete justice would be done to the other party by damages.[3] The opinion of Lord Watson in *Grahame* v. *Magistrates of Kirkcaldy*[4] has been frequently cited. "It appears to me that a Superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course. In order to justify the exercise of such a discretionary power there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights." And even this statement is qualified, in a later passage of the same opinion, by the explanation that it is applicable primarily only to the case where the action was with a public body, and not necessarily to a demand for the enforcement of an obligation undertaken by a private individual.

There are, however, authorities which illustrate the rule that even an individual obligant may not be bound to fulfil his obligation in circumstances of exceptional hardship. In *Winans* v. *Mackenzie*[5] a tract of land was let as a deer forest. It was provided that the landlord should have a certain time "to remove the shepherds and other occupants in connection with this ground." The lessee brought an action against the lessor, the only conclusion being that he should be ordained to remove certain cottars who had houses in the deer forest. The landlord objected, on the ground that the cottars occupied their houses "under a customary tenure peculiar to the Highlands." Apart from the question whether any obligation to remove these cottars had been undertaken in the lease, it was held that the remedy of specific performance might be refused on equitable grounds, leaving to the lessee a claim for any damages which he might have suffered. In *Moore* v. *Paterson*,[6] *A.*, in a contract with *B.*, had agreed to form a road through ground belonging to *C.* He did so under the impression that he had the power to compel *C.* to form the road. In a prior litigation it was found that he had no such right. *C.* refused to sell the ground in question except at an exorbitant price. In an action concluding that *A.* should be ordained to form the road in terms of his obligation, it was held that the pursuer—one of several assignees from *B.*—had no title to sue, but opinions were expressed that the only possible remedy in the circumstances was a claim of damages, and that the Court was entitled, on equitable grounds, to refuse a decree of specific implement. In *Wilson* v. *Pottinger*,[7] *A.*, by arrangement with *B.*, had built a house in which he had used the gable of a house belonging to *B.* In order to comply with the requirements of the Dean of Guild, but

[1] *E.g.*, applications for the rectification of a register. See Companies (Consolidation) Act, 1908, sec. 32. See also *Delaney* v. *Edinburgh, etc., Children's Aid Society*, 1889, 16 R. 753, where a decree *ad factum præstandum* was pronounced against directors.

[2] See *Whyte* v. *Whyte*, 1913, 2 S.L.T. 85 (Clerk of Court authorised to sign conveyance).

[3] *Davidson* v. *Macpherson*, 1889, 30 S.L.R. 2, per Lord Young.

[4] 1882, 9 R. (H.L.) 91.

[5] 1883, 10 R. 941.

[6] 1881, 9 R. 337.

[7] 1908, S.C. 580.

without obtaining *B.'s* express consent, he had made the wall thicker in such a way as to cause it to project beyond the boundary between them. In an action concluding for the removal of the gable, in so far as it constituted an encroachment, the principal ground of judgment for the defender was that the pursuer had impliedly consented, but it was also held that, in any event, his only remedy was a claim of damages, and that he was not entitled to decree ordaining the demolition of the gable.

Decree *ad factum præstandum* must be Definite. The party who is subjected to a decree *ad factum prastandum*, carrying with it the penalty of imprisonment in the event of failure to comply, is entitled to know exactly what he is ordained to do, and therefore decree will not be granted on conclusions couched in vague and indefinite terms. In *Middleton* v. *Leslie*[1] a party who had undertaken to erect buildings was, by the interlocutor of the Lord Ordinary, ordained, in terms of the conclusions of the summons, to erect them "forthwith." In the Inner House it was held that the defender was entitled to a more exact statement of his obligations, and he was ordained to erect the buildings within one year. "In pronouncing decree *ad factum prastandum*, the Court has to bear in mind the consequences and sanctions of such a decree. Failure to implement such a decree exposes a defender to the penalty of imprisonment, which it is in the power of the pursuer to put in force. I therefore think that in the case of decrees which may be thus enforced, or which expose a defender to penal consequences, it is right that the Court should so express the decree that the defender shall be in no doubt regarding the obligation he has to discharge."[2] In *Hendry* v. *Marshall*[3] a lease contained a clause of consent to registration for preservation and execution, in common form. The landlord recorded the lease in the Books of Council and Session, and obtained an extract on which he charged the tenant to implement and perform "the haill obligations having reference to the proper cultivation and management of the said farm." He then obtained a warrant in the Bill Chamber for imprisonment on the extract, and a minute containing a crave to that effect, and on this warrant the tenant was apprehended. In a note of suspension and liberation it was held that while it might be competent to charge the tenant to perform some specific and defined act—a point which was not decided—the execution of a charge in terms which gave the tenant no notice of what specific acts he was called upon to do was clearly incompetent.

Enforcement of Decree. A creditor who has obtained a decree *ad factum prastandum* is invested with the power to charge the debtor to perform, and, on an *ex parte* statement, to obtain a warrant for his imprisonment.[4] The remedy is a note of suspension and liberation. But it is not the practice so to enforce a decree ordaining the party to do something which can be done through the agency of others (for instance, an obligation to erect buildings), and suspension and liberation would be at once granted. In such a case the object of the decree is to give the defender an opportunity to obtemper it, and the remedy of the pursuer, in the event of failure, is to apply for authority to carry out the operation in question, at the defender's expense.[5] And where, in an action of division and sale, decree was pronounced ordaining *A.*

[1] 1892, 19 R. 801. See *M'Kellar* v. *Dallas's Ltd.*, 1928, S.C. 503, narrated *supra*, pp. 658-9.
[2] *Ibid.*, per Lord President Robertson, 19 R., at p. 802.
[3] 1878, 5 R. 687.
[4] Personal Diligence Act, 1838, 1 & 2 Vict. c. 114. For procedure, see Graham Stewart, *Diligence*, 709.
[5] *Davidson* v. *Macpherson*, 1889, 30 S.L.R. 2; see opinion of Lord Young.

to sign a conveyance, and *A.* refused to do so, the Lord Ordinary authorised the Clerk of Court to sign it on his behalf.[1] But the creditor in an obligation, while he may obtain authority to execute work at the expense of the party who has undertaken to do it, mistakes his position if, without judicial authority, he executes the work himself and sues for the cost. Thus *A.* had undertaken to keep a road in repair, had been called upon to fulfil his obligation, and, without definitely refusing, had failed to comply. *B.*, who was the creditor in the obligation, executed repairs, and sued for the amount he had expended. The action was dismissed as irrelevant, on the ground that *B.'s* action had deprived *A.* of the safeguards for good and economical work which he would have had if, after an application to the Court, the work had proceeded under judicial authority and under the supervision of a judicial referee.[2]

Adjudication in Implement.—The creditor in an obligation to convey land may find his remedy in an action of adjudication in implement, and may complete his title to the subjects as if the decree were a conveyance by the obligant.[3] For this subject works devoted to conveyancing must be consulted.

(2) *Interdict*

Cases where Interdict Competent.—An obligation of a negative character—to abstain from some act or course of action—may be enforced by interdict. Thus it has never been doubted that where a party has undertaken not to carry on a particular trade, interdict is the appropriate remedy, assuming the obligation to be legal and valid.[4] Where in a lease of an hotel or shop the landlord undertook not to use his other property in any competing business, it was observed that the remedy of interdict was open to the tenant.[5] It is true that interdict is an equitable remedy, and the Court is never bound to exercise an equitable jurisdiction without being sure that the result of its own judgment is not necessarily to cause another wrong;[6] but this consideration can seldom be of importance in cases where the Court is asked to enforce a definite contractual obligation.[7]

Building Restrictions.—Equitable considerations are of more importance in cases where buildings have been erected in defiance of building restrictions. If interdict has been applied for, *a fortiori* if it has actually been granted, it is conceived that in a question between private parties there is no answer to an action concluding for the demolition of the buildings erected thereafter.[8] Even if no action has been taken before the buildings are actually erected, the general rule is that an order for their demolition may be pronounced,[9] except in cases where the consequent loss to the defender would be grossly out of proportion to the interest of the pursuer.[10] It has been observed that in such cases there may be such acquiescence as will bar a decree for the removal of the building, but will not bar an action for damages.[11]

[1] *Whyte* v. *Whyte*, 1913, 2 S.L.T. 85; *Wallace's Curator* v. *Wallace*, 1924, S.C. 212.
[2] *Northern Lighthouses Commissioners* v. *Edmonston*, 1908, 16 S.L.T. 439.
[3] Conveyancing (Scotland) Act, 1874, 37 & 38 Vict. c. 94, sec. 62.
[4] *E.g.*, *Stewart* v. *Stewart*, 1899, 1 F. 1158. As to legality of restrictions, see *supra*, p. 569.
[5] *Campbell* v. *Watt*, 1795, Hume, 788; *Davie* v. *Stark*, 1876, 3 R. 1114.
[6] *Maclure* v. *Maclure*, 1911, S.C. 200, at p. 206.
[7] *Bank of Scotland* v. *Stewart*, 1891, 18 R. 957.
[8] *Grahame* v. *Magistrates of Kirkcaldy*, 1881, 8 R. 395; 1882, 9 R. (H.L.) 91, per Lord Watson, at p. 95; *Campbell* v. *Clydesdale Banking Co.*, 1868, 6 M. 943, per Lord Benholme, at p. 949.
[9] *Naismith* v. *Cairnduff*, 1876, 3 R. 863.
[10] *Supra*, p. 660.
[11] *Shand* v. *Henderson*, 1814, 2 Dow, 519, Lord Chancellor Eldon.

Interdict to Enforce Positive Obligation.—It is somewhat more doubtful how far the fulfilment of a positive obligation may be enforced by interdict against acts which are inconsistent with its fulfilment. It is not a competent form of process for the removal of a tenant in possession under a lease.[1] In *London and North-Western Rly. Co.* v. *Scottish Central Rly. Co.*[2] the defenders had agreed to lease their line to the pursuer. On the allegation that the contract was *ultra vires* they were in course of negotiation for a lease to another company. A note of suspension and interdict against any agreement with any other company was passed, on caution being found to indemnify the defenders for any loss in the event of its being found that the first agreement was not binding. But it was observed that the case was exceptional, and the agreement was one which could have been specifically enforced. There would seem to be no decision in Scotland on the question whether a contract of service, which cannot be enforced by a decree *ad factum præstandum*, can be indirectly enforced by interdict against the servant entering into some other employment. A servant improperly dismissed must, probably, find his remedy in an action of damages, and cannot obtain an interdict against his employers obtaining another servant.[3] In England an injunction in the case of an ordinary contract of service would seem to be incompetent, in the absence of an express negative covenant,[4] though it might be granted in exceptional cases, such as where the servant was in possession of trade secrets, and proposed to take service with a rival.[5] On English authority, again, it would appear that where *A.* has undertaken to take all his requirements of a particular commodity from *B.*, *B.* is entitled to restrain him by injunction from obtaining supplies elsewhere.[6] A purchaser of a ship, which, to his knowledge, was under a charter-party, was restrained from dealing with the ship in any way inconsistent with the charter-party, although, as he was not a party to the contract, he could not have been found liable in damages for not fulfilling it, and decree of specific performance could not have been pronounced against him.[7]

Penalty no Bar to Interdict.—The mere fact that a contract, by which a particular act is prohibited, provides a penalty in the event of contravention, does not infer a licence to do the act on payment of the penalty, or offer any bar to an interdict if otherwise competent.[8]

Form of Decree.—The principle, already explained with reference to actions for specific implement, that a party who may be subjected to penal consequences for failure to comply is entitled to know exactly what his obligation is, applies with equal force to an interdict. Its terms must be precise.[9]

[1] *Ranken* v. *M'Lachlan*, 1864, 3 M. 128.

[2] 1847, 10 D. 215.

[3] *Cormack* v. *Keith & Murray*, 1893, 20 R. 977.

[4] *Whitwood Chemical Co.* v. *Hardman* [1891], 2 Ch. 416, explaining *Lumley* v. *Wagner*, 1852, 1 De G. M. & G. 604, as a case where there was an express negative covenant; *Davis* v. *Foreman* [1894], 3 Ch. 654; *Mortimer* v. *Beckett* [1920], 1 Ch. 571; *Rely-a-Bell, Burglar, etc., Co.* v. *Eisler* [1926], 1 Ch. 609.

[5] *Robinson & Co.* v. *Heuer* [1898], 2 Ch. 451.

[6] *Metropolitan Electric Supply Co.* v. *Ginder* [1901], 2 Ch. 799.

[7] *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* [1926], A.C. 108 (J.C.). And see *supra*, p. 268.

[8] Ersk. iii. 3, 86; Bell, *Prin.*, sec. 34; *Mackenzie* v. *Craigies*, 18th June 1811, F.C.; affd. 1815, 6 Paton, 117; *Gold* v. *Houldsworth*, 1870, 8 M. 1006; *Dalrymple* v. *Herdman*, 1878, 5 R. 847.

[9] *Supra*, p. 661; *Cairns* v. *Lee*, 1892, 20 R. 16. "It must be in terms so plain that he who runs may read," per Lord Deas, *Kelso School Board* v. *Hunter*, 1874, 2 R. 228, 232.

CHAPTER XXXVII

IRRITANCIES AND PENALTIES

The parties to a contract often attempt to provide for the possibility that one or other may fail to implement his contractual obligations by conferring on the party aggrieved the right to visit such failure with consequences which would not be inferred by law. This, however, is a matter in which absolute freedom of contract is not allowed. The law has always drawn a distinction between a direct agreement to secure a certain result, which is enforceable unless that result be illegal, and provisions designed to secure the same result in the event of breach of another term of the contract. Thus a promise by *A.* to give £1,000 to *B.* is a valid contract, which will be enforced according to its terms; a clause in a contract between *A.* and *B.* under which *A.* agrees to forfeit £1,000 if he fails to implement his other obligations is, generally speaking, not enforceable unless *B.* can shew that £1,000 is a fair pre-estimate of the loss he is likely to suffer through *A.'s* failure.

Distinction between Irritancy and Penalty.—A conventional provision for the results of failure to perform a contract may take the form of an irritancy or a penalty, or of both combined. An irritancy is a right to one party to cancel or irritate the contract in the event of some failure by the other; a penalty, a provision that in a similar event the party who fails shall incur a forfeit. In effect, either provision involves a penalty; a man is as much penalised by the loss of the rights which he has secured under a contract as by the forfeiture of his property. But in the one case he loses only the rights which belong to him solely under the contract which, *ex hypothesi*, he has failed to implement; in the other he is deprived of property or money to which he has a title independently of that contract. And as the conditions under which the Court will interfere with the enforcement of a penal provision, according as it is in effect an irritancy or a forfeiture, are not the same, irritancies and penalties may be considered separately.

Meaning of Irritancy.—An irritancy, as distinguished from a penalty, is a right to put an end to contractual relations, and with them to any right which depends on the continuance of those relations. Thus a right to a landlord to irritate a lease, when exercised, determines the tenant's right to possess, but is properly an irritancy and not a penalty, because the tenant's right of possession depends solely on the contractual relations between him and his landlord, and not on any antecedent right of his own. On the other hand, a provision whereby failure to pay a debt involves the irritancy of the right to redeem property conveyed in security of it is in substance a provision for a penalty, because the debtor agrees to the loss of property which he holds independently of the contract. Irritancies in feu-contracts, it might be argued, belong to the former class, in respect that the right of the vassal is a right acquired solely under the contract. But in this respect the Court has had regard to the substantial nature of a feu-right as a right of property, and

not merely as a right under a contract, and has drawn a distinction between irritancies in feu-charters and in other contracts.[1]

Legal Irritancies.—In feu-contracts and leases various statutes provide for the irritancy of the right of the feuar or tenant on failure, more or less prolonged, to pay the feu-duty or rent. These are known as legal irritancies, and it is a general principle that a legal irritancy, though incurred, may be purged by payment before decree in an action taken to enforce it.[2]

Conventional Irritancies.—An irritancy is termed conventional when it is expressly provided by the contract, whether it merely expresses (in the case of feu-contracts or leases) the irritancy which the law would imply, or gives, or attempts to give, a right for which the law has no provision.

The right to put an end to a contract may be regarded as an irritancy, although the act or event on which it becomes enforceable is not a breach of the contract. Thus in leases the most common irritancy is in the event of the insolvency or bankruptcy of the tenant. But the term irritancy, and the legal rules which control its operation, are confined to cases where the right of one party to terminate the contract is dependent on some act or omission of the other, or, as in the case of insolvency, in some change in his condition. They do not apply to a provision, such as a break in a lease, which depends merely on the efflux of time. It is hard to draw any theoretical distinction, but it is certainly the law that the Court possesses and exercises a power to control the enforcement of proper irritancies which it has never exercised, and would not now arrogate to itself, in the case of options to terminate the contract at a particular time or on the occurrence of some external event.

In cases of mere irritancies, where the sole right contracted for is the right to put an end to contractual relations, without involving any penalty on the other party, there would seem to be no general rule limiting the freedom of parties to contract. It is open to the parties to provide that either shall have the right to determine the contract in respect of any act or omission on the part of the other, although that act or omission may be of trivial importance. Such agreements will be construed fairly, and considerations of hardship are irrelevant. So, in the case of an irritancy in a lease the Court held, in the words of Lord Moncreiff, that "this is a simple and strict question of contract, and it is altogether incompetent for the Court to enter into any question whether the landlord has made a hard bargain with his tenant or not."[3]

Right to Purge Irritancy. But while an irritancy is not a *pactum illicitum* merely because it is severe, its exercise is often controlled by giving to the party in default the right to purge it, by doing the act, or repairing the omission, on which the irritancy depends, even although by its terms that act or omission is declared to be irremediable. This is a question on which the course of decision has varied remarkably. In the earlier cases the Court drew a distinction between legal and conventional irritancies, holding the former to be purgeable, the latter not.[4] In the latter part of the

[1] See opinion of Lord Neaves in *Stewart* v. *Watson*, 1864, 2 M. 1414.

[2] Bell, *Prin.*, sec. 701; *Maxwell's Trs.* v. *Bothwell School Board*, 1893, 20 R. 958. For legal irritancies in feus, see Act 1597, c. 250; Conveyancing (Scotland) Act, 1874, sec. 4 (4); in leases, A.S., 14th December 1756, secs. 4, 5; Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10, sec. 25); House Letting and Rating (Scotland) Act, 1911 (1 & 2 Geo. V. c. 53), sec. 5.

[3] *Moncrieff* v. *Hay*, 1842, 5 D. 249.

[4] See Ersk. iii. 5, 27; and Lord Curriehill's history of the law in *Duncanson* v. *Giffen*, 1887, 15 S.L.R. 356.

eighteenth century the tendency was to hold all irritancies purgeable on equitable grounds;[1] more recently greater weight has been allowed to the consideration that if a party deliberately agrees to a provision in his contract, it ought to be binding on him according to its terms.[2] It is in one sense a question of construction, but a question of construction in which very plain and unambiguous words have been read in a non-natural sense, on the ground of the presumed intention of the parties that what they expressed as an irritancy was meant merely as a means of enforcing performance.[3] And it is recognised that the Court has an equitable jurisdiction to allow a party in default to purge an irritancy in exceptional circumstances, and on the ground of oppression, even where it cannot reasonably be denied that the intention of the parties was that the operation of the irritancy was to be instant.[4] Circumstances may make the enforcement of any irritancy equivalent to a penalty, and bring in the rules which preclude or limit the possibility of acquiring property by enforcing penalties.

In considering the cases in which the Court will interfere with the enforcement of an irritancy by allowing an opportunity of purgation, it may be best to reserve the question of the enforcement of a provision limiting the right of redemption in dispositions in security. That is in substance a question of penalty.

If an irritancy merely confers contractually a right which the law would infer without it, it is settled in the case of feu-contracts, and is probably the law in leases, that as the legal irritancy is purgeable before decree, so is the conventional expression of it.[5]

Irritancies in Feu-Contracts.—It is probably an absolute rule in the construction of feu-contracts, where an irritancy is regarded as a penalty, that any irritancy may be purged by payment or performance before decree of declarator. So if the feu-contract contains a provision binding the vassal to erect buildings within a certain time, with a clause of irritancy in the event of failure, the vassal may meet a declarator, though brought after the time has expired and the irritancy has been incurred, by an offer to erect the buildings at once.[6] In such cases a time will be fixed by the Court for the completion of the building, and no further prorogation will be allowed.[7] It has been pointed out that the right to purge an irritancy is an equitable right, and that the conditions on which it may be allowed may depend on the circumstances.[8]

[1] Argument in *Lockhart* v. *Shiells*, 1770, M. 7244; *Campbell* v. *Scotland*, 1794, M. 321.

[2] See opinion of Lord Dundas, *Chalmers' Tr.* v. *Dick's Tr.*, 1909, S.C. 761.

[3] *Cassels* v. *Lamb*, 1885, 12 R. 722, opinion of Lord Kinnear, at p. 777. "The true ground of this equitable interference, in violation of the letter of a clause of irritancy, is, that in substance the condition is a stringent remedy for non-payment or non-performance. The Court, therefore, interferes to carry out the true intention of the contract, by allowing the irritancy to be purged when its purpose of compelling performance has been effectuated."

[4] *Stewart* v. *Watson*, 1864, 2 M. 1414.

[5] *Lockhart* v. *Shiells*, 1770, M. 7244; *Tailors of Aberdeen* v. *Coutts*, 1840, 1 Rob. 296, opinion of consulted judges, at p. 449; *Duncanson* v. *Giffen*, 1878, 15 S.L.R. 356; *Maxwell's Trs.* v. *Bothwell School Board*, 1893, 20 R. 958. The earlier law held that conventional irritancies were not purgeable (see history of the law by Lord Curriehill in *Duncanson* v. *Giffen*, *cit.*). By the Conveyancing Act Amendment Act, 1887, 50 & 51 Vict. c. 69, sec. 4, a decree of irritancy *ob non solutum canonem* is not final until an extract is recorded in the Register of Sasines. In *Earl of Elgin* v. *Whittaker* (1901, 9 S.L.T. 375) it was held that an express provision, in a mineral lease, that an irritancy in the event of failure to pay rent for two years should not be purgeable, would receive effect.

[6] *Duncanson* v. *Giffen*, 1878, 15 S.L.R. 356; *Magistrates of Glasgow* v. *Hay*, 1883, 10 R. 635, per Lord Shand.

[7] *Duncanson* v. *Giffen*, *supra*.

[8] *Maxwell's Trs.* v. *Bothwell School Board*, 1893, 20 R. 958, per Lord Rutherfurd Clark.

Failure in Regular Payment.—With an exception in the case of premiums on a policy of insurance [1] it may be doubted whether an irritancy dependent on failure in regularity in making a periodical payment—feu-duty, interest, rent—can ever be enforced as an immediate nullity, in face of an offer of payment when action is brought to enforce it. Such cases fall within the principle that the irritancy may be regarded as a remedy for non-payment, which ceases to be necessary on payment being made.[2] So an irritancy of an entail, incurred by failure to pay the interest on the entailer's debts, has been held to be purgeable.[3] The law is not clear as to irritancies for non-payment of rent in terms other than those implied by law. In *Finlayson* v. *Clayton* [4] it was held that such an irritancy was not purgeable. But in *Hog* v. *Morton* [5] it was decided that an action to enforce the irritancy would not lie if the arrears of rent had in fact been paid, though they were paid by the use of landlord's sequestration, and after the irritancy had been incurred. In *Hogg* v. *Hogg* [6] the House of Lords found an irritancy purgeable, but the case is reported without opinions, and may have been decided on specialties, or on the ground that the irritancy was the conventional expression of what the law would imply. In *Ogilvie* v. *Duff* [7] a contract framed as a perpetual lease contained a provision that if three years' rent was due and unpaid the lease should become null and void. The tenant had deserted the subjects; the landlord, without any declarator of irritancy, had entered into possession; the rent had been unpaid for twelve years. In these circumstances it was held that the irritancy was a sufficient defence to an action at the instance of the heir of the tenant, but the judgment proceeded on the special circumstances of the case, and does not decide that the irritancy in ordinary circumstances might not have been purged.

Bankruptcy as Irritancy.—The principle that the primary object of an irritancy is the enforcement of payment or performance does not apply to an irritancy conditional on insolvency or bankruptcy. There the object of the irritancy is to avoid the disadvantage of having to continue in contractual relations with a party who is or has been bankrupt, and as a general rule such an irritancy is enforceable in its terms, and it is not a good answer to it that the insolvency or bankruptcy has ceased to exist. This has been applied in leases where a tenant has settled with his creditors.[8] It was held to be clear that where a contract of partnership provided for an irritancy in the event of the "declared insolvency" of any partner (without any forfeiture of the capital he had contributed), the other partners were entitled to enforce it against a partner who had become insolvent, although by the time the question was raised he had settled with his creditors.[9] The object of the irritancy was to prevent the continuance in the firm of a partner who had become known to be insolvent, to the possible detriment of commercial reputation, and having regard to that object it was immaterial whether he retrieved his insolvency or not. But opinions have been expressed that in cases where bankruptcy may have arisen from accidental circumstances, and has been met by full payment, the irritancy in a lease might not be enforceable.[10]

[1] *Robertson* v. *Davidson*, 1842, 4 D. 398, opinion of Lord Mackenzie.
[2] *Supra*, p. 666, note 3.
[3] *Somervell* v. *Somervell*, 1901, 9 S.L.T. 344.
[4] 1761, M. 7239.
[5] 1823, 3 S. 617.
[6] 1780, 2 Paton, 516.
[7] 1834, 12 S. 857.
[8] *Tennant* v. *Macdonald*, 1836, 14 S. 976; *Hall* v. *Grant*, 1831, 9 S. 612.
[9] *Hannan* v. *Henderson*, 1879, 7 R. 380.
[10] Per Lord Fullerton, *Hall* v. *Grant*, 1831, 9 S. 612; *Anstruther* v. *Greenshields*, 1855, 18 D. 59, per Lord Justice-Clerk Hope.

Irritancies in Leases. Two narrower cases have been decided on irritancies in leases. In *Stewart* v. *Watson* [1] the irritancy was enforceable in the event of the tenant, by allowing the rent to fall into arrears, suffering a sequestration at the instance of the landlord. Sequestration was awarded, and the landlord, founding on the irritancy, brought an action of removing in the Sheriff Court. The tenant paid the rent, and defended the action on the ground that he had thereby purged the irritancy. Decree of removing was pronounced. The Court were of opinion that the irritancy was a lawful condition, and that it was not truly purged by payment of the rent; but it was observed that judicial interference would be justified in a case where it could be shewn that the landlord had taken advantage of the irritancy by instant sequestration without adequate notice to the tenant. *Lyon* v. *Irvine* [2] shews a less hesitating acceptance of the argument that if a party has agreed to an irritancy he must submit to its enforcement. There the irritancy was provided in the event of the tenant "assigning and subsetting." The tenant, in consideration of a loan, granted a factory and commission to a third party to manage the farm, undertaking to abstain from all interference with the management. The landlord brought an action of removing and obtained decree. Thereafter the tenant executed a deed recalling his factory and commission, and, in a suspension of a charge, pleaded, *inter alia*, that he was entitled to purge the irritancy, and had done so. The charge was suspended on the ground that the terms of the irritancy did not warrant the decree which the landlord had asked for and obtained; but in reference to the suspender's argument that he had purged the irritancy the Lord President said: "The answer to that, and a good one it is, is that conventional irritancies are not purgeable, and that there is nothing in this case to take it out of the rule." [3]

Construction of Irritancy.—Unless, perhaps, where the irritancy is expressed in very exceptional and unusual terms, it is construed as conferring an option on the party who is aggrieved by the act, omission, or event on which it becomes operative. It cannot be appealed to by the party in breach.[4] In *Bidoulac* v. *Sinclair's Tr.* an agricultural lease contained a clause declaring that in the event of the tenant's bankruptcy the lease should "*ipso facto* become null and void, as if the same had never been entered into." The tenant became bankrupt, and the trustee renounced the lease. The landlord lodged a claim for damages. The trustee rejected the claim on the ground that by the terms of the irritancy the lease became *ipso facto* void on the tenant's bankruptcy, and the renunciation, therefore, only recognised that fact, and did not constitute a breach of contract. It was held that the fair construction of the irritancy was that it conferred an option on the landlord to declare the lease void if he chose; it did not import a nullity of which the tenant could take advantage. The landlord had the option either, by enforcing the irritancy, to free both himself and the tenant from all obligations for the future, or, by abstaining from enforcing it, to leave the tenant entitled to possess and bound to pay the rent, with the corollary that if the tenant or his trustee renounced the lease, his estate was liable in damages.

[1] 1864, 2 M. 1414. [2] 1874, 1 R. 512.

[3] 1 R., at p. 518. In an earlier case almost exactly similar—*Forsyth & Johnston* v. *Kennedy*, 1708, M. 7255—it was held that the irritancy could be purged by the revocation of the assignation.

[4] *Kinloch* v. *Mansfield*, 1836, 14 S. 905; *Burns* v. *Martin*, 1885, 12 R. 1343; revd. 1887, 14 R. (H.L.) 20; *Bidoulac* v. *Sinclair's Tr.*, 1889, 17 R. 144. And see *supra*, p. 406.

Irritancy and Common Law Remedies. Generally the fact that a particular remedy is expressly contracted for does not oust the remedies which the law would imply. Thus a lease provided that the tenant should be bound to uphold the works in good condition to the satisfaction of an engineer, and that in the event of repairs being necessary and not executed by the tenant, the landlord should be entitled to execute them and charge the tenant with the expense. The tenant left the works in a defective state. The landlord brought an action of damages, in which he stated that he did not intend to execute repairs. The tenant argued that his only liability was for the cost of repairs, if executed, on the theory that the landlord, by stipulating for one remedy, had discharged his right to all others. The argument was repelled, on the ground that a conventional remedy was to be read as in addition to, and not in substitution for, those implied by law in the particular circumstances.[1]

Enforcement of Irritancy Excluding Claim of Damages.—In certain cases it has been held that the exercise of a conventional irritancy amounts to an election to take that remedy in place of any other that may be open, and therefore is a bar to a claim of damages. In feu-contracts it is an established though surely anomalous rule that if the superior irritates the feu he cannot claim arrears of feu-duties.[2] In leases, if the landlord takes advantage of an irritancy on the bankruptcy of the tenant, he has no claim for damages for the failure of the tenant to implement the lease.[3] But in this case the event on which the irritancy becomes operative—the bankruptcy of the tenant—does not involve any prior breach of contract on his part, and it would seem that if the irritancy did depend on an act which involved a breach of contract, there is no reason why the claim of damages for that breach should be sopited by the enforcement of the irritancy. This was in effect held in a case where a charter-party gave the charterer the right to cancel the contract if the ship was not ready by a particular date, but contained no provision binding the shipowner to have her ready.[4] The charterer exercised his option, and in an action for damages proved that the non-arrival of the ship was due to the wilful act of the shipowner, by which she was prevented from arriving within a reasonable time. The Court rejected the contention put forward in defence—that a cancelling clause left the shipowner free to provide a ship or not as he pleased—and held that he was liable in damages if her failure to arrive within a reasonable time was due to his act or fault.

Penalties. Turning from irritancies to penalties, the majority of the cases have related to clauses providing for liquidate damages in the event of a breach of contract. But before embarking on that subject there are certain other cases which may be considered.

Penal Clauses in Securities. It is settled law that where property is conveyed in security, a clause limiting the right to redeem (*pactum legis commissoriæ in pignoribus*) is not a contract which the Court will enforce literally. It is always a sufficient answer to tender payment before any decree of declarator of irritancy has been obtained. Regarded as an irritancy, it is one which can always be purged; regarded as a penalty, it is not

[1] *Allan's Tr.* v. *Allan & Son*, 1891, 19 R. 215.

[2] *Magistrates of Edinburgh* v. *Horsburgh*, 1834, 12 S. 593; *Cassels* v. *Lamb*, 1885, 12 R. 722, per Lord Kinnear, at p. 782. The same rule applies to ground-annuals (*Wingate's Trs.* v. *Wingate*, 1892, 29 S.L.R. 406).

[3] *Walker's Trs.* v. *Manson*, 1886, 13 R. 1198; *Bidoulac* v. *Sinclair's Tr.*, 1889, 17 R. 144; *Buttercase & Geddie's Tr.* v. *Geddie*, 1897, 24 R. 1128.

[4] *Nelson & Sons* v. *Dundee East Coast Shipping Co.*, 1907, S.C. 927.

enforceable according to its terms.[1] In *Thomson* v. *Threshie*[2] a ninety-nine years' lease was assigned in security, with a clause providing that in the event of non-payment of the amount advanced within ten years, the lease should belong absolutely to the assignee. Twenty years after the date when payment should have been made, the heir of the debtor was held to be entitled to redeem the lease. The creditor, though he had been in possession for eleven years, had never obtained a decree of irritancy, and it was laid down as settled law that without such a decree the right of redemption could not be defeated. In *Smith* v. *Smith*[3] the same principle was applied to a right in security constituted by an *ex facie* absolute disposition, with a back-bond providing for a limited right of redemption. Heritable subjects were disponed, and the disponee granted a back-bond declaring that the conveyance was truly in security, and binding himself to reconvey, if required, at any time within one year of the death of a liferentrix of the subjects, and on payment of certain bonds. Fifteen years after the death of the liferentrix it was decided that the disponee was still entitled to redeem. Lord President Inglis, after pointing out that there was no express limitation of the right of redemption, said: "But assuming that such an irritancy were clearly implied or expressed, I should still hold that, until an action of declarator was brought for the purpose of finding that the pursuer had lost his right, the effect would not be to convert the transaction from a security into a sale, because the rule is quite fixed that if a transaction is only a security, it cannot be converted into a right of property without a declarator of the extinction of the former proprietor's right." In *Leitch* v. *Swan*[4] it was held that even where in a declarator of irritancy the interlocutor, finding the lands still redeemable after the time limited for redemption had expired, proceeded to fix a day for redemption, the debtor was entitled to redeem, although he omitted to do so on the day fixed; but it may be doubted whether the case would be followed. And in a case of a declarator of irritancy for failure to erect buildings on a feu the Lord Ordinary allowed an extension of the time, but intimated that no further extension would be allowed.[5]

In *Thomson* v. *Threshie*[6] Lord Mackenzie expressed doubts whether, even if no offer of payment were made, it was competent to grant decree of declarator extinguishing the right to redeem subjects conveyed in security. But the competency is expressly recognised by Stair and Erskine.[7]

In *Salt* v. *Marquis of Northampton*[8] the next heir to an entailed estate borrowed £10,000 from an insurance company. He granted a bond and disposition in security over the estate, and took out a policy on his life for £34,500 with the company which had advanced the money. It was provided that in the event (which happened) of his predeceasing the heir in possession, thus rendering the bond and disposition in security valueless, the policy should belong to the company. The Court, holding on the facts that the policy originally belonged to the debtor, and that the company were security holders, decided that the provision that the policy should belong to the

[1] Stair, i. 13, 14; ii. 10, 6; Ersk. ii. 8, 14; *Earl of Tullibardine* v. *Murray*, 1667, M. 7206; *Erskine* v. *Hamilton*, 1706, M. 7212; *Thomson* v. *Threshie*, 1844, 6 D. 1106; *Smith* v. *Smith*, 1879, 6 R. 794. In *Campbell* v. *Scotland*, 1794, M. 321, the Court, while recognising that the intention of the Legislature, in Act 1672, c. 19 was that the expiry of the legal should *ipso jure* preclude the redemption of lands adjudged, refused to give effect to that intention, and decided that redemption was competent until a decree of declarator had been pronounced.

[2] 1844, 6 D. 1106. [3] 1879, 6 R. 794. [4] 1769, M. 7220.

[5] *Duncanson* v. *Giffen*, 1878, 15 S.L.R. 356.

[6] 1844, 6 D. 1106.

[7] Stair, i. 13, 14; Ersk. ii. 8, 14. [8] [1892], A.C. 1.

company, involving as it did that the debtor's right to reduce a subject conveyed in security should be cut off, was one to which effect could not be given, and that the debtor's representatives were entitled to the proceeds of the policy, subject to the claim of the insurance company for repayment of the £10,000 advanced, and arrears of interest.

Sale with Right of Repurchase. The rule that a conveyance in security is always redeemable before declarator does not apply to a contract of sale with a provision giving the seller a right to repurchase within a limited time. Such a contract is construed strictly according to its terms, and the Court will not, on equitable grounds, sustain a demand for repurchase after the time has expired.[1] "But clauses irritant in reversions are only thus qualified in real impignorations: but when the reversion is of a true sale, not in security, but for an equivalent price, or where it is granted after the right related to, and not for implement of a promise or condition made at that time, it is valid; for only *pactum legis commissoriæ in pignoribus* is rejected in law."[2] So far as any principle is involved in this distinction, it has been suggested that it is that equity should intervene where an omission threatens the loss of a right of property, not where it merely precludes its acquisition.[3]

Control of Court over Penal Clauses.—It is a general principle that the Court may, on equitable grounds, refuse to give effect to a clause in a contract imposing a penalty, even although it may be clear that it has been incurred, and purgation of the act by which it was incurred may be impossible, or may not be offered. This has chiefly been illustrated by the cases limiting the enforcement of provisions for liquidate damages, to be considered immediately. In a case of partnership Lord Shand expressed the opinion that if an agreement giving one party the power to put an end to the partnership on the insolvency or breach of contract of the other involved a forfeiture of the capital which the defaulting partner had contributed, it would not be enforceable.[4] Where a ship captain agreed that in the event of his being intoxicated he might be dismissed and would forfeit his right to property held in trust for him by his employer, the Court refused to enforce the forfeiture.[5] It has twice been held by the Judicial Committee, in the case of a sale with a price payable by instalments, that a provision whereby the contract should be null on failure in punctual payment of any instalment, and all prior instalments paid should be forfeited, was an agreement for a penalty which could not be enforced.[6] But in the ordinary contract of hire-purchase the instalments payable, when analysed, include payment for the hire of the article, part-payment of the price, and interest on what is still unpaid. A provision for the return of the article on failure to pay an instalment is invariably insisted. Such a provision involves the forfeiture of the amount paid as part-payment of the price, but it would appear that no objection can be taken to its enforcement.[7] Cases relating to leases suggest that the limits within which the power of the Court to intervene

[1] Stair, i. 14, 4; ii. 10, 6; Ersk. ii. 8, 14; *Beatson* v. *Harrower*, 1679, M. 7208; *Cutler* v. *Malcolm*, 1718, M. 7215; *Boyd* v. *Steel*, 1771, M. 7221; *Young* v. *O'Rourke*, 1826, 4 S. 617, as explained in *Thomson* v. *Thrashie*, 1844, 6 D. 1106; *Earl of Hopetoun* v. *Hunter's Trs.*, 1863, 1 M. 1074; revd. 1865, 3 M. (H.L.) 50, per Lord Justice-Clerk (Inglis), at p. 1094; *Latta* v. *Park & Co.*, 1865, 3 M. 508.

[2] Stair, ii. 10, 6.

[3] More's *Lectures*, i. 621.

[4] *Hannan* v. *Henderson*, 1879, 7 R. 380.

[5] *Watson* v. *Noble*, 1885, 13 R. 347.

[6] *Kilman* v. *British Columbia Orchard Lands* [1913], A.C. 319; *Steedman* v. *Drinkle* [1916], 1 A.C. 275.

[7] *Taylor* v. *Wylie & Lochhead*, 1912, S.C. 978, opinion of Lord Johnston.

will be exercised, in other words, the degree of forfeiture or penalty for which it is competent to stipulate, cannot be even approximately defined. In *Moncrieff* v. *Hay*[1] a lease provided for an irritancy in the event of the tenant's insolvency, and gave the landlord the right to the "lands, in the state they might then be in, and to the straw and chaff of all the crop then on the ground or in the barn-yard, and likewise to all the dung, lime, and other manure then on the lands . . . without any claim or demand being competent to the tenant or his creditors." On the insolvency of the tenant the landlord obtained a decree of removing at the ensuing Martinmas term. At that time part of the land was sown with wheat, part with grass. The tenant was sequestrated, and the trustee made a claim for the value of the wheat and grass crops. The landlord maintained that under the terms of the lease he was under no such liability. This contention, characterised by the Lord Ordinary as a monstrous and unheard-of exaction, was sustained, on the grounds that it was clearly the meaning of the clause in the lease, that the possibility of its becoming exigible might be assumed to have been an element in fixing the rent, and that parties must be bound by their express agreement. In *Chalmers' Tr.* v. *Dick's Tr.*,[2] where this case was followed, the lease provided, in the event of the tenant's bankruptcy, that "it shall not be in the tenant's power, without the proprietor's consent, to continue any longer in possession of, or carry on and manage, the said farm and others for his 'own or his creditors'' behoof, and the proprietor shall be entitled to re-enter and resume possession of the said farm." The tenant became bankrupt, and the lease was irritated as from the ensuing term of Whitsunday. It was held that the trustee in bankruptcy was not entitled to the crop which had been sown.

Pactional Rent.—Again, it was established, until the law was altered by recent legislation, that a provision in a lease providing for additional rent—usually termed pactional rent—was enforceable according to its terms.[3] In this respect the law has been limited by sec. 34 of the Agricultural Holdings Act, 23.[4] Under its provisions a landlord is not entitled to recover, under any provision in the lease, in the event of a breach of any covenant or condition, more than the loss he has actually sustained, with an exception in the case of a covenant or condition against breaking up permanent pasture, grubbing underwoods, felling, cutting, lopping, or injuring trees, or regulating the burning of heather.

In *Moncrieff* v. *Hay*[5] and *Chalmers' Tr.* v. *Dick's Tr.*[6] some very general expressions were used by the judges as to the obligation to implement unambiguous contractual provisions. But it is not supposed that they imply

[1] 1842, 5 D. 249.

[2] 1909, S.C. 761. The main argument for the trustee was that the property in the crops in question had passed to him, under the maxim *messis sementem sequitur*. It was held that the property in growing crops was in the landlord, with a right in the tenant to remove them a right which could be abrogated by contract. The decision would therefore not cover the case where there was a provision that on the bankruptcy of the tenant his moveable stocking should become the property of the landlord. Moveables would pass to the trustee in bankruptcy, and the landlord, apart from any question as to the legality of such a penal clause, could assert no right to them (cp. *Forbes' Tr.* v. *Ogilvy*, 1904, 6 F. 548; and *supra*, p. 651).

[3] *Little* v. *Mutter*, 1797, Hume, 797; *Fraser* v. *Ewart*, 25th February 1813, F.C.

[4] 13 & 14 Geo. V. c. 10, re-enacting sec. 22 of the Agricultural Holdings Act, 1908.

[5] 1842, 5 D. 249.

[6] 1909, S.C. 761. Lord Dundas said: "It occurs to me to add, with reference to part of the arguments of counsel, that in a case of this kind, while considerations of alleged hardship arising to one or other of the parties may be relevant in construing ambiguous phrases in a lease, they can be of no importance, and are indeed incompetent, if the Court holds the language of the document to be fairly capable of only one construction."

that in leases, any more than in other contracts, a party is free to enforce whatever penal provisions he can induce the other to assent to, and that the function of the Court is confined to interpretation and enforcement. It is conceived that the equitable jurisdiction might be invoked in extreme cases. Assume that the lessor of a house inserts a provision that in the event of a breach of contract by the tenant the furniture shall be forfeited, it is difficult to believe that the Courts would enforce it.

Construction of Penal Clause. Where an obligation, positive or negative, is undertaken, and fortified by a penalty in the event of failure, the obligant has no right to maintain that by paying the penalty he relieves himself of the obligation.[1] "When a penalty is imposed to enforce an obligation, no option is given to the party against whom it is directed to get quit of his obligation by paying the penalty. In the language of the law of Scotland the penalty is by and attour performance. It is one mode of enforcing the obligation added to every other mode which would otherwise have been competent."[2] A provision for penal rent in the event of miscropping does not deprive the landlord of the remedy of interdict,[3] and the same principle applies to building restrictions in a feu[4] or long lease.[5] A party who has undertaken not to carry on a particular business under a penalty does not acquire the right to do so on payment thereof.[6] An obligation to be answerable for the performance of an act by a third party is an exceptional case, and the obligant is relieved by payment of the penalty.[7]

Penalties and Liquidate Damages.—In contracts reduced to writing it is a common provision that on failure to perform all, or any, of the contractual obligations, a fixed sum shall be paid by the party in default, either as a penalty, or as liquidate or ascertained damages. Such clauses have proved a fertile source of litigation. In the modern decisions an increasing tendency may be noted to uphold them if the amount fixed is not grossly and obviously exorbitant. But it is still the law that a sum fixed as liquidate damages must have a reasonable relation to the loss likely to be sustained by the breach of the contract. The rule, originally based on the canon laws against usury,[8] is in modern times justified on the ground that a party is not entitled to obtain more in damages than he has lost. He may get compensation: he is not entitled to penalise.[9]

The question in any particular case is not greatly affected by the actual phraseology of the contract. A provision described as a penalty may be enforced as really liquidate damages, and *vice versa*.[10] But the term used is not unimportant. Thus where the clause ran, "both parties hereto bind and oblige themselves to implement their part of this agreement under the penalty of £50, to be paid by the party failing to the party performing or willing to perform over and above performance," it was held that the use of

[1] Stair, i. 17, 20; Ersk. iii. 3, 86; Bell, *Prin.*, sec. 34.

[2] Per consulted judges in *University of Glasgow* v. *Faculty of Physicians*, 1840, 1 Rob. 397, at p. 415.

[3] *Mackenzie* v. *Craigie*, 18th June 1811, F.C.; affd. 1815, 6 Paton, 117.

[4] *Dalrymple* v. *Herdman*, 1878, 5 R. 847.

[5] *Gold* v. *Houldsworth*, 1870, 8 M. 1006.

[6] *Curtis* v. *Sandison*, 1831, 10 S. 72; *National Provincial Bank* v. *Marshall*, 1888, 40 Ch. D. 112.

[7] *Bairdiner* v. *Drysdale*, 1706, M. 10043; *Cochran* v. *Montgomery*, 1702, M. 10041.

[8] *Home* v. *Hepburn*, 1549, M. 10033.

[9] See opinion of Lord Justice-Clerk in *Craig* v. *M'Beath*, 1863, 1 M. 1020.

[10] *Clydebank Engineering Co.* v. *Castaneda*, 1903, 5 F. 1016; affd. 1904, 7 F. (H.L.) 77, where this point is treated as settled both in England and Scotland.

the word "penalty" and of the phrase "over and above performance" were important points in considering whether the sum of £50 was intended as a pre-estimate of probable loss, or as a penalty in the nature of punishment.[1]

It is so far a question of the intention of the parties that a clause providing for liquidate damages will not be sustained as such if it is shewn that it cannot have been intended as a pre-estimate of damages. But it is not enough to prove that both parties intended that the one who failed to fulfil his contract should be mulcted in a penal sum. That is not an intention which the law will enforce.[2]

Effect of Clause of Liquidate Damages.—If the Court arrives at the conclusion that the parties to the contract intended to provide for liquidate damages, *i.e.*, had made a pre-estimate of the loss which a breach of contract was likely to involve, the result is that that sum may be recovered without any proof of actual damage. If the fact of breach be admitted, no proof is necessary; if proof have been taken as to the fact of breach, any evidence given as shewing the amount of damage is irrelevant.[3] The opinions given in *Forrest & Barr* v. *Henderson*[4] may be read as putting the question in a different light, and holding that, even where the provision in the contract is read as liquidate damages, it may be subject to modification if shewn by evidence to be exorbitant—a contention which would involve the necessity of proof in every case on an averment by the defender that the liquidate damages were exorbitant. But the case has not been so interpreted. It is held that the question whether the damages are exorbitant is a question of the construction of the contract, looking to the state of knowledge of the parties at the time, and that an affirmative answer to that question is a conclusive reason for holding that there is no provision for liquidate damages, but only for a penalty, with the result that the pursuer must prove the actual damage he has sustained. This point was very clearly put by Lord Davey, who, after adverting to the opinion of the Lord President in *Forrest & Barr* v. *Henderson*,[5] said: "I hold it to be perfectly irrelevant and inadmissible for the purpose of shewing the claim to be extravagant, in the sense in which I use that word, to admit evidence, such as the learned counsel who has last addressed us has drawn our attention to, of the damages which were actually suffered by the Spanish Government. I agree that it was for the very purpose of excluding that kind of evidence that the parties determined to have the damages liquidate in this manner by naming a specific sum, and it appears to me that the learned counsel have been doing the very thing which the parties intended to prevent by the way in which they have framed their contract."[6] If a clause is read as a valid provision for liquidate damages both parties are bound by it: the defender cannot prove that the loss sustained has been less, the pursuer cannot claim any more.[7]

[1] *Dingwall* v. *Burnett*, 1912, S.C. 1097, opinion of Lord Salvesen, at p. 1103. In *Cameron-Head* v. *Cameron & Co.*, 1919, S.C. 627, a sum fixed as a "penalty" was sustained as liquidate damages.

[2] *Robertson* v. *Driver's Trs.*, 1881, 8 R. 555. "If the penalty be truly a penalty—that is, a punishment—the Court will not allow that, because the law will not let people punish each other. They may contract that the one will be bound to reimburse the other for any loss caused, but not for punishment." Per Lord Young, at p. 562.

[3] *Lord Elphinstone* v. *Monkland Iron and Coal Co.*, 1886, 13 R. (H.L.) 98; *Clydebank Engineering Co.* v. *Castaneda*, 1903, 5 F. 1016; affd. 1904, 7 F. (H.L.) 77; *Public Works Commissioners* v. *Hills* [1906], A.C. 368; *Webster* v. *Bosanquet* [1912], A.C. 394.

[4] 1869, 8 M. 187.

[5] *Supra.*

[6] *Clydebank Engineering Co.* v. *Castaneda*, *supra*, 7 F. (H.L.), at pp. 82, 83.

[7] *Diestal* v. *Stevenson* [1906], 2 K.B. 345.

Penalty as Limit. It was formerly held that where the Court arrived at the conclusion that the sum fixed was a penalty, and therefore not enforceable by either, it still was to be regarded as a limit, beyond which no damages could be recovered, even though loss in excess were proved. But the cases[1] supporting that doctrine were considered in *Dingwall* v. *Burnett*,[2] and held to be distinguishable or wrongly decided. There a contract for the lease of an hotel and purchase of fittings contained a general clause providing for a penalty of £50 to be paid by the party in breach. The Court, arriving at the conclusion that this could not be regarded as liquidate damages, in respect that the contract imposed one penalty for the breach of a variety of obligations of varying materiality, held that the party in breach could not maintain that in any event it was to be regarded as the maximum of his liability.

Cases where Liquidate Damages Inadmissible.— Apart from any question of construction there are certain cases where it is established that a provision for the consequences of a breach of contract, whether the term penalty or liquidate damages be used, will not be given effect to. One case is a provision for a penalty or additional rent for miscropping in leases.[3] Phrases sometimes inserted in charter-parties, "penalty for non-performance estimated amount of freight," or "proved damages not exceeding estimated amount of freight," are meaningless words, they neither fix nor limit the damages.[4] In the ordinary form of bond the debtor obliges himself for payment of one-fifth part more of liquidate penalty in the event of failure in punctual payment of principal or interest.[5] It has long been settled that this provision cannot be enforced according to its terms,[6] and the Court has statutory powers to modify it.[7] Penalty clauses in bonds, however, are not meaningless words of style. It is competent to charge for payment of the principal sum and the penalty, and a suspension of the charge, though admissible, requires a tender of the actual expenses which the creditor has incurred.[8] In an early case where a bond contained no express provision for interest the creditor recovered interest under the penalty clause.[9] And, under the penalty clause, a creditor may recover the expenses he has incurred in vindicating his right to any subjects conveyed in security, whether those expenses are incurred in a question with the debtor himself,[10] or with other bondholders or parties asserting adverse right,[11] and his claim for such expenses is covered by the

[1] *Johnstone's Trs.* v. *Johnstone*, 19th January 1819, F.C.; *Hyndman's Trs.* v. *Miller*, 1895, 33 S.L.R. 359.

[2] 1912, S.C. 1097.

[3] *Supra*, p. 672.

[4] *Stroms Bruks Aktie Bolag* v. *Hutchison*, 1904, 6 F. 486; approved on this point, 1905, 7 F. (H.L.) 131; *Watts, Watts & Co.* v. *Mitsui* [1917], A.C. 227; Scrutton, *Charter-Parties*, 12th ed., 430.

[5] See form of bond and disposition in security in Sched. F.F. of the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101).

[6] Bell, *Com.*, i. 700; *Nasmyth* v. *Samson*, 1785, 3 Paton 9.

[7] Debts Securities (Scotland) Act, 1856 (19 & 20 Vict. c. 91), sec. 5. "In all cases where penalties for non-payment, over and above performance, are contained in bonds or other obligations for sums of money, and are made the subject of adjudication, or of demand in any other shape, it shall be in the power of the Court to modify and restrict such penalties, so as not to exceed the real and necessary expenses incurred in making the debt effectual."

[8] Bell, *Com.*, i. 701; *Borthwick* v. *Lord Advocate*, 1862, 1 M. 94; *Mitchell* v. *Allardyce*, 1915, 2 S.L.T. 398 (O.H., Lord Anderson).

[9] *Semple* v. *Semple*, 1622, M. 10033.

[10] *Bruce* v. *Scottish Amicable Assurance Society*, 1907, S.C. 637. Not where, in an action for the reduction of the bond, the defender (creditor) was assoilzied, but no expenses were allowed (*Smith* v. *M'Lean's Creditors*, 1800, M. App. Expenses, No. 2.

[11] *Allardes* v. *Morison*, 1788, M. 10052; *Orr* v. *Mackenzie*, 1839, 1 D. 1046.

security.[1] But a creditor is not entitled to claim, under the penalty clause, damages for the inconvenience or loss he has sustained through default in punctual payment.[2] A provision in a bond for an increased rate of interest in default of punctual payment is a doubtful point; but the common arrangement, under which the creditor agrees to accept a lower rate than that specified in the bond if payment is made punctually, is valid, and will be enforced strictly according to its terms.[3]

Distinction between Penalty and Liquidate Damages.—In contracts which involve obligations other than the payment of money, the general rules may be stated in the words of Lord Dunedin, explaining the effect of the decision in the leading case of *Clydebank Engineering Co.* v. *Castaneda*:[4] "The general principle to be deduced from that judgment seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidate damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. The *indicia* of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed at the time the bargain was made."[5]

Exorbitancy.—In extreme cases the exorbitancy of the sum stipulated may be a conclusive indication that no pre-estimate of probable loss can have been in the minds of the parties. "For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for £50 you were to pay a million of money as a penalty, the extravagance of that would be at once apparent."[6] Exorbitancy is of course a question of degree, but there is probably a distinction between cases of positive and negative obligations. In the latter, as abstaining from a particular act is within the party's own power, he will not readily escape a penalty which he has agreed to pay in the event of transgression.[7]

One Sum for any Possible Breach.—The fact that a single sum is provided as penalty or liquidate damages for any breach of a complex contract is a strong indication that it should be treated as merely penal.[8] "When a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended

[1] Bell, *Com.*, i. 701; *Jameson* v. *Beilby*, 1835, 13 S. 865; *Bruce* v. *Scottish Amicable Assurance Society*, 1907, S.C. 637.

[2] *Allan* v. *Young*, 1757, M. 10047.

[3] *Gatty* v. *Maclaine*, 1920, S.C. 441; 1921 S.C. (H.L.) 1. English law regards a provision for higher interest as a penalty, and unenforceable, but gives effect to provisions such as that in *Gatty* v. *Maclaine*. As the English law has been characterised by high authority (Jessel, M.R., *Wallis* v. *Smith*, 1882, 21 Ch. D. 243, 261), as utterly unreasonable, possibly the Scottish Courts might arrive at a different conclusion. See Leake, *Contracts*, 7th ed., 821; Coote, *Mortgages*, 8th ed., 136.

[4] 1903, 5 F. 1016; affd. 1904, 7 F. (H.L.) 77.

[5] *Public Works Commissioners* v. *Hills* [1906], A.C. 368, 375.

[6] Per Lord Chancellor Halsbury, *Clydebank Engineering Co.* v. *Castaneda, supra*, 7 F. (H.L.), at p. 78; *Willson* v. *Love* [1896], 1 Q.B. 626.

[7] *Forrest & Barr* v. *Henderson*, 1868, 8 M. 187. The illustration given is an agreement by a tenant not to cut down trees.

[8] *Craig* v. *M'Beath*, 1863, 1 M. 1020; *Dingwall* v. *Burnett*, 1912, S.C. 1097; *Public Works Commissioners* v. *Hills* [1906], A.C. 368.

the sum to be penal, and subject to modification." [1] But it is not enough to shew that in some possible event the sum paid would be out of all proportion to any conceivable loss, if in the case of any cause of damage which was likely to occur it might stand as a fair pre-estimate.[2] And where a single sum is provided as liquidate damages for the breach of a number of stipulations, and these, though of varying importance, are likely, if not fulfilled, to cause loss of the same kind, and loss which, from the nature of the case, cannot be precisely ascertained, the stipulated sum, if not plainly exorbitant, will be sustained as a reasonable pre-estimate. In *Dunlop Pneumatic Tyre Co.* v. *New Garage Co.*[3] trade-purchasers from makers of pneumatic tyres undertook not to tamper with the marks on the tyres; not to export without the makers' consent in writing; not to supply to parties on a suspended list; not to sell below list prices. It was provided that £5 per tyre should be payable, as liquidate damages, for the breach of any of these conditions. In a case where a trade-purchaser had sold below list prices he was found liable in £5 for each tyre. Considering the impossibility of ascertaining the exact amount of loss which breach of any of the conditions might cause to the makers' business, £5 per tyre was accepted as a reasonable pre-estimate. And a clause of liquidate damages, though expressed as applicable in general terms to any breach of the contract, may be treated as applicable to one set of circumstances but not to another. So where a charter-party contained the clause, "penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith," it was held that though this might be regarded as liquidate damages in the event of short shipment, it could have no application to a claim by the charterer for failure to provide the ship.[4] "In general," said Lord M'Laren, "a claim of damages will not be held to be liquidated unless there is some intelligible relation between the specified penalty and the damage which may be or has been sustained."

Penalty for Delay.—Where a particular sum is provided for one special breach of contract, such as delay in the completion of work, it will generally be regarded as liquidate damages unless it is grossly exorbitant. This is especially the case where the sum is made to vary with the amount of damage, as in the case of a stipulation for damages for delay, at so much per week,[5] or in a contract for levelling ground, at so much per acre of ground unlevelled.[6] It is conceived that it may now be laid down that there is no legal objection to the exact enforcement of a clause of this kind. It may fairly be considered, especially in cases where the contract has been obtained after competitive tender, that the contractor took the obligation

[1] Per Lord Watson in *Lord Elphinstone* v. *Monkland Iron and Coal Co.*, 1886, 13 R. (H.L.) 98, at p. 106. See on this dictum opinion of Lord Dunedin in *Dunlop Pneumatic Tyre Co.* v. *New Garage Co.* [1915], A.C. 79.

[2] *Webster* v. *Bosanquet* [1912], A.C. 394.

[3] [1915], A.C. 79.

[4] *Ströms Bruks Aktie Bolag* v. *Hutchison*, 1904, 6 F. 486; affd. on this point, 1905, 7 F. (H.L.) 131.

[5] *Johnston* v. *Robertson*, 1861, 23 D. 646; *MacElroy & Son* v. *Tharsis Sulphur and Copper Co.*, 1877, 5 R. 161; revd. 1878, 5 R. (H.L.) 171; *Steel* v. *Bell*, 1900, 3 F. 319; *Clydebank Engineering Co.* v. *Castaneda*, *infra*; *Cameron-Head* v. *Cameron & Co.*, 1919, S.C. 627. See also, on the construction of contracts of this kind, *British Glanzstoff Manufacturing Co.* v. *General Accident, etc., Assurance Corporation*, 1912, S.C. 591; affd. 1913, S.C. (H.L.) 1, a very special case, and comments thereon in *Cameron-Head*. *Robertson* v. *Driver's Trs.* (1881, 8 R. 555) is *contra*, and seems a case where the Court held that the parties could not have intended to be bound by the plain words of their contract.

[6] *Lord Elphinstone* v. *Monkland Iron and Coal Co.*, 1886, 13 R. (H.L.) 98.

to finish within a particular time into account in fixing his price.[1] If, however, in a building or engineering contract, or any other contract for work to be done on land, the employer fails to give the contractor possession at the appointed time, he cannot enforce a clause providing for liquidate damages for delay, though he may remain entitled to claim damages for any loss which he can prove affirmatively that he has sustained.[2]

Actual Loss Unascertainable. – In narrow or doubtful cases, where the question of exorbitancy may be arguable, it is a strong argument in favour of holding the party to his contract to pay liquidate damages that from the nature of the case it may be impossible, or extremely expensive, to prove the exact amount of damage that has been done. In *Clydebank Engineering Co.* v. *Castaneda*[3] a contract for the building of two torpedo boats for the Spanish Government contained the clause, "the penalty for late delivery shall be at the rate of £500 per week for each vessel." The time of delivery was exceeded by several months. It was held that the shipbuilders were liable for the penalty stipulated, the decision proceeding largely, though not exclusively, on the ground that where the actual amount of damage resulting from breach of contract could not be ascertained, any pre-estimate of liquidate damages, unless absolutely preposterous, could be enforced. The same principle applies in cases where a party undertakes not to carry on a particular trade, and a penalty is provided.[4] The difficulty of estimating the damage his competition may inflict is a strong reason for enforcing the penalty in the event of his breach of the agreement. In *Webster* v. *Bosanquet*[5] *A.* had established a business for the sale of a particular kind of tea, supplied by *B.*'s plantation. *B.* undertook not to sell his tea to anyone else, an obligation which he contravened. It was held that *A.* could enforce the penalty provided in the contract without any proof of actual damage, on the ground that where proof of actual damage was extremely difficult or impossible a penalty must be considered as liquidate damages.

Deposits on Sale. The rule that a provision for a penalty or liquidate damages cannot be enforced unless the sum fixed can be regarded as a pre-estimate of the loss likely to be suffered has not been extended to the case where a purchaser deposits a part of the price, and agrees that it is to be forfeited if he does not carry out his contract. The forfeiture, if incurred, will be enforced.[6] In *Commercial Bank* v. *Beal*,[7] *A.* entered into a contract for the purchase of a brewery at the price of £35,000. He deposited £5,000 in bank in the joint names of himself and the sellers, and agreed that if he failed to pay the price by a certain date the £5,000 should be forfeited. *A.* failed to pay the price, and admitted that he was unable to implement his contract. In a multiplepoinding raised by the bank he maintained that the sellers had sustained no loss, that the agreement as to the deposit was a contract for a penalty which the law would not enforce, and that, consequently, he was entitled to recover it. It was held that the contract was neither a provision for liquidate damages nor for a penalty, and that there

[1] In *Stegmann* v. *O'Connor*, 1899, 81 L.T. 267, the Court of Appeal held that if a contractor is unable to carry out the work the penalty clause runs until the employer intimates that he holds the contract as repudiated. *Quid juris*, if he takes no action ?

[2] *M'Elroy* v. *Tharsis Co.*, 1877, 5 R. 161 ; revd. (on another ground) 5 R. (H.L.) 171.

[3] 1903, 5 F. 1016 ; affd. 1904, 7 F. (H.L.) 77.

[4] *Page* v. *Sherratt*, 1908, 15 S.L.T. 731.

[5] [1912], A.C. 394. See also *Dunlop Pneumatic Tyre Co.* v. *New Garage Co.* [1915], A.C. 79, narrated *supra*, p. 477 ; *English Hop Growers* v. *Dering* [1928], 2 K.B. 174.

[6] *Commercial Bank* v. *Beal*, 1890, 18 R. 80 ; *Wallis* v. *Smith*, 1882, 21 Ch. D. 243.

[7] 1890, 18 R. 80.

was no ground on which the Court should refuse to enforce it according to its terms. In a similar case relating to a deposit on a contract for the sale of a ship, it was provided, in addition to a clause of forfeiture of the deposit in the event of the buyers failing to implement the contract, that they should be liable for any deficiency in the price on a resale. It was argued unsuccessfully that this latter clause indicated that the case was to be regarded as involving the imposition of a penalty, and the seller's claim to the deposit was sustained.[1]

[1] *Roberts & Cooper* v. *Salvesen*, 1918, S.C. 794.

CHAPTER XXXVIII

DAMAGES

Principles of Law.—When damages are claimed for breach of contract, "it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not." [1] "It would require express language in any contract to indicate any intention of negativing a right to damages for the breach of an obligation imposed by it." [2] It is the object of the succeeding pages to consider how far the principles so laid down have been carried into effect.

Failure to Pay Money. They are not regarded when the breach complained of is a failure to pay money at the time agreed upon. Then, though interest on the amount which should have been paid may in certain cases be demanded—a question considered presently—it is a general rule that no damages for the consequences of delay are due.[3] "Thus, though the debtor's failing to make punctual payment should have drawn after it the utter ruin of the creditor, still the creditor can demand no more *nomine damni* than the reimbursement of the costs of suit, or expense of diligence truly disbursed in recovering his debt." [4]

Dishonour of Cheque.—At least one exception to this general rule has been recognised—the breach of contract involved in the failure of a banker to honour his customer's cheque. The customer, it has been held, may recover damages for the resulting injury to his credit.[5] From the cases cited it would appear that substantial damages are due, that no actual proof of diminished credit is necessary, and that the amount of damages is a jury question, on which the award of a judge of first instance will not lightly be disturbed.[6]

It is possible that the general rule that damages are not due for failure to pay money might admit of exception in the case where it was proved that the debtor was aware, at the time of entering into the contract out of which the debt resulted, that his failure to pay at the appointed term would cause exceptional loss.[7] In *Roissard* v. *Scott's Trs.* an action of damages

[1] Per Fletcher-Moulton, L.J., in *Chaplin* v. *Hicks* [1911], 2 K.B. 786, at p. 794. Quoted and adopted by Lord Murray (Ordinary) in *Duke of Portland* v. *Wood's Trs.*, 1926, S.C. 640, 645; affd. 1927, S.C. (H.L.) 1.

[2] Per Fletcher-Moulton, L.J., *Wallis* v. *Pratt* [1910], 2 K.B. 1003, 1016 [1911, A.C. 394]; and see *Beck* v. *Szymanowski* [1924], A.C. 43.

[3] Ersk. iii. 3, 86; Bell, *Prin.*, sec. 32; *Stephen* v. *Swayne*, 1861, 24 D. 158, per Lord President M'Neill.

[4] Ersk., *ut supra.*

[5] *King* v. *British Linen Co.*, 1899, 1 F. 928. *Wilson* v. *United Counties Bank* [1920], A.C. 102.

[6] It is difficult to reconcile this result with the provision of sec. 57 of the Bills of Exchange Act, 1882, which seems to lay down a statutory rule for the measure of damages in the event of the dishonour of a bill, and which, by sec. 73, is applicable to cheques.

[7] *Mansfield* v. *Campbell*, 1836, 14 S. 585; *Roissard* v. *Scott's Trs.*, 1897, 24 R. 861. See opinion of Jessel, M.R., *Wallis* v. *Smith*, 1882, 21 Ch. D. 243, at p. 257. From *Gilchrist* v. *Whyte* (1907, S.C. 984) it may be inferred that if *A.*, in a probative and binding form, undertook to advance money on the security of property belonging to *B.*, and broke his contract, *B.* would be entitled to recover preparatory expenses, *e.g.*, a valuation.

was brought based on averments that the pursuer had been forced to realise property at a loss owing to the defenders' failure in timeous payment of money which was due. The action was held irrelevant, but it was based on delict and not on contract, and there were no averments that the defenders had any notice that their failure to pay would result in exceptional loss.

Interest on Debt. - A party who supplies goods, performs services, or enters into any other contract under which payment is due to him, may stipulate for interest on that payment with or without a certain period of credit, and there is no rule of law to prevent such a provision being given effect to according to its terms.[1] A provision that a debt shall bear interest at a certain period is a strong indication that no prior interest is due.[2] The question whether interest is due *ex lege*, where there is no express provision for it, depends on the nature of the contract out of which the debt arises. It has been laid down that "interest can be demanded only in virtue of a contract express or implied, or by virtue of the principal sum of money having been wrongfully withheld and not paid on the day when it ought to have been paid."[3] The dictum points to the distinction between cases where interest is due as damages for failure to implement a contract to pay,[4] and where it is due as an implied term of the original contract; but the decisions have established arbitrary rules with regard to particular debts rather than any general principle. Interest is due on a dishonoured bill of exchange, as liquidate damages, from the date of presentment for payment, if payable on demand, or otherwise from the maturity of the bill.[5] It is also due on promissory notes.[6] It has been held to be due on any loan, even where no payment had been demanded for thirty-four years.[7] And where money is paid on an obligation to repay if a certain event occurs, interest is due from the date of payment.[8] A cautioner is entitled to interest on any payments he may have made on behalf of the principal debtor.[9] In partnership, where the matter is not expressly provided for, a partner is entitled to interest on any advances he has made beyond the capital which he has agreed to subscribe.[10] Interest is due to a law agent on his outlays, though not for his professional charges.[11] It is due by, or to, a mercantile agent on a balance in his hands or owing to him.[12] It may be stated as a fixed rule of law that when possession is given on a sale of land, interest is due on the price from the date when possession is taken, although the price may not be then settled, or although the seller may not then be able to give

[1] *Linlithgow Oil Co.* (*Liquidator of*) v. *North British Rly. Co.*, 1904, 12 S.L.T. 421.

[2] *Baird's Trs.* v. *Baird*, 1877, 4 R. 1005.

[3] Per Lord Westbury in *Carmichael* v. *Caledonian Rly. Co.*, 1870, 8 M. (H.L.) 119, at p. 131. Adopted by Lord Shaw in *Greenock Harbour Trs.* v. *Glasgow and South-Western Rly. Co.*, 1919, S.C. (H.L.) 49, where, however, it is submitted that the principle on which interest was allowed was rather that of recompense than of implied contract or damages for withholding payment. See also opinion of Lord Justice-Clerk Alness in *Waddell's Trs.* v. *Crawford*, 1926, S.C. 654, 665 (interest on legacies).

[4] See *infra*, p. 683. *Dunn* v. *Anderston Foundry Co.*, 1894, 21 R. 880.

[5] Bills of Exchange Act, 1882, sec. 57.

[6] *Hope Johnstone* v. *Cornwall*, 1895, 22 R. 314.

[7] *Cuninghame* v. *Boswell*, 1868, 6 M. 890; *Hope Johnstone* v. *Cornwall*, *supra*. Where the loan was made on the understanding that repayment would not be demanded until the circumstances of the borrower improved, interest was not due until citation (*Forbes* v. *Forbes*, 1869, 8 M. 85).

[8] *Glasgow Gas Light Co.* v. *Barony Parish*, 1868, 6 M. 406.

[9] Ersk. iii. 3, 78; Bell, *Prin.*, sec. 32.

[10] Partnership Act, 1890, sec. 24, Rule 3.

[11] *Blair's Tr.* v. *Payne*, 1884, 12 R. 104.

[12] Bell, *Com.*, i. 6, 93; *Findlay, Bannatyne & Co.'s Assignee* v. *Donaldson*, 1864, 2 M. (H.L.) 86.

a good title.[1] This rule applies both to voluntary sales and to lands taken compulsorily under statutory powers.[2] Where, under the provisions of a statute, each party acquired lands from the other, but, owing to disputes the price which each was to pay was not settled for eleven years after possession was given, it was held that interest was due on the balance of the price which one party had to pay to the other.[3] An exception is admitted to this rule where a definite period of credit is given, or the price is payable by instalments.[4]

Cases where no Interest Due.—On the other hand, it is established that no interest is due on arrears of feu-duties,[5] or on other payments of a similar character, such as arrears under an obligation of relief of public burdens.[6] The authorities, though not conclusive, support the view that the same rule applies to arrears of rent.[7] Interest is not due on claims for demurrage ;[8] nor, on English authority, on a policy of insurance.[9] As regards open accounts, such as that of the seller of goods, of a tradesman for work done, or of a law agent for professional services, the general rule is that interest is not due merely because the accounts have been rendered, unless either action has been raised, or a definite intimation been made that interest is claimed in the event of non-payment.[10] "I think it is a wholesome general rule that interest will not be allowed on open accounts until there has been either a judicial demand made for payment, or an intimation that after a certain date interest will be charged on the account if not paid by that date. That is in accordance with general custom and practice, both as regards traders' accounts and as regards lawyers' accounts."[11] In *Somervell's Tr.* v. *Edinburgh Life Assurance Co.*[12] the question was raised as to the right to interest on three separate accounts for professional services rendered by law agents in the course of a bankruptcy. For one of these accounts action had been raised against the trustee ; the second had been submitted, with a statement that interest would be claimed, and had been passed by the Commissioners on the bankrupt estate ; the third had merely been rendered. It was held that interest was due on the first account from the date of citation in the action ; on the second, from the date when it was passed by the Commissioners ; it was not due on the third. It was observed that even on an open account interest might be due in special circumstances, such, possibly, as the case where goods were sold expressly for cash payment, but without any definite claim for interest. The doctrine of Erskine,[13] that in an

[1] Ersk. iii. 3, 79 ; *Speirs* v. *Ardrossan Canal Co.*, 1827, 5 S. 764 ; *West Highland Rly. Co* v. *Place*, 1894, 21 R. 576 ; *Grandison's Trs.* v. *Jardine*, 1895, 22 R. 925 ; *Greenock Harbour Trs.* v. *Glasgow and South-Western Rly. Co.*, 1909, S.C. 1438 ; affd. 1909, S.C. (H.L.) 49.

[2] *West Highland Rly. Co.* v. *Place*, 1894, 21 R. 576.

[3] *Greenock Harbour Trs.* v. *Glasgow and South-Western Rly. Co.*, 1909, S.C. 1438 ; affd. 1909, S.C. (H.L.) 49.

[4] *Baird's Trs.* v. *Baird*, 1877, 4 R. 1005.

[5] Bell, *Prin.*, secs. 32, 695 ; *Marquis of Tweeddale's Trs.* v. *Earl of Haddington*, 1880, 7 R. 620, where it was questioned, but not decided, whether interest would run after a demand for payment.

[6] *Durie's Trs.* v. *Ayton*, 1894, 22 R. 34.

[7] *Moncrieff* v. *Lord Dundas*, 1835, 14 S. 61 ; *Stirling and Dunfermline Rly. Co.* v. *Edinburgh and Glasgow Rly. Co.*, 1857, 19 D. 598 ; *Blair's Tr.* v. *Payne*, 1884, 12 R. 104, per Lord Fraser.

[8] *Pollich* v. *Heatley*, 1910, S.C. 469, per Lord President Dunedin, at p. 478.

[9] *Webster* v. *British Empire Insurance Co.*, 1880, 15 Ch. D. 169. Possibly the law of Scotland differs on this point (*Crawford* v. *Bertram*, 15th May 1812, F.C. ; Bell, *Com.*, i. 691).

[10] *Blair's Tr.* v. *Payne*, 1884, 12 R. 104 ; *Bunten* v. *Hart*, 1902, 9 S.L.T. 476 ; *Somervell's Tr.* v. *Edinburgh Life Assurance Co.*, 1911, S.C. 1069. Cp. *Cardno* v. *Stewart*, 1869, 7 M. 1026.

[11] Per Lord Salvesen, *Somervell's Tr.* v. *Edinburgh Life Assurance Co.*, 1911, S.C. 1069, at p. 1071.

[12] *Supra.*

[13] Ersk. iii. 3, 80.

ordinary open account a year's credit is understood to be given, and interest is due after that period, has not been accepted.[1]

Interest from Citation. Interest is due on a debt arising directly from contract at latest from the date of citation.[2] In actions for damages it has been laid down that the ordinary rule of practice is that interest is due only from the date of the final judgment.[3] It has been said that "the rule that interest does not run in damages is well fixed. The damages are not liquidated till after the verdict."[4] But this was in a case of damages for collision. In actions for damages for breach of contract it has been put forward as the law that interest on damages is not, as a rule, due until the damages are ascertained, but that the rule does not necessarily apply to all cases.[5] An exception was recognised in a case where *A.* had undertaken to supply cargo of a fixed amount and at a definite rate, on the ground that if *A.* had fulfilled his contract the party with whom he contracted would have had the use of the money for which *A.* would then have become liable.[6] On this reasoning the judgment should apply only to cases where, if the contract had been duly fulfilled, interest would have been due *ex lege* on the debt arising under it, not to the case of a failure to accept goods or services, since, on the authorities cited in the preceding paragraph, no interest is due unless expressly bargained for on the price of goods supplied, or the sum due for services rendered.

Rate of Interest.—There is no legal rate of interest:[7] where the term was used in an assignation, 5 per cent. was allowed.[8] Where there is a question as to price, and a sum is consigned in bank in the joint names of seller and purchaser, no more than the bank interest on the consignation receipt is due.[9] But where a trustee unnecessarily withheld payment from the beneficiaries, and deposited the money with a bank at 2 per cent., he was held liable for 4 per cent., and it was observed that he was very well off in getting clear at 4 per cent. instead of 5.[10]

Compound Interest. Ordinary contractual debts, in circumstances where no direct trust is involved,[11] do not bear compound interest, in the absence of express agreement.[12] "A claim for compound interest, with annual rests, is a demand which can only be maintained, either in the case of a fixed usage in commercial dealings, or where there has been an abuse in a party trusted with funds and violating his trust."[13] So it was not allowed on arrears of interest on a bond,[14] nor where the claim was for repayment of

[1] *Blair's Tr.* v. *Payne*, 1884, 12 R. 104. See opinion of Lord Fraser.

[2] *Napier* v. *Gordon*, 1831, 5 W. & S. 745; *Somervell's Tr.* v. *Edinburgh Life Assurance Co.*, 1911, S.C. 1059, per Lord Salvesen, at p. 1071. See opinion of Lord Shand in *London, Chatham and Dover Rly. Co.* v. *South-Eastern Rly. Co.* [1893], A.C. 429, 443, contrasting English and Scots law.

[3] *Roger* v. *Cochrane*, 1910, S.C. 1.

[4] *Flensburg Steam Shipping Co.* v. *Seligmann*, 1871, 9 M. 1011.

[5] *Denholm* v. *London and Edinburgh Shipping Co.*, 1865, 3 M. 815; *Martin & Sons* v. *Robertson, Ferguson & Co.*, 1872, 10 M. 949; *Dunn* v. *Anderston Foundry Co.*, 1894, 21 R. 880.

[6] *Dunn* v. *Anderston Foundry Co., supra.*

[7] *Greenock Harbour Trs.* v. *Glasgow and South-Western Rly.* 1909, S.C. 1438; affd. 1909, S.C. (H.L.) 49; *Ross* v. *Ross*, 1896, 23 R. 802; *Waddell's Trs.* v. *Crawford*, 1926, S.C. 654.

[8] *Christie's Factor* v. *Hardie*, 1899, 1 F. 703.

[9] *Grandison's Trs.* v. *Jardine*, 1895, 22 R. 925, opinion of Lord Adam.

[10] *Darling* v. *Adamson*, 1834, 12 S. 598.

[11] As to cases of trust, see Menzies, *Trustees*, 2nd ed., sec. 1100.

[12] Ersk. iii. 3. 82; Bell's *Prin.*, sec. 32. As to English law, which differs materially, Chitty, *Contracts*, 17th ed., 709.

[13] Per Lord Justice-Clerk Inglis in *Douglas* v. *Douglas's Trs.*, 1867, 5 M. 827, 836.

[14] *M'Neill* v. *M'Neill*, 1830, 4 W. & S. 455.

advances made by request to meet the premiums on a policy of insurance.[1] The right of a banker to charge compound interest on overdrawn accounts has been judicially recognised ;[2] and it has been held that a law agent was liable to that extent on sums due to his client, and observed that he would be entitled so to charge on advances made to the client.[3] It is probably the law that compound interest runs on accounts in cases of mercantile agency.[4] Where a debt and arrears of interest have been sued for, interest is due from the date of citation, not only on the debt but on the arrears.[5] But it is not permissible to charge compound interest during the years which may happen to elapse between citation and decree.[6]

Nominal Damages.—Where the pursuer proves a breach of contract, but fails to prove that he has sustained any loss, there is authority for holding that the result should be an award of nominal damages. This rule was laid down by Lord President Inglis in *Webster* v. *Cramond Iron Co.* :[7] "The contract and the breach of it are established. That leads, of necessity, to an award of damages. It is impossible to say that a contract can be broken even in respect of time without the party being entitled to claim damages at the lowest, nominal damages." In *Teacher* v. *Calder* [8] the Lord Ordinary, holding that a breach of contract had been proved, but that no damages had resulted, dismissed the action. It was observed that his judgment could not stand, as the pursuer was entitled, in any view, to an award of nominal damages. There are not wanting cases which seem inconsistent with this rule,[9] but they may probably be explained on the ground that the possibility of nominal damages was not suggested. *Hawick Heritable Investment Bank* v. *Hoggan* [10] is a difficulty. There the defender, who was the lessee of licensed premises, undertook, as part of an arrangement whereby he was relieved of the obligations of the lease, to indorse his licence whenever required, with a view to its transfer to a new tenant. This obligation he refused to implement. Indorsation of a licence has no statutory effect, but is commonly accepted by Licensing Courts as proof that the existing holder assents to the new application. This fact, however, can obviously be proved in other ways. In an action for damages by the landlord it was found that, even on the assumption that the tenant had broken his contract, the pursuer had suffered no loss, and therefore that the defender was entitled to absolvitor. The proper result, it would appear, would have been an award of nominal damages.[11]

[1] *Graham's Exrs.* v. *Fletcher's Exrs.*, 1870, 9 M. 298.

[2] In *Graham's Exrs., supra.* ; *Reddie* v. *Williamson*, 1863, 1 M. 228.

[3] *Duke of Queensberry's Exrs.* v. *Tait*, 1826, 5 S. 180.

[4] So held in *Palmer & Co.'s Assignees* v. *Glas* (1835, 13 S. 308), and in the Court of Session in *Fergusson* v. *Fyffe* (1838, 16 S. 1038). But this was doubted on appeal to the House of Lords (1841, 2 Rob. 267 ; 8 Cl. & Fin. 121), though the judgment proceeded on the ground that the law applicable was that of England. In *Findlay, Bannatyne & Co.'s Assignee* v. *Donaldson* (1864, 2 M. (H.L.) 86), compound interest was allowed in an accounting between two firms, one of which had taken over the business of the other, primarily on the ground that this was the footing on which the parties had acted, but also on the ground that compound interest was "the usual course in mercantile affairs" (see p. 105).

[5] *Jolly* v. *M'Neill*, 1829, 7 S. 666 ; *M'Lean* v. *Campbell*, 1856, 18 D. 609 ; *Napier* v. *Gordon*, 1831, 5 W. & S. 745.

[6] *Jolly* v. *M'Neill, supra.* ; *Clyde Navigation Trs.* v. *Kelvin Shipping Co.*, 1927, S.C. 622.

[7] 1875, 2 R. 752, 754.

[8] 1898, 25 R. 661 ; 1899, 1 F. (H.L.) 39.

[9] *Hawick Heritable Investment Bank* v. *Hoggan*, 1902, 5 F. 75 ; *Waugh* v. *More-Nisbett*, 1882, 19 S.L.R. 427 ; *Irving* v. *Burns*, 1915, S.C. 260.

[10] 1902, 5 F. 75.

[11] *Hawick Heritable Investment Bank, supra.* Is there any answer to the Lord Ordinary's conclusion that the pursuer had been deprived of a facility for which he had expressly stipulated, and which would have made it easier and probably less expensive to obtain a transfer of the licence ?

Damages for Dislocation of Business.—An award of nominal damages would be of little use to a pursuer, as, if he averred and failed to prove actual loss, it is conceived that he would, as a rule, be found liable in expenses.[1] But it is recognised that in commercial contracts, such as for the supply or carriage of goods, a breach of contract causes trouble and inconvenience, for which damages are due, even although, by a fortunate turn in the price of the goods, the party whose contract has been broken may have actually been the gainer. For such damages there is no legal measure.[2]

Damages where Loss Uncertain. It is a relevant defence to a claim for substantial damages if the party in breach can prove—the onus of proof being on him—that the loss would not have been averted by the fulfilment of the contract.[3] So where a trustee embezzled the trust funds, and his co-trustee was sued on the ground that he had not exercised reasonable care, the defence was successful that, considering the circumstances of the defaulter, no amount of care by the defender would have saved the funds.[4] It is also relevant to prove that the right which fulfilment of the contract would have secured must necessarily have been valueless. In *M'Lean* v. *Grant* [5] a law agent, in carrying out an adjudication, made two errors, either of which would have been fatal to the diligence. The error first in point of time, depending on a doubtful legal question, did not amount to a breach of his contract to exercise reasonable professional skill; the second error was inexcusable. It was held that as the second error, for which alone damages could be claimed, merely caused the loss of a diligence which was already invalid, no damages were due. But it is no sufficient defence to prove that the value of the right which performance would have secured depended on a contingency.[6] Where an agent neglected to complete a security, and the money was lost, an action by the principal was not met by proof that the security, if completed, would have been open to challenge on the ground that it was granted within sixty days of the debtor's bankruptcy.[7] Where a ship should have been sent to load at a port in the Black Sea, but, owing to war measures, could not have passed the Dardanelles, it was held that the charterer was entitled to damages, on the ground that if the ship had arrived he would have been able to insure against war risks and to recover under the policy of insurance, though there was no affirmative proof that he would have thought it worth while to pay the heavy premium which would have been charged.[8] So where a patent was lost through the failure of patent agents to attend to the formalities necessary to secure its renewal, it was held to be irrelevant for the defenders to aver that the patent

[1] *Ströms Bruks Aktie Bolag* v. *Hutchison, infra.*

[2] *Webster* v. *Cramond Iron Co.*, 1875, 2 R. 752; *Ströms Bruks Aktie Bolag* v. *Hutchison*, 1904, 6 F. 486; revd., on other grounds, 1905, 7 F. (H.L.) 131; *M'William* v. *Fletcher*, 1905, 13 S.L.T. 455 (sum due for trouble and inconvenience in addition to actual loss).

[3] *Millar's Trs.* v. *Polson*, 1897, 24 R. 1038; *Coldman* v. *Hill*, 1919, 1 K.B. 443.

[4] *Millar's Trs.* v. *Polson, supra.*

[5] 1805, M. App. *voce* Reparation, No. 2. Sequel reported in Bell, *Com.*, i. 490. Cp. *Hawick Heritable Investment Bank* v. *Hoggan*, 1902, 5 F. 75, narrated *supra*, p. 807. See also *Bank of Scotland* v. *Dominion Bank*, 1889, 16 R. 1081; affd. 1891, 18 R. (H.L.) 21, as to onus of proof that debt could have been paid, where by defender's fault the pursuer was deprived of the opportunity of immediate diligence.

[6] *Davidson* v. *Mackenzie*, 1856, 19 D. 226; *Bank of Scotland* v. *Dominion Bank*, 1889, 16 R. 1081; affd. 1891, 18 R. (H.L.) 21; and cases in three following notes. *Chaplin* v. *Hicks* [1911], 2 K.B. 786 (chance of winning a prize).

[7] *Stiven* v. *Watson*, 1874, 1 R. 412.

[8] *Watts, Watts & Co.* v. *Mitsui*, 1917, A.C. 227.

could have been successfully challenged on the ground of prior use.[1] That depended upon whether third parties chose to attack the patent—a contingency too remote and speculative to be taken into account.[2] But where a lessee had the right, by taking some possible but expensive measures, to put an end to the lease, it was held that his chance of availing himself of this option was an element to be taken into consideration in fixing the damages due when, on his bankruptcy, the trustee refused to adopt the lease.[3]

Elements of Damage.—Before proceeding to consider the rules which regulate the measure of damages, it may be well to indicate some elements which are not entitled to weight.

Profit made by Party in Breach.—As damages are intended as compensation for loss, it follows that it is irrelevant to consider what profit the party who has broken his contract may have made by doing so,[4] except in so far as that profit may be evidence of the profit the other party would have made had the contract been fulfilled. If *A.* undertakes to sell a particular article to *B.*, breaks his contract, and sells to *C.*, the price he obtains from *C.* will, in the normal case, be evidence from which *B.'s* loss may be calculated. But it will be open to *A.* to shew that *B.* could not have sold to such good advantage. In *Watson, Laidlaw & Co.* v. *Pott, Cassels & Williamson* [5] the question was the measure of damages for the infringement of a patent for a particular machine. It was held that it was *primâ facie* the profits made by the infringer on the sales he had effected, unless it was shewn that these sales, or some of them, could not have been effected by the pursuer.

Means of Defender.—The means of the defender, and his consequent ability to meet the damages without serious loss to himself, are, in the ordinary case, clearly irrelevant. Evidence on this point is inadmissible in actions founded on negligence,[6] and in most cases of breach of contract it would be out of the question. But probably in this, as in some other respects, an action of damages for breach of promise of marriage is exceptional, and evidence as to the defender's means is admissible.[7]

Injury to Feelings.—With an established exception in the case of a breach of promise of marriage [8] it is conceived that injury to the feelings of the party whose contract has been broken, either from the fact or the manner of the breach, are not elements to be taken into account in estimating damages. In *Addis* v. *Gramophone Co.*[9] this was laid down as a general principle, and it was held that where a servant had been wrongfully dismissed his claim for damages was limited to the sum which he would have earned had the contract been duly carried out, and was not to be enhanced on the ground that the method of dismissal was abrupt or insulting. It was pointed out by Lord Shaw that if an employer, in dismissing a servant, made charges against him which amounted to slander, the servant would be entitled to

[1] *Turnbull & Co.* v. *Cruickshank & Fairweather*, 1905, 7 F. 791.
[2] *Turnbull & Co.* v. *Cruickshank & Fairweather*, 1905, 7 F. 791.
[3] *Ebbw Vale Steel Co.* v. *Wood's Tr.*, 1898, 25 R. 439.
[4] See *Teacher* v. *Calder*, 1898, 25 R. 661; affd. 1899, 1 F. (H.L.) 39, narrated *supra*, p. 519; *Houldsworth* v. *Brand's Trs.* 1877, 4 R. 369.
[5] 1913, S.C. 762; affd. 1914, S.C. (H.L.) 18.
[6] *Black* v. *North British Rly. Co.*, 1908, S.C. 444, per Lord Guthrie (Ordinary), at p. 448.
[7] *Somerville* v. *Thomson*, 1896, 23 R. 576; *Brodie* v. *M'Gregor*, 1900, 8 S.L.T. 200; *Stroyan* v. *M'Whirter*, 1901, 9 S.L.T. 242.
[8] *Hogg* v. *Gow*, 27th May 1812, F.C.; Bell, *Prin.*, sec. 1508.
[9] [1909], A.C. 488. Lord Shaw considered the law of Scotland, holding it to be in conformity with the principles laid down, and disapproving statements in Fraser, *Master and Servant*, 2nd ed., 135.

damages for that separate wrong, but not to an increase in the damages due for the breach of contract involved in the dismissal.[1] Averments that the motives of an employer, in dismissing a servant, were malicious, are irrelevant either as a ground of damages in excess of the actual loss where the dismissal was unjustified, or as a ground of action where there is no breach of contract.[2]

Incidental Injury to Reputation. *Addis* v. *Gramophone Co.*[3] is also an authority for the proposition that no damages can be claimed for the injury to a party's reputation or credit which may, in certain circumstances, such as a sudden dismissal in the case of service, result from a breach of contract. It may be presumed that the Scotch Courts will follow this rule, but in *Cameron* v. *Fletcher*, a case of wrongful dismissal, the Sheriff's award of damages was sustained, though it exceeded the amount of wages lost, on the ground that, looking to the circumstances of the dismissal, the pursuer must have suffered some injury.[4]

Loss Due to Wrongful Disclosure.—If *A.* is bound not to reveal to *C.* the fact that the latter has a claim against *B.*, and does reveal it, with the result that *B.* is found liable to *C.*, *B.* cannot recover more than nominal damages for *A.'s* breach of contract. He may seem to have suffered a substantial loss, but that loss consists in being compelled to satisfy his legal obligation, and is not one of which the law will take account. In *Weld-Blundell* v. *Stephens*,[5] *S.* had been employed by *W.-B.* to investigate the affairs of a certain company. In a letter written to *S.*, *W.-B.* had made libellous statements regarding two of the company's officials. *S.* carelessly left the letter in the office of the company, with the result that it came to the knowledge of the officials in question. It was not in dispute that it was an implied condition of the employment of *S.* that he should exercise reasonable care, and that he had failed to do so. The officials sued *W.-B.* for libel, and were awarded damages. For the amount of these, and the expenses, *W.-B.* sued *S.*, unsuccessfully. There were other grounds of judgment, but the majority of the Court were of opinion that *W.-B.* had suffered no loss. By making libellous statements he had incurred a liability, and the mere enforcement of that liability was no loss to him. The case, it was observed, was in substance the same as if the letter had revealed to one of *W.-B.'s* creditors the existence of a debt due by him, of which the creditor had previously been unaware.[6]

[1] *Addis, supra* [1909], A.C., at p. 503. It would be competent to sue on both grounds in the same action with separate conclusions (*Mollison* v. *Baillie*, 1885, 22 S.L.R. 595).

[2] *Brown* v. *Magistrates of Edinburgh*, 1907, S.C. 256; *Addis* v. *Gramophone Co., supra.*

[3] [1909], A.C. 488.

[4] *Cameron* v. *Fletcher*, 1872, 10 M. 301, opinion of Lord Benholme. The rule in *Addis* v. *Gramophone Co.* ([1909], A.C. 488) seems to restore the original view in Scotland as to damages for wrongful dismissal, on which certain cases had impinged. In *Cooper* v. *Henderson* (1825, 3 S. 619) it was held that it was an implied term of a contract of service that the master might dismiss the servant on paying wages and board wages for the period of notice; in other words, that there was an implied provision of liquidate damages. The dicta in *Cameron* v. *Fletcher* (*supra*), *Bentinck* v. *Macpherson* (1869, 6 S.L.R. 376), and *Mollison* v. *Baillie* (1885, 22 S.L.R. 595), tended to throw doubts on this rule, which seems now to have the sanction of the House of Lords.

[5] [1919], 1 K.B. 520; affd. [1920], A.C. 956. For other questions involved in this case, see *infra*, p. 690.

[6] So held by Lords Dunedin, Sumner, and Wrenbury, and by the majority of the C.A. Lord Chancellor Finlay and Lord Parmoor, with Scrutton, L.J., in the C.A., differing on this point, and holding that while a man was bound to satisfy his legal obligations the fact that he was called upon to fulfil them at once might involve a loss which would be an item in a claim for damages. The case of a breach of confidence giving rise to an unfounded and unsuccessful claim by a third party was raised but not decided in *Mushets* v. *Mackenzie Brothers* (1899, 1 F.

Pursuer's Negligence the Immediate Cause of Loss.—A party is not entitled to recover, as damages for a breach of contract, a loss by which the immediate cause is his own wrongful or negligent act, even although the opportunity or inducement to commit the act was furnished by the breach of contract, or the injurious consequences would not have followed if the contract had been duly performed. So where *A.* wrongfully diverted water on to *B.'s* land, and *B.*, equally wrongfully, passed it to land belonging to *C.*, and was found liable in damages for doing so, *B.* could not recover what he had paid from *A.* *A.'s* conduct may have induced *B.'s* act, but the damages to which *B.* was subjected were the consequence of his own wrong.[1] Where an article is supplied for use in the hirer's or purchaser's work, on terms which imply a warranty that it is reasonably fit for its purpose, and, owing to the defective character of the article, a workman is injured, and recovers damages from his employer, it would appear that the latter cannot recover these damages for the party who supplied the article. As the award of damages to a workman imports that the injury was due to the fault or negligence of the employer, that fault or negligence is the *causa causans* of the loss for which the pursuer sues, the prior breach is only the *causa sine qua non*. If the employer settles the workman's claim, and tries to recover from the party who supplied the defective article, he is in the dilemma that, if he was not negligent, he has made a payment for which he was not liable, and which he cannot recover; if he was negligent, his negligence was the real cause of his loss.[2]

Obligation to Minimise Loss.—A principle which underlies all rules relating to the measure of damages is that a party whose contract has been broken is bound to take all reasonable means to minimise the resulting loss, and cannot recover more than the amount which the adoption of such means would have failed to avert. So where a buyer delays to purchase the goods with which he ought to have been supplied, and the price continuously rises, he cannot demand more than the loss he would have sustained if he had bought at once.[3] Dealing with the analogous case of a resale, where the buyer refused to take delivery, Lord President Inglis said: "A seller is certainly not entitled to speculate either for himself or for any

756). *A.* furnished *B.* with particulars of the character of a workman. *B.* shewed these to the workman, who, considering them defamatory, sued *A.* for damages. His action was unsuccessful. *A.* then brought an action against *B.*, claiming, as damages, the expenses he had incurred beyond those allowed by the auditor. *B.* was assoilzied, but the question of the legitimacy of the item of loss was not considered. The Lord Justice-Clerk based his opinion on the ground that extrajudicial expenses could never be recovered from anyone; the other judges held that *B.* had not engaged to keep the information secret, and there was, therefore, no breach of contract on his part.

[1] *Scouller* v. *Robertson*, 1829, 7 S. 344.

[2] *Wood* v. *Mackay*, 1906, 8 F. 625. The case related to an accident resulting from defective ropes, used as slings in unloading a ship, and it was held that the party who supplied the ropes had not warranted that they were reasonably fit for their purpose. But the Lord President (Dunedin), who gave the leading opinion, explained that even if there had been a warranty the sum awarded to the injured workman could not be recovered from the party who supplied the ropes, questioning the dicta, and, it is submitted, the grounds of decision, in *Mowbray* v. *Merryweather* [1895], 2 Q.B. 640. The decision of Lord Kincairney (Ordinary) in *Baxter* v. *Boswell*, 1899, 6 S.L.T. 278 (which was not cited), seems irreconcilable with Lord Dunedin's opinion.

[3] *Warin & Craven* v. *Forrester*, *infra*; *Ireland & Son* v. *Merryton Coal Co.*, 1894, 21 R. 989; *Duff & Co.* v. *Iron and Steel Fencing Co.*, 1891, 19 R. 199, per Lord M'Laren, at p. 204. So if the buyer fails to take delivery the damages are measured by the difference between the contract price and the market price at the date when delivery should have been taken. If the seller in fact retains the goods, he gets no more, though the price continues to fall; he gets no less, though the price rises, and he may lose nothing by the buyer's breach of contract (*Jamal* v. *Moola, Dawood & Co.* [1916], A.C. 175).

other party. He is not entitled to consider his own interest. He must resell whatever the state of the market, and it is only if he immediately does so that he can charge the difference between the contract and the market price against the buyer." [1] Where perishable goods are sent in a state which justifies their rejection, the buyer is certainly within his rights probably only fulfils his legal obligation to minimise the loss if he sells them at once instead of sending them back to the buyer.[2] On the same principle a servant improperly dismissed is bound to seek other employment, and can recover, as damages, the full amount of his loss only if no other employment was attainable.[3] To borrow an illustration from a case where damages were claimed for a wrong: where a ship was injured by a collision, and her owners (the Admiralty) repaired her in their own dock, it was held that they could not recover from the ship responsible for the collision more than would have been charged by other repairing docks.[4] And where goods supplied are defective, the purchaser is bound to take reasonable care to examine them before use, and cannot recover damages for a loss which such care would have averted. So where the wrong kind of cabbage seed was supplied to a market gardener, and he sold the young plants without discovering the mistake, it was held that he could not hold the seller responsible for the damages which he had to pay to his customers, because a reasonably careful market gardener would have discovered, by inspection of the young plants, that they were of the wrong kind.[5]

A party whose contract has been broken is not bound to make extraordinary exertions to minimise the loss. The purchaser cannot be expected to supply himself with goods if they can only be obtained with difficulty and in remote markets.[6] A shipowner, when the charterer fails to supply a cargo, does enough if he makes reasonable efforts to obtain cargo elsewhere.[7] Where a buyer could have minimised the loss due to the seller's failure by taking legal measures to enforce his rights against parties to whom he had resold, but, in the particular circumstances, such a course would have had an injurious effect on his commercial reputation, it was found that he was under no obligation.[8] And generally the onus of proving that the best available means to minimise the loss were not taken rests on the party who has broken his contract and is seeking to escape from the consequences. It is not enough to shew that in the light of subsequent events a different course of action would have been preferable. "I think the wrongdoer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after events that another course might have saved loss." [9] In *Connal, Connal & Co.* v. *Fisher, Renwick & Co.*[10] *A.* undertook to convey goods from Newcastle to Montreal, and failed to provide a ship. It was then too late in the year to arrange for their transmission directly. They were sent by another

[1] *Warin & Craven* v. *Forrester*, 1876, 4 R. 190, at p. 193; affd. 1877, 4 R. (H.L.) 75.
[2] *Pommer & Thomsen* v. *Mowat*, 1906, 14 S.L.T. 373.
[3] *Ross* v. *Macfarlane*, 1894, 21 R. 396.
[4] *Admiralty* v. *Aberdeen Steam Trawling Co.*, 1910, S.C. 553.
[5] *Wilson* v. *Carmichael & Sons*, 1894, 21 R. 732; *Carter* v. *Campbell*, 1885, 12 R. 1075 (failure to examine seed before sowing).
[6] *Gunter & Co.* v. *Lauritzen*, 1894, 31 S.L.R. 359.
[7] *Henderson & Co.* v. *Turnbull & Co.*, 1909, S.C. 510, per Lord Ardwall, at p. 520.
[8] *Finlay & Co. Ltd.* v. *Kwik Hoo Tong* [1929], 1 K.B. 400.
[9] Per Lord Collins, *Clippens Oil Co.* v. *Edinburgh Water Trs.*, 1907, S.C. (H.L.) 9. See "*Baron Vernon*" v. "*Metagama*," 1927, S.C. 498; affd. 1928, S.C. (H.L.) 21.
[10] 1883, 10 R. 824.

route, at a cost more than four times what *A.* had agreed to accept. It was held that *A.* was liable for the actual expense incurred by the shippers, unless he was able to prove affirmatively that some other and less expensive method of transport was available. If measures taken to minimise the loss due to a breach of contract occasion expense, the party in breach will be liable for it if and in so far as the loss has been reduced.[1] An offer to perform the contract on altered terms, if refused, and if in the circumstances a reasonable man would have accepted it, may reduce the damages to a nominal sum.[2]

Limits of Amount of Damages.—Assuming that a party has taken all reasonable means to minimise the consequences of a breach of contract, it does not follow that he will necessarily be entitled to recover his loss, or the whole of it. His claim may be limited on two grounds: (1) that the loss is too remote a consequence of the breach of contract: or (2) that though the loss is the direct result of the breach, yet it arises from some exceptional circumstances, of which the party in breach was not aware, and the effect of which he could not be expected to foresee. In the first case the defender in effect pleads that no one could have foreseen the results which have followed his breach of contract; in the second that he had not the information which would have enabled him to foresee them.

Loss too Remote.—It would seem impossible to formulate any exact rule as to the degree of remoteness in the chain of cause and effect which will save the perpetrator of a breach of contract from liability for a consequence of which it may be said, negatively, that it would not have happened if the contract had been duly implemented.[3] It by no means follows that it can be stated, affirmatively, that the breach of contract is the cause. To say that the measure of damages is "the estimated loss directly and naturally resulting in the ordinary course of events"[4] from the breach of contract, is simply to state in other words that the consequence must not be too remote. A full discussion of this subject, involving the consideration of many cases dealing with the ordinary or remote consequences of wrongful acts, is beyond the scope of the present work.[5] It may be suggested as a rule which will cover many of the cases that if the loss of which the pursuer complains is due to several causes, of which the defender's breach of contract is one, the defender will not be liable for it unless the co-existence of the other causes, and their cumulative effect, should have been within the contemplation of a reasonable man who was considering whether it would be to his advantage to break his contract or not. And the authorities seem to approach, if they have not reached, the conclusion that a loss is too remote a consequence of a breach of contract (or of negligence) if its direct cause is the act of a third party, and that act is a deliberate wrong, as distinguished from mere negligence, or from wrongs due to thoughtlessness. So where a letter was left in the office of a company, and no loss would have resulted unless the manager had read it and shewed it to parties whose character it impugned, the majority in the House of Lords were of opinion

[1] *Cazalet* v. *Morris*, 1916, S.C. 952.

[2] *Ross* v. *Macfarlane*, 1894, 21 R. 396; *Brace* v. *Calder* [1895], 2 Q.B. 253; *Payzu Ltd.* v. *Saunders* [1919], 2 K.B. 581.

[3] For judicial attempts to formulate a rule, see *Hobbs* v. *London and South-Western Rly. Co.*, 1875, L.R. 10 Q.B. 111, per Cockburn, J., at p. 117; *Dulieu* v. *White* [1901], 2 K.B. 669, per Kennedy, J., at p. 678; per Lord Justice-Clerk Hope, in *Houldsworth* v. *British Linen Co.*, 1850, 13 D. 376, at p. 383.

[4] Sale of Goods Act, 1893, secs. 50, 51, 53.

[5] See Mayne, *Damages*, 10th ed., 42.

that as the manager's act was deliberately wrongful its consequences could not form an item in a claim for damages against the party responsible for leaving the letter.[1]

Illustrative Cases. Where *A.*, who had agreed to pasture *B.'s* horse, placed in the same field a horse suffering from glanders, and *B.*, noticing that his horse was unwell, but not knowing the cause, placed it in his own stable where there were two other horses, with the result that they were infected and died, it was held that the death of these two horses was a result arising sufficiently directly from *A.'s* breach of contract, in subjecting the first horse to infection, to entitle *B.* to claim their value from *A.*[2] In another and a very remarkable decision *A.* hired a horse on terms which made it a breach of contract to gallop it. He did gallop it, with the result that it was lamed. It subsequently died from inflammation of the bowels. The Court arrived at the conclusion, in the teeth of any expert evidence that was led, that the want of exercise consequent on lameness must have caused the illness of the horse, and found *A.* liable.[3] Where a newspaper undertook to recommend a reliable stockbroker, and recommended a man who was an undischarged bankrupt and not a member of the Stock Exchange, it was held that embezzlement on his part was a consequence for which the newspaper was liable.[4] Where a bank was employed to present a bill for payment, and returned it protested for non-payment, but had in fact failed to present it within business hours, and the creditor in the bill sequestrated the effects of the debtor, and was ultimately found liable in damages for wrongous sequestration, it was held, on the assumption that the sequestration was a reasonable step had the bill been really dishonoured, that the damages found due by the creditor, and the expenses he incurred in defending the action, should be regarded as direct consequences of the bank's breach of their contract to present the bill regularly, and could therefore be recovered.[5] Where the wrong kind of seeds is supplied, the seedsman is liable for the loss of the crop, and for any damages the purchaser may incur by supplying the wrong kind of plant (if he do so without negligence),[6] but not for the secondary consequence of injury to stock due to the want of the turnips which would have been secured if the proper kind of seed had been supplied.[7] Where a railway company landed the passenger at a wrong station, and the passenger, compelled to walk home on a wet night, caught cold, it was held that this physical injury was too remote a consequence of the company's breach of contract to admit of any allowance of damages for it.[8] But this case has been doubted in *Macmahon* v. *Field*,[9] where it was held that an innkeeper, who had contracted to supply stabling for horses, and, having no room, placed them in a yard, was responsible for the injury caused by their catching cold, as a natural and probable consequence of his conduct. Where

[1] *Weld-Blundell* v. *Stephens* [1920], A.C. 956, Finlay, L.C., and Lord Parmoor dissenting. And see *supra*, p. 687; *Marshall* v. *Caledonian Rly. Co.*, 1899, 1 F. 1060, where a railway company, in carrying out work, had left a hole which made theft possible, and were found liable when theft occurred, seems irreconcilable. And see opinion of Scrutton, L.J., in *Polemis and Furness, Withy & Co., in re* [1921], 3 K.B. 560, as to the course of judgments in the House of Lords. As to thoughtless and impulsive wrongs by a third party, see *Scott's Trs.* v. *Moss*, 1889, 17 R. 32, approved by Lord Dunedin in *Weld Blundell*.

[2] *Robertson* v. *Connolly*, 1851, 13 D. 779. Cp. *Smith* v. *Green*, 1875, 1 C.P.D. 92.

[3] *Seton* v. *Paterson*, 1880, 8 R. 236.

[4] *De La Bere* v. *Pearson* [1908], 1 K.B. 280.

[5] *Houldsworth* v. *British Linen Co.*, 1850, 13 D. 376.

[6] *Wilson* v. *Carmichael & Sons*, 1894, 21 R. 732. [7] *Taylor* v. *Sharp*, 1868, 6 S.L.R. 95.

[8] *Hobbs* v. *London and South-Western Rly. Co.*, 1875, L.R. 10 Q.B. 111.

[9] 1881, 7 Q.B.D. 591.

a retail dealer is supplied with a defective article, and, in ignorance of the defect, supplies it to his customers, the question whether the resulting injury to his business reputation is a sufficiently direct result of the breach of contract to entitle him to damages from the party who supplied it was left open in a case in Scotland,[1] and has been decided in the affirmative in England.[2]

Measure of Damages: Question for Court or Jury.—In attempting to state the rules with regard to the measure of damages, it may be premised that there are many cases where the amount of damages is merely a question for the jury, or for a judge exercising the functions of a jury. Thus if a breach of contract results in physical injury, as where a tenant suffers in health from the landlord's failure to maintain the house in a tenantable condition, there is no rule of law to supply a measure of the damages due for his sufferings. And the same remark applies to the case where damages are awarded for the loss and inconvenience resulting from the non-fulfilment of a mercantile contract.[3] And there may be cases where a particular thing is lost by the breach of contract, but there may be no means of estimating, except generally and approximately, the interest of the pursuer in possessing that thing. So where a lighter in a harbour was damaged, and replaced by a spare lighter kept for such emergencies, the argument that the harbour authorities had suffered no loss beyond the expense of repairs was repelled, but it was held that the amount due for the deprivation of the use of the lighter was purely a jury question.[4]

But while there are still many cases where the amount of damages must be little better than guesswork, the tendency of modern cases has been to hold that an award should be governed by rules of law, and not by unfettered judicial discretion. So it was laid down, in a case arising from the infringement of a patent, that it is the duty of a judge of first instance to state the grounds on which he arrives at the amount of damages which he awards.[5] There was some authority, no longer to be relied upon, to the effect that the law of Scotland was exceptional in this matter, and refused to recognise that an award of damages could be regulated by any fixed rules. In *Watt* v. *Mitchell* [6] the Court declined to admit that there was any rule that where a seller failed to supply goods which could be obtained in the open market the measure of damages for the want of the goods was the difference between the contract price and the price ruling at the date of refusal to deliver. Founding mainly on this case, and on an elaborate opinion given by Lord Medwyn,[7] Lord Chancellor Cottenham, in *Dunlop* v. *Higgins*,[8]

[1] *Millar* v. *Bellvale Chemical Co.*, 1898, 1 F. 297. See also *Dempster* v. *Wallace, Hunter & Co.*, 1833, 12 S. 548.

[2] *Cointat* v. *Myham* [1913], 2 K.B. 220, per Lord Coleridge, J. See also *Bostock* v. *Nicholson* [1904], 1 K.B. 725.

[3] See *supra*, p. 685.

[4] *The "Mediana"* [1900], A.C. 113. Cp. *Chaplin* v. *Hicks* [1911], 2 K.B. 786. Opinions in *Clydebank Engineering Co.* v. *Castaneda*, 1904, 7 F. (H.L.) 77, narrated *supra*, p. 678.

[5] *Watson, Laidlaw & Co.* v. *Pott, Cassels & Williamson*, 1913, S.C. 762.

[6] 1839, 1 D. 1157. See also *Baird* v. *Reilly*, 1856, 18 D. 734; *Garrow* v. *Forbes*, 1866, 2 S.L.R. 203. As to the application of technical rules recognised in England, see opinion of Lord President Clyde in *Duke of Portland* v. *Wood's Trs.*, 1926, S.C. 640, 651; affd. 1927, S.C. (H.L.) 1.

[7] Lord Medwyn (1 D., at pp. 1161-67) says that such a rule would be a temptation to dishonesty, making it to the advantage of a seller, who had sold in a rising market, to repudiate his bargain. But this is a mistake. On the assumption, on which his argument proceeds, that the goods could be readily bought, the seller could make nothing by repudiating his bargain. He would have to pay as damages the difference between the price and the market price of the goods. He could place himself in exactly the same position by supplying the goods, and applying the price in a purchase of a new supply of the same goods.

[8] 1848, 6 Bell's App. 195.

stated the law of Scotland to be that the jury were entitled to look into all the circumstances, for the purpose of measuring the damages. But this dictum, which as a general rule in cases of sale is clearly inconsistent with the provisions of the Sale of Goods Act, 1893,[1] has been definitely rejected by the House of Lords in a case where damages were claimed against a shipowner for failure to supply a ship for the transport of goods.[2]

Before entering on the question how far notice of the probable effects of a breach of contract enlarges the elements or items of loss for which damages may be claimed, it may be well to consider, in comparatively simple cases, on what basis the loss for which the defender is admittedly or clearly responsible is calculated in money.

Failure to Supply Goods.—Where the breach of contract consists in failure to supply goods which have been bought, the rule for estimating the amount of damages is in many cases supplied by the Sale of Goods Act, 1893. "Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."[3] And as a buyer is entitled to reject goods which are materially disconform to contract, and treat the contract as repudiated, the same measure of damages will apply when he elects to take this course.[4]

It has been held in England that this general rule applies, even where the buyer has not sustained loss to the extent of the difference between the contract price and the price at the date of failure to deliver, owing to the fact that he has meanwhile resold the goods at an intermediate price.[5] So where *A.*, in June 1910, sold coal for delivery to *B.* in November 1911 at 16s. 3d. per ton, *B.* resold it to *C.* at 19s., and at the end of November 1911, when *A.* failed to deliver, the price was 23s. 6d., it was held that *B.* was entitled to recover from *A.* the difference between the contract price—16s. 3d.—and the price at the date of failure to deliver—23s. 6d.—not merely the amount he had actually lost, *i.e.*, the difference between the contract price and the price at which he had resold.[6] The principle of the rule is that the value of the goods, in estimating damages, is to be considered independently of any circumstances peculiar to the individual parties; and as the seller would not be liable for any exceptional loss his failure might cause to the particular buyer, so he is not relieved because to that particular buyer the loss happens to be less than it would be in the normal case. It would appear, though the law is not free from doubt, and the application of the English rules to Scotland at least questionable, that if the seller's failure is in respect of time of delivery the terms of a sub-sale, if entered into before the goods arrive, may be taken into account in determining the measure of damages.[7] And if the seller knows that there is a reasonable

[1] 56 & 57 Vict. c. 71, sec. 51.

[2] *Ströms Bruks Aktie Bolag* v. *Hutchison*, 1904, 6 F. 486; revd. 1905, 7 F. (H.L.) 131.

[3] 56 & 57 Vict. c. 71, sec. 51 (3). This is only the general and *primâ facie* rule. It does not exclude a claim for trouble and inconvenience caused by the breach of contract (*M'William* v. *Fletcher*, 1905, 13 S.L.T. 455).

[4] *Ibid.*, sec. 11 (2).

[5] *Rodocanachi* v. *Milburn*, 1886, 18 Q.B.D. 67. Reaffirmed in the House of Lords, *Williams Brothers* v. *Agius* [1914], A.C. 510.

[6] *Williams Brothers* v. *Agius, supra.*

[7] *Wertheim* v. *Chicoutimi Pulp Co.* [1911], A.C. 301 (J.C.); opinion of Lord Dunedin in *Williams Brothers* v. *Agius, supra.* Doubts whether this rule has any logical foundation were expressed in *Slater* v. *Hoyle & Smith* [1920], 2 K.B. 11.

probability that the buyer will resell the goods, or part of them, before they arrive, the measure of damages will be the difference between the contract price and the price in the contract by which the goods have been resold.[1]

The general rule assumes that the buyer stands strictly upon his legal rights, it is not applicable to the case where the seller asks for time, and the buyer, expressly or impliedly, assents. The damages are then measured by the price ruling when the request for time is withdrawn, or when the buyer intimates that his patience is exhausted.[2]

Failure in Instalment. Where the contract is for delivery by instalments, and the seller has failed either completely or partially, the measure of damages is, with regard to each instalment, the difference between the contract price and the price ruling on the last day on which delivery might have been made.[3]

Where no Available Market.—The general rule that damages for the want of goods sold are to be estimated by the difference between the contract price and the price ruling at the time of failure is applicable only in cases where there is an available market for the goods. This means where the goods can be obtained elsewhere without exceptional difficulty to the buyer. It was held there was no available market by which to estimate the damages in a case where the goods were not attainable at the place of delivery (Aberdeen), but could have been obtained in small parcels at Leith and Dundee.[4]

In cases where a specific thing is sold which cannot be obtained in any available market, the damages for failure to supply it may not admit of exact estimation. If the buyer can prove that he made a good bargain, he may recover the difference between the contract price and the proved value of the thing.[5] Where the goods are known to be required for resale, the general rule is that the buyer, whose opportunity of resale is lost by the failure of the seller, is entitled to recover a reasonable commercial profit. If a manufacturer fails to supply specific articles of an ascertained value to a shopkeeper, he will generally be liable for the profit which the shopkeeper would have made on the probable amount of retail sales.[6] But where that profit would have been exceptionally large, and due to circumstances of which the seller had no notice, the damages were estimated at a sum calculated as approximately equal to the ordinary profit on a venture such as that in which the buyer was engaged.[7]

Refusal to Accept Goods.- Similar rules govern the measure of damages where the buyer wrongfully refuses to accept the goods.[8] But it may be noted that if the property in the goods has passed to the buyer under the contract of sale, or where the price is payable on a day certain irrespective of delivery, the seller may maintain an action for the price.[9]

[1] *Hall Ltd.* v. *Pim*, 1927, 33 Com. Cas. 324 (H.L.). See comments in *Finlay & Co. Ltd.* v. *Kwik Hoo Tong*, 1928 [1929], 1 K.B. 400.

[2] *Ogle* v. *Earl Vane*, 1868, L.R. 3 Q.B. 272; *Hickman* v. *Haynes*, 1875, L.R. 10 C.P. 598.

[3] *Ireland & Son* v. *Merryton Coal Co.*, 1894, 21 R. 989; *Dunn* v. *Anderston Foundry Co.*, 1894, 21 R. 880. For the converse case—wrongful failure to accept delivery of instalments—see *Acton Hall Colliery Co.* v. *Taylor*, 1896, 3 S.L.T. 375; *Brown* v. *Muller*, 1872, L.R. 7 Ex. 319.

[4] *Gunter & Co.* v. *Lauritzen*, 1894, 31 S.L.R. 359; *Marshall* v. *Nicoll*, 1919, S.C. 244; 1919, S.C. (H.L.) 129.

[5] *Anderson* v. *Croall & Sons*, 1903, 6 F. 153.

[6] *Millar* v. *Bellvale Chemical Co.*, 1898, 1 F. 297.

[7] *Duff & Co.* v. *Iron and Steel Buildings Co.*, 1891, 19 R. 199. See *Carswell* v. *Collard*, 1892, 19 R. 987; affd. 1893, 20 R. (H.L.) 47 (failure to supply ship; estimated profits allowed as damages).

[8] Sale of Goods Act, 1893, sec. 50; *Warin & Craven* v. *Forrester*, 1876, 4 R. 190; affd. 1877, 4 R. (H.L.) 75; *Govan Rope and Sail Co.* v. *Weir & Co.*, 1897, 24 R. 368.

[9] Sale of Goods Act, 1893, sec. 49.

Supply of Defective Goods.—Where goods or work are disconform to contract, but are nevertheless accepted, the general measure of damages is the difference between the value of the goods as delivered, or the work as done, and the value they or it would have had if conform to contract.[1] So where a ship was built of a less carrying capacity than that stipulated for, the measure of damages was the difference between her actual and expected earning power.[2] Where a tenant fails to restore the subjects in the condition agreed upon the landlord is entitled, as damages, to the expense of the operations or repairs necessary. It is no objection that the value of the subjects is so small that by leaving them in their defective state the landlord may make a profit.[3]

Injury from Use of Defective Article.—A defective article, however, if put to its ordinary use, may cause injury to the person or property of the user, and injury so resulting may have no relation to the value of the article, and may exceed it to an indefinite extent. But such injury must be presumed to have been within the contemplation of the party who supplies it, and will be recoverable as damages. So a landlord is liable for injury to the tenant's health arising from the defective state of the house.[4] And in the cases where the ground of action has been that a seller has failed to supply goods reasonably fit for the particular purpose disclosed by the buyer,[5] or has failed to supply goods of merchantable quality,[6] injury to the buyer's person or property resulting from the use of the goods in question has been held to be recoverable.[7] It seems doubtful whether there is any limit: the authorities supply no definite answer to the question whether a marine store dealer, who has supplied an anchor with a latent flaw, and therefore not of merchantable quality, is liable for the whole value of the ship, in the event of her loss being due to the breaking of the anchor.

Failure to Carry Goods.—In contracts of affreightment, if the shipowner fails to supply a ship, and other means of transport are available, the measure of damages is the extra rate of freight, if any, which the charterer has to pay.[8] If there are no other means of transport, the charterer is entitled to supply himself with similar goods at the port of delivery, and the measure of damages is the difference between the cost of the goods, including the freight, and expenses of insurance, if the contract had been duly performed, and the extra cost involved in procuring similar goods at the time and place of delivery.[9] If, on the other hand, the charterer wrongfully fails to supply a cargo, the shipowner is entitled to the difference between the freight agreed upon and the freight which in the circumstances he is able to obtain.[10] In cases of short shipment the damages (known as dead freight) are the amount

[1] Sale of Goods Act, 1893, sec. 53; *Electric Construction Co.* v. *Hurry & Young*, 1897, 24 R. 312, per Lord Kinnear, at p. 325; *Lesly* v. *Guthrie*, 1670, M. 3148 (goods damaged in transport). The measure of damages is not effected by the fact that the buyer has been able to resell the defective article at a price which saves him from all loss (*Slater* v. *Hoyle & Smith* [1920], 2 K.B. 11).

[2] *Gillespie & Co.* v. *Howden & Co.*, 1885, 12 R. 800.

[3] *Allan's Tr.* v. *Allan & Sons*, 1891, 19 R. 215; *Duke of Portland* v. *Wood's Trs.*, 1926, S.C. 640; affd. 1927, S.C. (H.L.) 1.

[4] *Dickie* v. *Amicable Property Investment Co.*, 1911, S.C. 1079.

[5] *Preist* v. *Last* [1903], 2 K.B. 148; *Duke* v. *Jackson*, 1921, S.C. 302; and see *supra*, p. 312, note 1.

[6] *Supra*, p. 313, note 2.

[7] *Supra*, p. 313, note 2.

[8] *Connal, Connal & Co.* v. *Fisher, Renwick & Co.*, 1883, 10 R. 824.

[9] *Ströms Bruks Aktie Bolag* v. *Hutchison*, 1904, 6 F. 486; revd. 1905, 7 F. (H.L.) 131; *Watts, Watts & Co.* v. *Mitsui* [1917], A.C. 227.

[10] *Dunford & Elliot* v. *Macleod & Co.*, 1902, 4 F. 912.

of freight beyond that actually earned that would have been earned had a full shipment been supplied, deducting from that amount any extra expense to which the shipowner would have been put if the whole cargo had been shipped.[1]

Direct and Consequential Damages.—The cases so far cited have related to the question how the immediate and obvious loss resulting from a breach of contract may be estimated in money. In them the ruling consideration was to discover the amount of loss necessarily resulting to the party whose contract has been broken. But the consequences of a breach of contract may be far-reaching; it may involve loss in a particular case which would not usually follow from a similar breach in the majority of cases. Then the reimbursement of the injured party is no longer the sole consideration; it comes in conflict with the equally general principle that it is unfair to saddle a contracting party, even although he may have broken his contract, with consequences which could not reasonably have been in his contemplation at the time he entered into the contract, and which, if realised, might have led him to elect not to enter into the contract rather than to run the risk. In such cases a distinction, never more than approximate, may be drawn between the items of loss which may be said to flow naturally from the breach of contract, and the items which, though they have actually resulted, may be ascribed to the exceptional circumstances of the particular case.

Rule of *Hadley* v. *Baxendale*.—For the general rule as to the items of damage for which a party who has broken his contract may be held responsible the following extract from an opinion of the Court of Exchequer in *Hadley* v. *Baxendale*[2] has been constantly referred to in Scotland[3] as well as in England: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

This passage distinguishes the two classes of loss which may directly

[1] *M'Lean & Hope* v. *Fleming*, 1871, 9 M. (H.L.) 38; *Henderson & Co.* v. *Turnbull & Co.*, 1909, S.C. 510.

[2] 1854, 9 Ex. 341, *per curiam*. See explanation in *Hammond* v. *Bussey*, 1887, 20 Q.B.D. 79, and Mayne, *Damages*, 10th ed., 10. The rule was anticipated by Pothier (*Obligations*, sec. 162; *Vente*, sec. 73).

[3] *Duff & Co.* v. *Iron and Steel Fencing Co.*, 1891, 19 R. 199.

result from a breach of contract (1) loss which may be called ordinary or generic, which would follow in the majority of cases from a similar breach of a similar contract; and (2) loss spoken of as special, consequential, or collateral, which would not have resulted had not the circumstances been exceptional. In a negative form the rule is that a party is not liable for consequential damages unless he had notice at the time of contracting that the circumstances were exceptional. It may perhaps be stated shortly that a party who breaks his contract is liable for those consequences which a reasonable man, possessing the knowledge which the party had at the time of contracting, would have anticipated.[1]

Cases of Ordinary Damage.—The following cases illustrate the law as to ordinary or generic damages, indicating the character of the results which a reasonable man should expect to ensue from a breach of his contract, where he has no notice that any exceptional loss is likely to be caused:—

Loss of Sub-Contract.—A party who fails to carry or supply goods according to his contract should anticipate the possibility that the goods may be required to fulfil a sub-contract by which the other party may have disposed of them, with the result that that other party may be forced to buy at once, or, where the goods cannot be obtained, may be liable in damages on his sub-contract. And he will be liable for damages found due on that sub-contract, and for loss of profit thereon, provided that neither damages nor profit were exceptional.[2] This really follows from the general rule, already explained, that the ordinary damages for failure to supply goods should be calculated by the difference between the contract price of the goods, and the price at which they can be obtained at the time of failure to deliver, or, if they cannot be obtained, their value as at the time and place fixed for delivery. Of that difference in price or value the amount payable as damages for failure in a sub-contract is evidence, assuming that the sub-contract contains no exceptional terms. So it would appear that unless the pursuer in an action of damages has limited his claim by his pleadings to the actual loss he has sustained on his sub-contract, the defender will gain nothing by proving that, owing to a variance in terms in the original contract and the sub-contract, the breach of the latter did not directly result

[1] In *Polemis and Furness, Withy & Co., in re* ([1921], 3 K.B. 560) a different rule was applied to the case where the claim for damages was founded on negligence. It was held that the party in fault was liable for any injury directly traceable to the negligent act, and not due to the operation of independent causes, however unexpected and exceptional that injury might be. So where a stevedore's workman let a plank fall into the hold of a ship, and in some unexplained way ignited petrol vapour so that the ship was burned, the stevedore, as responsible for his labourer's negligent act, was found liable for the value of the ship. *Hadley* v. *Baxendale* (*supra*) was not cited, and the action was treated as one based solely on negligence, although, it would seem, it involved breach of contract, in respect that a stevedore contracts that the workmen he employs shall take reasonable care. No reasons are given why a different rule should hold in cases of negligence from that established in cases of a breach of contract. As in contract the party might have provided for any exceptional loss, so in cases of negligence the negligent party, had he been aware of the exceptional danger, might have taken more care. It is not yet decided whether the Scotch Courts will follow the decision in *Polemis*. In *Malone* v. *Cayzer, Irvine & Co.* (1908, S.C. 479), Lord President Dunedin approved of a dictum of Collins, M.R., in *Dunham* v. *Clare* ([1902], 2 K.B. 292), to the opposite effect—a dictum which in *Polemis* was cited and rejected. In *Golder* v. *Caledonian Rly.* (1902, 5 F. 123) Lord Kinnear said, p. 126, "if liability were said to be the result of wilful wrongdoing, it might be quite relevant to inquire what an ordinarily prudent man would have contemplated as the probable consequence of his action." All these cases related to claims under the Workmen's Compensation Act.

[2] *Ströms Bruks Aktie Bolag* v. *Hutchison*, 1904, 6 F. 486; revd. 1905, 7 F. (H.L.) 131; *Keddie, Gordon & Co.* v. *North British Rly. Co.*, 1886, 14 R. 233. See, as to a seller's failure to deliver, *supra*, p. 693.

from the breach of the former. In *Ströms Bruks Aktie Bolag* v. *Hutchison*,[1] *A.* undertook to supply *B.* with a ship for the carriage of wood pulp from Sweden to Cardiff. He failed to supply it, and no other means of carriage were available. The charterer (*B.*) had contracted to sell pulp for delivery at a certain date to a third party. As owing to *A.'s* failure to provide a ship he was unable to deliver, the third party bought wood pulp elsewhere, and recovered the difference between the contract price and the cost from *B.* For this amount *B.* sued *A.* The defender was able to shew that, while keeping within the terms of his contract, he might have delivered too late to enable *B.* to fulfil his sub-contract, and, on this ground, it was held in the Court of Session that he was liable only for a small sum for the general trouble and inconvenience occasioned. In the House of Lords it was decided that even assuming that *A.'s* failure to provide a ship was not necessarily the direct cause of *B.'s* failure to fulfil his sub-contract, still *B* was entitled to recover from *A.* the difference between the cost to him of wood pulp duly delivered at Cardiff and the cost of obtaining it there, and that difference was the sum sued for. *B.*, it was pointed out by Lord Macnaghten, was not claiming exceptional damages. He was claiming "nothing but ordinary damages ascertained and limited by the special circumstances of the case."[2]

Sub-Contract on Exceptional Terms. But a carrier or seller is not bound to anticipate that goods are required to fulfil a sub-contract containing exceptional terms, and therefore in the ordinary case he will not be liable for any exceptional damages which may be incurred, or for the loss of any exceptional profit which the fulfilment of the sub-contract would have produced. He will not, for instance, be responsible should the sub-contract contain a clause involving penalties for delay in delivery.[3] Where *A.* had a contract for the supply of boots for the French Army at an exceptionally high price, and the contract was lost owing to the delay of a railway company in forwarding the boots, it was held they were not liable for the profit which *A.* would have made.[4] Where goods of a special kind were ordered for the purpose of retailing them, and were rejected as disconform to contract, it was held that the proper measure of damages was the reasonable amount of profit to be expected on such a venture, and that proof that retail contracts had been made on exceptionally profitable terms would not have increased the liability of the manufacturers.[5] Where *A.* had ordered goods from *B.*, and had resold a larger quantity, and the result of *B.'s* failure was that he could not fulfil his contract, he was not entitled to recover from *B.* his whole loss.[6]

Expense Reasonably Incurred. The expenses actually incurred in consequence of a breach of contract may be recovered, subject to the condition that they must be expenses which would have been incurred by a reasonable man. Where a train missed a connection, and a passenger took a special train to his destination, the test applied to the question whether he could recover the expense from the railway company (assuming that they had guaranteed the connection) was whether an ordinary and reasonable man would in the particular circumstances have incurred that expense if he had

[1] 1904, 6 F. 486; revd. 1905, 7 F. (H.L.) 131.
[2] 7 F. (H.L.), at p. 135.
[3] *Elbinger Gesellschaft* v. *Armstrong*, 1874, L.R. 9 Q.B. 473; *Grébert-Borgnis* v. *Nugent*, 1885, 15 Q.B.D. 85.
[4] *Horne* v. *Midland Rly. Co.*, 1872, L.R. 7 C.P. 583.
[5] *Duff & Co.* v. *Iron and Steel Fencing Co.*, 1891, 19 R. 199.
[6] *Dunlop* v. *M'Kellar*, 31st May 1815, F.C.

known that he had no recourse.[1] Where a machine was supplied and proved disconform to contract, and the purchasers rejected it and replaced it by a new one of a more efficient kind, it was held, on proof that it was cheaper to purchase the new machine than to go on working with the deficient one, that they were entitled to recover the price of the new machine, but as it was more efficient than the old one would have been even if it had been conform to contract, they were bound to allow for the advantage which the new machine gave them.[2]

Litigation with Third Parties. The expenses of litigation with third parties may be recoverable as the ordinary and natural consequence of a breach of contract if the litigation was in the circumstances reasonable. If *A.* fails to supply goods which *B.* has undertaken to supply to *C.*, *B.* would not be justified in incurring legal expenses in defending an action at *C.'s* instance and charging these expenses as part of the damages due by *A.*, if he knew, or should have known, that his defence was hopeless.[3] But *A.* will be liable if his conduct in the matter gave *B.* reasonable grounds for believing that his defence to *C.'s* action was maintainable.[4] In *Munro & Co.* v. *Bennett & Son*,[5] *A.* ordered from *B.* a pump, which he had undertaken to supply to a county council. The pump did not work satisfactorily, and the county council intimated rejection. Acting on *B.'s* assurance that the pump was conform to contract, *A.* brought an action for the price, and settled it on discovering that he was wrong on the merits. It was held that he might recover the expenses he had incurred from *B.*, on the ground that, in the circumstances, the attempt to recover the price was reasonable, and therefore that the expenses resulted directly from *B.'s* breach of contract. In *Agius* v. *Great Western Colliery Co.*[6] *A.* failed to supply coals at the time fixed by the contract. *B.*, who had ordered them, required them to fulfil a sub-contract with *C.*, and was sued by *C.* for £150 as damages for delay. After intimating this claim to *A.*, who declined to intervene, *B.* lodged defences, and made a tender of £20. He was found liable for £20, and, in respect of the tender, entitled to expenses from *C.* as from its date. *B.* then sued *A.* for *inter alia* the expenses incurred beyond those for which *C.* had been found liable. It was held that his defence had been reasonable, and that the expenses he sued for formed a legitimate item in his claim for damages. In *Dougall* v. *Magistrates of Dunfermline*,[7] *D.*, who was the lessee of a farm from the magistrates, found that a number of persons were in the habit of trespassing on the farm, alleging that they were entitled to do so in pursuance of a right of fishing vested in the inhabitants of Dunfermline. *D.* requested the magistrates to take steps to prevent trespassing. They did not justify the trespass, but refused to interfere. *D.* then brought an action of interdict, in which he failed, and was found liable in expenses, on the ground

[1] *Le Blanche* v. *London and North-Western Rly. Co.*, 1876, 1 C.P.D. 286.

[2] *British Westinghouse Co.* v. *Underground Electric Co* [1912], A.C. 673.

[3] *Barkley* v. *Simpson*, 1897, 24 R. 346; *The "Wallsend"* [1907], P. 302.

[4] *Munro & Co.* v. *Bennett & Son*, 1911, S.C. 337; *Dougall* v. *Magistrates of Dunfermline*, 1908, S.C. 151; *Hammond* v. *Bussey*, 1887, 20 Q.B.D. 79; *Agius* v. *Great Western Colliery Co.* [1899], 1 Q.B. 413; *Rederi Aktiebolaget Nordstjernan* v. *Salvesen & Co.*, 1903, 6 F. 64; revd. 1905, 7 F. (H.L.) 101; *Kasler & Cohen* v. *Slavouski* [1928], 1 K.B. 78, where there was a series of sub-purchasers.

[5] 1911, S.C. 337.

[6] *Supra.*

[7] 1908, S.C. 151, correcting Bell's *Principles*, sec. 895, and distinguishing expenses incurred in repelling unsuccessful attempts to evict, which cannot be recovered from a seller or lessor of land, because it is no part of his bargain that attempts to evict the purchaser or lessee will not be made (*Inglis* v. *Anstruther*, 1771, M. 16633; *Stephen* v. *Lord Advocate*, 1878, 6 R. 282; *Straiton Estate Co.* v. *Stephens*, 1880, 8 R. 299).

that the public right of fishing had been established. It was held that *D.* was entitled to recover from the magistrates both the expenses in which he had been found liable and his own expenses in the action. The establishment of the public right of fishing constituted an invasion of his right of peaceable possession of the farm, for which the magistrates were liable on the warrandice in the lease against eviction, and the expenses he had incurred in his action of interdict were, in the circumstances, reasonably incurred in defending his title.

Damages from Use of Article.—A party—seller or carrier—who undertakes to supply an article, may be assumed to contemplate, without special notice, that the article is intended for use, and therefore will be liable for the loss directly resulting from the fact that its ordinary use is precluded or affected by his failure to supply it, delay, or failure in respect of quality. The loss may, in the last case, consist of physical injury to the person or property of the other party.[1] Where the use of an article contemplated by its buyer is of an exceptional kind, the seller, if he had no notice of the buyer's intention, is not liable for the profit which that exceptional use would have produced. He is not, however, entitled to maintain that the damages must be merely nominal, on the theory that as the buyer did not intend to put the article to its ordinary use he can have suffered no loss from being precluded from doing so. The damages will be the profit which the ordinary use would have produced, at least if that does not exceed the profit reasonably to be expected from the exceptional use which the buyer had in contemplation.[2]

Consequential Damages: Notice.—Where a party on entering into a contract has notice that there are circumstances attending it which will probably involve exceptional loss in the event of failure to fulfil it, he may be liable if that loss in fact results. This, the second branch of the rule laid down in *Hadley* v. *Baxendale*,[3] is chiefly of importance in cases where, expressly or impliedly, a party has undertaken to do or supply something by a particular date, and fails to observe it. Then he is in breach of contract, and is liable in damages for the consequences of his delay, but in the absence of notice these damages are to be measured by the loss—which may be merely nominal—which would result from such delay in the average case. So where the supply or carriage of an article is delayed beyond the contract time, and from some exceptional circumstances a great fall in price occurs, the party in breach cannot be made liable for the difference between the price realisable at arrival, and the price ruling at the date when the article should have been delivered, unless he had notice, either expressly or from the nature of the case, that arrival by the particular date was likely to be important.[4] On similar principles where a carrier's delay causes the loss of an exceptionally lucrative contract, he is not liable for it in the absence of notice.[5] The want of a particular piece of machinery may involve the stoppage of a manufactory, but damages on that head cannot be recovered from the party who is too late in supplying or conveying it, if he was excusably ignorant that such stoppage would ensue.[6] Where a cable message, which was in cipher, was delayed, and a loss of business resulted, it was held that the party who had

[1] *Supra*, p. 695. [2] *Cory* v. *Thames Ironworks, etc., Co.*, 1868, L.R. 3 Q.B. 181.
[3] 1854, 9 Ex. 341, quoted *supra*, p. 696.
[4] *The* "*Parana*," 1877, 2 P.D. 118, as explained in *Dunn* v. *Bucknall Brothers* [1902], 2 K.B. 614.
[5] *Horne* v. *Midland Rly. Co.*, 1873, L.R. 8 C.P. 131.
[6] *Hadley* v. *Baxendale*, 1854, 9 Ex. 341; *British Columbia Saw Mills Co.* v. *Nettleship*, 1868, L.R. 3 C.P. 499; *Den of Ogil Co.* v. *Caledonian Rly. Co.*, 1902, 5 F. 99.

delayed it was not liable for this loss, as he had no notice that the message was of any special importance.[1]

On certain authorities in England it may be doubted whether mere notice that exceptional loss will be caused is sufficient to make a carrier liable for it. Opinions have been expressed in cases relating to the liability of carriers for delay, that where exceptional loss, not to be expected in the ordinary course of events, has resulted, more than mere notice of the risk of such loss is required, and that facts must be brought out on which an implied contract to undertake it may be inferred.[2] How far this is to be held to be the law is not determined, but it does not apply beyond cases of negligence. Where a carrier, who had notice that the goods he carried would lose their market if delayed, loaded other goods which rendered him liable to detention by military authorities, the mere notice of the probable loss of market was sufficient to entitle the owner of the goods to recover this exceptional loss.[3]

The circumstances which have raised the question of exceptional liability arising from notice have chiefly been of two kinds—(1) Where delay has caused the loss of opportunity of using the goods, or disposing of them to exceptional advantage: (2) where the delay in supplying or conveying a particular thing had caused loss due to the fact that the particular thing was necessary for some larger enterprise.

Loss through Delay.—Where a party has notice that an article which he is asked to supply or carry is wanted for a particular purpose, that this purpose will be defeated if the delivery of the article is delayed, and that some particular loss will in consequence be incurred—if he then contracts on terms which make delay a breach of contract on his part, he will be liable for that particular loss. In entering into the contract he presumably has considered the risk of liability in the event of failure, and charged for it, though this, as mentioned above, may be doubtful in the case of an isolated contract with a carrier. So where a tug was hired to fulfil a salvage contract, and arrived too late, the amount which the salvor would have gained if the salvage had been carried out was awarded.[4] In answer to the plea that merely nominal damages should be awarded, the Lord Ordinary (Lord Lee), whose reasoning was adopted by the Court, said: "It must have been in the contemplation of the defender that as the tug was not wanted for ordinary towage, or merely as a dispatch boat, the damage which would be caused by non-performance of the contract could not be measured in that way."[5] Where railway companies run trains which are intended to suit a particular market, and are, in the circumstances, liable for delay, the damages to which they will be subjected are not merely the loss which would in the ordinary course of events result from the particular delay, but the loss arising from missing the particular market.[6] In *Macdonald* v. *Highland Rly. Co.*[7]

[1] *Sanders* v. *Stuart*, 1876, 1 C.P.D. 326.

[2] *British Columbia Saw Mills Co.* v. *Nettleship*, 1868, L.R. 3 C.P. 499, per Willes, J.; *Horne* v. *Midland Rly. Co.*, 1873, L.R. 8 C.P. 131, per Kelly, C.B., Blackburn, B., Martin, B. See Mayne on *Damages*, 10th ed., 28; 16 L.Q.R. 275.

[3] *Dunn* v. *Bucknall Brothers* [1902], 2 K.B. 614.

[4] *Mackenzie* v. *Liddell*, 1883, 10 R. 705.

[5] *Mackenzie, supra*, at p. 712.

[6] *Anderson* v. *North British Rly. Co.*, 1875, 2 R. 443. Cp. *Simpson* v. *London and North-Western Rly. Co.*, 1876, 1 Q.B.D. 274. The same rule applies to ships (*Dunn* v. *Bucknall Brothers* [1902], 2 K.B. 614).

[7] 1873, 11 M. 614. But in the absence of proof of any special custom known to the public, the terms of a label on goods does not impose any special liability on the carrier (*Candy* v. *Midland Rly. Co.*, 1878, 38 L.T. N.S. 226. See also *Bates* v. *Cameron*, 1855, 18 D. 186, a very special case).

goods, marked "perishable," were sent from Inverness to Skye, and were delayed in transit for one day. The result was that they arrived too late for the purpose for which they were required, and were damaged. It was proved that the custom of the railway company was to forward goods marked perishable in preference to goods not so marked, and that, owing to an oversight, this practice had not been followed. It was held that the observance of the known and established practice was an implied term of the contract between the company and the senders of goods, and that they were liable for the loss which had in fact been suffered.

Article Required for Other Enterprise. Where failure to deliver a particular thing causes an exceptional loss, such as the dislocation of the business of the party who has ordered it, the law would appear to be that the party in fault may be liable for such loss if he had full notice that it was likely to be incurred, but that he is not bound to draw the inference that exceptional loss will result when that is only one out of several possible contingencies. Thus, to take cases where the liability was affirmed, where a party employed to repair a ship knew that she was intended for whale-fishing, and exceeded the contract time for repairs, so that she was too late for the whale-fishing season, it was found that he was liable for the average profit her voyage should have produced.[1] Where a landlord knew the business for which premises let were intended, and failed to give possession for fifteen weeks, the damages were calculated on a reasonable estimate of the profits to be expected from the tenant's business during that period.[2] In *Hydraulic Engineering Co.* v *M'Haffie*,[3] *A.* employed *B.* to make a necessary part of a machine which he was constructing to order. *B.* was aware that *A.* had a customer for the machine, that the part he had agreed to supply was essential, and that it was a machine for which there was no general market. Owing to *B.'s* delay *A.* was unable to complete his machine in time, and his customer rejected it. It was held that *B.* was liable to *A.* for the profit he would have made on the sale of the machine, and the expense he had incurred in making the other parts. In *Den of Ogil Co.* v. *Caledonian Rly. Co.*[4] a steamer had broken her piston, and, though otherwise ready, could not sail without it. A new one was ordered. It was sent by passenger train, marked "very urgent," and, through the fault of the railway company, delayed for three days. In an action by the owners the railway company admitted liability, and the sole question was as to the measure of damages. On the evidence it was held that the railway company, when they accepted the piston for carriage, knew that until it arrived a ship could not sail, but they had no information as to the size of the ship or the number of the crew. The Court rejected a claim for loss of profit which the steamer might have earned, on the ground that on this point the railway company had no notice, but held them liable for a portion of the wages of the crew and expenses of the ship while waiting. It was observed that if the information as to the size of the ship and the number of the crew had been given, the whole expenses while detained might have been allowed. But a party who carries a piece of machinery is not bound without express notice to draw the inference that the works in which the machinery is used have been stopped for the want of it,[5] or even, where he is informed that works have been

[1] *Strachan & Gavin* v. *Paton*, 1828, 3 W. & S. 19.
[2] *Watson* v. *Kidston*, 1839, 1 D. 1254; *Jaques* v. *Millar*, 1877, 6 Ch. D. 153.
[3] 1878, 4 Q.B.D. 670.
[4] 1902, 5 F. 99.
[5] *British Columbia Saw Mills Co.* v. *Nettleship*, 1868, L.R. 3 C.P. 499.

stopped, to conclude that they cannot be started again with some makeshift.[1] A manufacturer, however, is credited with the ordinary knowledge of his trade, and, if he supplies machinery which cannot be renewed without loss of time, must be assumed to know that loss of time will involve loss of profit; and therefore where cast-iron stills were ordered for a chemical company, and, after trial, were justifiably rejected as disconform to contract, it was held that the manufacturers were liable for outlay on the stills, and for the loss of profit during the time which elapsed before they could be replaced.[2]

Successive Claims for Damages. — If an action for damages is founded on a single breach of contract, it must conclude for the whole loss which the party expects to suffer and hopes to recover. Any second action is incompetent, and is not rendered competent by the fact that it is based on a loss which has emerged subsequent to the first action.[3] Thus in *Stevenson* v. *Pontifex & Wood* the defenders supplied the pursuers with an ice-making machine, and bound themselves not to supply that kind of machine to anyone within a certain radius of Glasgow, where the pursuers carried on the business of ice-merchants. They broke their contract by supplying a machine to one *V.*, who used it to make ice in competition with the pursuers. For this breach of contract the pursuers raised an action of damages, and settled it for a certain payment. Subsequently they raised a new action, alleging that since the date of the first action they had suffered more loss owing to the continued competition by *V.* It was held that as there had been only one breach of contract by the defenders—in the supply of the machine to *V.*—no second action for damages could be allowed. It was pointed out that the rule would not apply to the case where the breach of contract was a continuing act, as where a party had agreed not to use his property in a particular way,[4] nor to a contract for delivery by instalments, where, though one instalment might be defective, it could not be assumed that the next would not be according to contract.

Waiver of Claim for Damages. — A claim of damages for breach of contract may be barred by delay. A case of admitted breach of contract, or of undisputed facts of which only the legal import is in question, probably excludes the plea of mere delay. "The plea of *mora* cannot be successfully maintained merely on account of lapse of time; the person stating it must also be able to shew that his position has been materially altered, or that he has been materially prejudiced, by the delay alleged. In other words, mere lapse of time will not, in my judgment, form an effective plea of *mora*." [5] So where the obligation to erect buildings on a feu was imposed in terms which made it personally binding on each succeeding feuar, it was held that twenty years' delay in insisting on fulfilment did not bar an action of damages.[6] But in cases where the breach of contract is not admitted, and

[1] *Hadley* v. *Baxendale*, 1854, 9 Ex. 341. In *Schulze* v. *Great Eastern Rly. Co.* (1887, 19 Q.B.D. 30) it was held that a carrier, who was informed that the goods were samples, was bound to draw the inference that if delayed in transit they would lose their value. But this seems hardly consistent with the other authorities.

[2] *Fleming & Co.* v. *Airdrie Iron Co.*, 1882, 9 R. 473.

[3] *Stevenson* v. *Pontifex & Wood*, 1887, 15 R. 125.

[4] See *Darley Main Colliery Co.* v. *Mitchell*, 1886, 11 App. Cas. 127; and *Duke of Abercorn* v. *Merry & Cunningham*, 1909, S.C. 750; where it was held that when subsidence was caused by mineral workings each new subsidence afforded a fresh ground of action.

[5] Per Lord President Kinross, in *Bain* v. *Assets Co.*, 1904, 6 F. 692, at p. 705; revd. 1905, 7 F. (H.L.) 104; adopted in *Lees' Trs.* v. *Dun*, 1912, S.C. 50; affd. 1913, S.C. (H.L.) 12. See also, as to the plea of *mora*, *supra*, p. 542.

[6] *Rankine* v. *Logie Den Land Co.*, 1902, 4 F. 1074.

the facts are in dispute, or where immediate action would have afforded an opportunity of minimising the loss, delay in taking action may be construed as a waiver of the claim.

Taking Delivery of Defective Goods.—In sale, it is decided that a claim for damages is not barred by taking delivery of the article and payment of the price, without any express reservation, even where the facts on which the claim of damages is based are fully known.[1] A purchaser is not bound to put forward claims which would probably be disputed and lead to delivery being delayed.[2] And acts which amount to an acceptance of the article sold, though sufficient to bar its subsequent rejection, do not preclude a claim of damages for defective quality.[3] But the obligation to inspect goods within a reasonable time, having as its basis the possibility that immediate inspection would have afforded a means of remedying the defect, applies to a claim for damages as much as to a claim for rejection; and therefore where parties purchased a boiler, and transmitted it to correspondents abroad without examination, it was held that as their conduct had deprived the sellers of the opportunity of repairing at home any defect which inspection might have revealed, a claim of damages for the expense incurred in repairing the boiler's defects was barred.[4]

In the analogous case, where an article is sent for repair, it has been laid down that there is a duty of inspection within a reasonable time after it is returned, and that failure to inspect is a bar to any claim for the defective character of the work.[5] The same rule applies where goods are delivered by a carrier.[6]

Engineering Work Approved.—Where in a building or engineering contract there is a provision for the appointment by the employer of a representative, to whose satisfaction the work must proceed, the employer is probably barred, in the absence of fraud on the part of the contractor, from subsequently objecting to work which his representative has passed. In *Nelson* v. *Chalmers & Co.*[7]—the case of a shipbuilding contract—where, however, the facts did not raise the point for decision, both Lord Kinnear and Lord Mackenzie expressed an opinion to this effect. The earlier cases are somewhat difficult. In *Muldoon* v. *Pringle* [8] a contract for the construction of a drain contained a provision that the drain should be 3½ feet deep, and that the work should be executed to the satisfaction of an inspector to be appointed by the employer. The inspector gave certificates that the work had been duly executed. The employer refused to pay the last instalment of the price, and cross-actions were raised, one by the contractor for payment of the last instalment, the other by the employer for damages for the defective character of the work. The employer proved that the drain had not been laid to the stipulated depth. The Court found that both the contractor and the inspector had been negligent, and held that the contractor

[1] *Sutherland* v. *Montrose Shipbuilding Co.*, 1860, 22 D. 665; *Burrell* v. *Russell*, 1900, 2 F. (H.L.) 80, at p. 85; *Clydebank Engineering Co.* v. *Castaneda*, 1903, 5 F. 1016; affd. 1904, 7 F. (H.L.) 77.

[2] *Clydebank Engineering Co., supra.*

[3] *Aitken, Campbell & Co.* v. *Boullen*, 1908, S.C. 490; *Electric Construction Co.* v. *Hurry & Young*, 1897, 24 R. 312, opinion of Lord Kinnear. As to what acts are sufficient, by involving acceptance, to bar rejection, see *supra*, p. 611. As to the effect of intimating rejection on a subsequent claim of damages, *supra*, p. 610.

[4] *Strachan* v. *Marshall*, 1910, 2 S.L.T. 108.

[5] *Clerk* v. *Elliott*, 1836, 15 S. 253.

[6] *Stewart* v. *North British Rly.*, 1878, 5 R. 426.

[7] 1913, S.C. 441. But such a representative has no implied authority to alter the terms of a written contract (*Burrell* v. *Russell*, 1900, 2 F. (H.L.) 80, and *supra*, p. 397).

[8] 1882, 9 R. 915.

was not entitled to payment of the last instalment, the employer not entitled to damages. No opinions were given, and the case looks like one where the Court forced a compromise on the parties. In *Ayr Road Trs.* v. *Adams*[1] a contract for the building of a bridge provided that the work should be done to the satisfaction of an engineer employed by the employers, and should be carried out under a resident inspector to be appointed by the contractors. As a matter of fact, the resident inspector was appointed and paid by the employers. On his information the engineer gave certificates, on which the whole of the price was paid. A year afterwards the bridge was finally taken over and all accounts were settled. It was afterwards discovered that concrete instead of ashlar had been used in building the bridge, with the result that it proved defective. This substitution had been known to the resident inspector. An action of damages against the contractors was raised two years after the final settlement of accounts. It was held that the pursuers must be credited with the knowledge possessed by their resident inspector, and, taking that into consideration, their claim was barred by delay and by the final settlement of accounts. The judgment was given expressly on the ground that there had been no fraud on the part of the contractors, but that their departure from the terms of the contract was such as to have rendered them liable in damages had the claim for it been made before the accounts were settled. The real ground of judgment seems therefore to have been mere delay. But the case was a very special one, and can hardly form a precedent.

Waiver between Landlord and Tenant.—In questions between landlord and tenant it is a very general rule that if a tenant has any claim for breach of the conditions of an agricultural or pastoral lease he is bound to state it at once, and that payment of rent without a definite and specific assertion of his claim exposes him to the plea of bar. In *Broadwood* v. *Hunter*,[2] which seems the first case in which this principle is definitely laid down, it is stated as an absolute and unqualified rule. The case was a claim stated at the end of a lease for damages for injury done by an excessive stock of game. Proof of the tenant's averments was refused, except with regard to the last year, when, though the rent was paid, a claim of damages was expressly reserved. The same rule has been applied in cases where a tenant complained of the failure of the landlord to put the fences in proper repair.[3] "It is plain, on the authority of *Broadwood* v. *Hunter*, that a tenant in such circumstances has a natural and appropriate remedy against his landlord on the occasion of his rent day. On that occasion it is his duty either to tell the landlord that he will not pay his rent until his claim for damages is satisfied, or to state a specific claim, and reserve it in a definite way. Now there is no averment on record of this having been done, but merely one of protest by the tenant."[4] But it is not a definite and conclusive rule of law that a tenant is barred from all claims of damages by payment of rent without reserve. It depends on the principle that the landlord is entitled, in the case of claims for injury to crops or pasture, to have immediate notice, so that he may have an opportunity of obtaining evidence as to the facts. Where that principle does not apply, as in the case of failure to supply buildings,[5] the claim may be brought forward though the rent has been

[1] 1883, 11 R. 326.
[2] 1855, 17 D. 340.
[3] *Emslie* v. *Young's Tr.*, 1894, 21 R. 710; *Hamilton* v. *Duke of Montrose*, 1905, 8 F. 1026.
[4] Per Lord President, *Emslie* v. *Young's Tr.*, *supra*, 21 R., at p. 712.
[5] *Johnstone* v. *Hughan*, 1894, 21 R. 777. See also *Macdonald* v. *Johnstone*, 1883, 10 R. 959 (damage by drainage); *Hardie* v. *Duke of Hamilton*, 1878, 15 S.L.R. 329.

paid. It has been laid down that the question whether the tenant has waived his claim is a question of fact in which all the circumstances have to be considered. So where the claim was based on failure to burn heather, it was held that as the damage resulting was cumulative, payment of rent without reserve was no bar to the tenant's claim.[1]

Where the claim is at the instance of the landlord, and is based upon miscropping, the rule is somewhat more strict. It is probably not too much to say that if the landlord was aware of the miscropping, and accepted payment of the rent without reserve, he could not afterwards enforce a provision in the lease for liquidate damages or penal rent.[2] And a similar rule was applied to interest on improvement expenditure, which should have been paid along with the rent,[3] and to a claim against a shooting tenant for unduly increasing the stock of game.[4] A renunciation of the lease by the tenant, and its acceptance by the landlord, is a stronger case for personal bar than either payment or acceptance of rent, and will imply the relinquishment of all claims for damages by either party which are not expressly reserved.[5]

[1] *Ramsay* v. *Howieson*, 1908, S.C. 697. See opinion of Lord M'Laren.
[2] *Baird* v. *Mount*, 1874, 2 R. 101; *Lamb* v. *Mitchell's Trs.*, 1883, 10 R. 640.
[3] *Callender* v. *Smith*, 1900, 8 S.L.T. 109.
[4] *Elliott's Trs.* v. *Elliott*, 1894, 21 R. 858.
[5] *Lyons* v. *Anderson*, 1886, 13 R. 1020.

CHAPTER XXXIX

PAYMENT, PERFORMANCE, AND DISCHARGE

It is proposed in this chapter to consider questions relating to (1) Payment: (2) Performance: (3) Acceptilation or Discharge: (4) Novation: (5) *Confusio*: (6) Extinction of Obligations by lapse of time.

(1) *Payment*

Duty of Debtor to Tender Payment.—When a debt is actually due and exigible, it is not generally necessary to make any demand for payment before taking action, or, if the form of the debt makes it possible, using diligence. *Primâ facie*, it is the duty of the debtor to tender payment. So a landlord is within his rights in raising an action for payment of rent, or for sequestration, as soon as the term of payment is past, and is not liable in damages for the injury which may result to the tenant's credit.[1] "While it may have been a harsh step to raise a small debt action for a debt without a previous demand for payment, I never understood that there was anything illegal in doing so. In taking a decree in absence for a debt actually due, a creditor only exercises his legal right, and it is of no consequence whether his motive be malicious or not." [2] On this principle it would appear that a party who has sold and delivered goods is entitled to raise an immediate action for the price, without sending in an account or making any demand for payment, unless a period of credit is provided either expressly or by the custom of the particular trade.[3] The acceptance of a bill of exchange implies an obligation on the part of the acceptor to appear to make payment at the place specified on the day when the bill is payable,[4] but the bill is not dishonoured until it has been presented for payment, unless, in special circumstances, presentment for payment is excused.[5] Failure to present it regularly discharges the drawer and indorser,[6] and while it does not affect the liability of the acceptor, it renders summary diligence against him incompetent.[7] In obligations embodied in a formal writing, such as bonds and leases, there is usually inserted a clause consenting to registration for execution. This authorises the creditor to register the deed in the appropriate register, and obtain an extract under which diligence

[1] *Pollock* v. *Goodwin's Trs.*, 1898, 25 R. 1051. See also *Oswald* v. *Graeme*, 1851, 13 D. 1229; *Alexander* v. *Campbell's Trs.*, 1903, 5 F. 634. The tenant is not *in mora* until the day after the term of payment (*Gilmour* v. *Craig*, 1908, 15 S.L.T. 797). A warrant to bring back furniture which the tenant has removed is an exceptional remedy, and may found an action for damages if executed without notice to the tenant (*Jack* v. *Black*, 1911, S.C. 691).

[2] Per Lord Kincairney (Ordinary), in *Pollock* v. *Goodwin's Trs.*, *supra*, 25 R., at p. 1052.

[3] Benjamin, *Sale*, 6th ed., 872. Cp. *Keay* v. *Crawford*, 1823, 2 S. 492.

[4] *Bartsch* v. *Poole*, 1895, 23 R. 328.

[5] Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, secs. 46, 47.

[6] *Ibid.*, sec. 47.

[7] *Ibid.*, sec. 52, sub sec. (1); *Neill* v. *Dobson, Molle & Co.*, 1902, 4 F. 625.

may proceed on a six days' charge.[1] If such a clause is inserted in a bond, it would seem to be within the creditor's rights to charge for payment without making a previous demand,[2] though the adoption of a course so unusual would weigh with the Court in the question of expenses.[3] Even without a consent to registration for execution an obligation to pay on demand is enforceable against a principal obligant without previous notice.[4] The creditor in a bond and disposition in security, though he may demand payment at once, cannot exercise the power of sale contained in his bond without previous notice to the debtor, given in strict accordance with statutory provisions;[5] but if the security is constituted by an *ex facie* absolute disposition, the creditor is entitled to sell at once, and is not liable in damages to the debtor merely on the ground that he has sold without notice.[6] A cautionary obligation, originally contingent, becomes a pure obligation by the principal debtor's default, and may then be at once enforced by summary diligence, if the bond by which it is constituted contains a consent to registration for execution.[7] If there is no such clause, it would appear that, even if the cautioner's obligation is to pay on demand, he is entitled to reasonable notice.[8]

Method of Payment Specified.—A creditor may stipulate for a particular method of payment. It is then a question of construction whether this is intended as an absolute condition, entitling the creditor to refuse an offer of payment which does not comply with the stipulated arrangements, and proceed with action or diligence, or whether it is merely a direction.[9] If the provision as to method of payment is definitely part of the contract, and the debtor disregards it, he takes the risk of his remittance being lost or stolen,[10] but a mere statement in an invoice that cheques are to be drawn in a particular way does not invalidate payment by a cheque payable to the creditor's agent, or payment to him in cash.[11] A debtor also takes the risk of loss or theft if he adopts some method of payment not in the ordinary course of business, and affording facilities for fraud.[12] If there is no express provision, the rules as to legal tender are regulated by statute,[13] and a

[1] See Graham Stewart, *Diligence*, 413 *et seq.* As to enforcing an obligation *ad factum præstandum* by summary diligence, see *Hendry* v. *Marshall*, 1878, 5 R. 687. By sec. 18 (*h*) of the Moneylenders Act, 1927 (17 & 18 Geo. V. c. 21), summary diligence is incompetent on a bill, promissory note, bond, or obligation, granted to or in favour of or held by a moneylender.

[2] *M'Whirter* v. *M'Culloch's Trs.*, 1887, 14 R. 918.

[3] *Mavor & Coulson* v. *Grierson*, 1892, 19 R. 868.

[4] *Walton* v. *Mascall*, 1844, 13 M. & W. 452; *North* v. *Ellam*, 1837, 2 M. & W. 461. Such an obligation, it was observed by Parke, B., in the last-cited case "is in a state of being broken perpetually if the party does not pay it." Cp. *M'Whirter* v. *M'Culloch's Trs.*, *supra*.

[5] Titles to Land Consolidation Act, 1868, 31 & 32 Vict. c. 101, sec. 119.

[6] *Baillie* v. *Drew*, 1884, 12 R. 199.

[7] *Fisher* v. *Syme*, 1828, 7 S. 97.

[8] *Brown* v. *Brown* [1893], 2 Ch. 300.

[9] *Earl of Shrewsbury* v. *Countess of Shrewsbury*, 1907, 23 T.L.R. 277.

[10] *Selwyn* v. *Arbuthnot*, 1730, M. 10094.

[11] *International Sponge Importers* v. *Watt*, 1911, S.C. (H.L.) 57.

[12] *Robb* v. *Gow*, 1905, 8 F. 90 (cheque to bearer). A cheque sent by post, and lost, is at the risk of the sender (*Pennington* v. *Crossley*, 1897, 13 T.L.R. 513), unless, as in the case of dividend warrants, it has been expressly or impliedly requested (*Thairlwall* v. *Great Northern Rly. Co.* [1910], 2 K.B. 509). In *Mitchell-Henry* v. *Norwich Insurance Co.* [1918], 2 K.B. 66, the debtor had to bear the loss when he sent £48 in treasury notes, in a letter registered, but not insured. Payment over the counter to a party there with apparent authority to receive it is good (*Barrett* v. *Deare*, 1828, 1 M. & M. 200; *Robb* v. *Gow*, *supra*, per Lord President Dunedin, at p. 104).

[13] Coinage Act, 1870, 33 & 34 Vict. c. 10, sec. 4. Gold is legal tender to any amount, silver coin up to £2, bronze up to 1s. As to bank notes, see Currency and Bank Notes Act, 1928 (18 & 19 Geo. V. c. 13).

creditor is probably within his rights in refusing to accept an offer of payment in any other form.[1] But if a cheque is sent, it is the duty of the creditor to return it at once if he does not mean to accept it, and, unless he returns it, to stop any diligence which he may have commenced.[2] "When a debtor's bill or cheque is not returned he is entitled to think himself safe from diligence until the bill is matured or the cheque presented."[3] It may be doubted whether a creditor, in a case where there were no reasonable grounds for doubts as to the debtor's solvency, would be justified in returning a cheque and proceeding with diligence.[4] And it is conceived that any condition depending on payment, statutory or conventional, is satisfied by payment in the ordinary course of business, though not in legal tender.[5]

Bill or Cheque. When a cheque or bill is accepted it presumably operates as conditional payment; it does not amount to novation of the debt, which revives if the cheque is dishonoured or the bill not met at maturity.[6] It has been held that the condition is resolutive, so that in the interval between the acceptance of a cheque and its presentment there is no debt which can be arrested either in execution or *ad fundandam jurisdictionem*.[7] But the seller of goods is entitled to stop them *in transitu*, though he has received, and retained, the buyer's acceptance for the price.[8] If the creditor who has accepted a cheque fails to present it within a reasonable time, with resulting loss to the debtor, the debt will be held to be discharged.[9] A stipulation for payment by "approved bill" means by a bill to which no reasonable objection can be taken, and does not imply that payment is complete when the creditor has in fact taken the debtor's acceptance, given when the debtor was on the verge of bankruptcy.[10]

Place of Payment. Where the contract makes no express provision regarding the place of payment, the legal implication is that the debtor is bound to tender payment to the creditor at his residence or place of business.[11] So an employer who has been found liable in weekly payments under the Workmen's Compensation Act is not entitled to require the workman to call

[1] See *Fraser* v. *Smith*, 1899, 1 F. 487; *Glasgow Pavilion Ltd.* v. *Motherwell*, 1903, 6 F. 116, per Lord Young; *Blumberg* v. *Life Interest, etc., Corporation* [1897], 1 Ch. 171; [1898], 1 Ch. 27; *Johnston* v. *Boyes* [1899], 2 Ch. 73.

[2] *Pollock* v. *Goodwin's Trs.*, 1898, 25 R. 1051; *M'Dougall* v. *M'Nab*, 1893, 21 R. 144.

[3] Per Lord Kincairney (Ordinary), in *M'Dougall* v. *M'Nab*, *supra*, 21 R., at p. 148; *Cullen* v. *Wright*, 1863, 1 M. 734.

[4] See *Minton* v. *Hawley & Co.*, 1882, 20 S.L.R. 126. If a cheque is refused on some other and untenable ground the creditor cannot afterwards put forward the objection that it is not legal tender (*Holt* v. *National Bank*, 1927, S.L.T. 484 (O.H., Lord Fleming).

[5] *Glasgow Pavilion Ltd.* v. *Motherwell*, 1903, 6 F. 116, where it was held that the statutory provision (Companies (Consolidation) Act, 1908, sec. 85) that a company should not proceed to allotment unless a certain sum "has been paid to and received by the company," was satisfied if cheques for the required amount had been received.

[6] *Wilson & Corse* v. *Gardiner*, 1807, Hume, 247; *Duke of Buccleuch* v. *M'Turk*, 1845, 7 D. 927 (effect of long delay); *Leggat Brothers* v. *Gray*, 1908, S.C. 67; *Walker & Watson* v. *Sturrock*, 1897, 35 S.L.R. 26; *Currie* v. *Misa*, 1875, L.R. 10 Ex. 153, at p. 163; 1876, 1 App. Cas. 554. So in a composition with creditors it is an implied condition that if a bill given for the composition is not paid the original debt revives (*Horsefall* v. *Virtue*, 1826, 5 S. 36).

[7] *Leggat Brothers* v. *Gray*, *supra*. In similar circumstances it was held in England that the receipt of a cheque merely suspended the remedy, and not the debt (*Cohen* v. *Hale*, 1878, 3 Q.B.D. 371).

[8] *M'Dowall & Neilson's Tr.* v. *Snowball Co.*, 1904, 7 F. 35.

[9] *Hopkins* v. *Ware*, 1869, L.R. 4 Ex. 268; Bills of Exchange Act, 1882, sec. 74.

[10] *M'Dowall & Neilson's Tr.* v. *Snowball Co.*, 1904, 7 F. 35.

[11] *Haughhead Coal Co.* v. *Gallacher*, 1903, 11 S.L.T. 156; *Robey* v. *Snaefell Mining Co.*, 1887, 20 Q.B.D. 152; *Duval* v. *Gans* [1904], 2 K.B. 685; *Fowler* v. *Midland Electric Corporation* [1917], 1 Ch. 656. The rule does not apply to the relationship of banker and depositor. A bank is not bound, without express arrangement, to pay at a branch other than that at which the depositor has his account; *Clare* v. *Dresdner Bank* [1915], 2 K.B. 576.

for the payments.[1] There is probably an exception to this rule if the creditor leaves the country.[2] In that case a request to pay to his banker is a reasonable one, with which the debtor is bound to comply.[3] Any expenses attaching to payment elsewhere than at the creditor's residence, *e.g.*, a difference in exchange, fall upon the debtor.[4]

Debts in Foreign Currency. When a debt is incurred in a foreign country and in a foreign currency, and sued for in Scotland, the amount to be decerned for in British currency is to be ruled by the rate of exchange prevailing at the date when the debt was incurred—not that prevailing at the date of the decree.[5] The same rule holds when damages for breach of contract or negligence, decerned for in a foreign country and in the local currency, are sued for in Scotland.[6]

Obligation to Accept Payment. A creditor is not bound to accept partial payment.[7] If he has raised an action for payment he is not bound to stay proceedings on a tender of payment of the debt, without a tender also of expenses.[8] But a poinding or sequestration for rent must be stopped on an unconditional tender of payment of the debt, which cannot be refused on the ground that the expenses of the diligence are not included.[9] A creditor is under no obligation to receive payment before it is due; and there would appear to be no principle of law precluding an arrangement whereby a creditor is entitled to demand instant payment, but not bound to accept it until a certain period has expired.[10] But it would seem that a creditor cannot insist on such an arrangement if its effect would be the confiscation of a subject conveyed in security of the debt.[11] A creditor who is not taking any active steps to enforce his debt is under no obligation to accept an offer of payment made by anyone but the debtor, or someone having his authority.[12] But if he is taking measures to enforce payment, or to realise securities, he is bound to accept payment and to grant an assignation to anyone who can show an interest to intervene, such as a friend of the debtor, or a postponed bondholder in subjects conveyed in security.[13] The obligation of a creditor, on receiving payment, to assign the debt and the securities held for it, has been already considered.[14]

Money Sent as Compromise. If money, or a cheque, is sent as a compromise of a debt, and the creditor refuses to agree to the compromise, it is conceived that he has no answer to a demand for the return of the money. If, without definitely accepting the compromise, he keeps the money without remonstrance, the inference will generally be drawn that he has taken it in full payment.[15] If the creditor refuses

[1] *Haughhead Coal Co., supra.* [2] *Thorn* v. *City Rice Mills*, 1888, 40 Ch. D. 357.

[3] *Earl of Shrewsbury* v. *Countess of Shrewsbury*, 1907, 23 T.L.R. 277.

[4] *Campbell* v. *Ramsay*, 15th February 1809, F.C. (This point is not noticed in the rubric.)

[5] *Societe des Hotels et de Touquet* v. *Cumming* [1922], 1 K.B. 451; *British American Bank, in re* [1922], 2 Ch. 589; *Peyrae* v. *Wilkinson* [1924], 2 K.B. 166.

[6] *Lebeaupin* v. *Crispin* [1920], 2 K.B. 714; *S.S. "Celia"* v. *S.S. "Volturno"* [1921], 2 A.C. 544.

[7] *Wilson's Tr.* v. *Watson & Co.*, 1900, 2 F. 761, per Lord Moncreiff, at p. 770; Pothier, *Obligations*, sec. 534.

[8] *Pollock* v. *Goodwin's Trs.*, 1898, 25 R. 1051; *Inglis* v. *M'Intyre*, 1862, 24 D. 541.

[9] *Inglis* v. *M'Intyre*, 1862, 24 D. 541; *Holt* v. *National Bank*, 1927, S.L.T. 484 (O.H., Lord Fleming).

[10] *Ashburton* v. *Escombe*, 1892, 20 R. 187.

[11] *Fairclough* v. *Swan Brewery Co.* [1912], A.C. 565. See also *Kreglinger* v. *New Patagonia Storage Co.* [1914], A.C. 25.

[12] *Smith* v. *Gentle*, 1844, 6 D. 1164, opinion of Lord Mackenzie.

[13] *Smith* v. *Gentle*, *supra*; *Cunningham's Trs.* v. *Hutton*, 1847, 10 D. 307; *Fleming* v. *Burgess*, 1867, 5 M. 856.

[14] *Supra*, p. 210. [15] *Day* v. *M'Lea*, 1889, 22 Q.B.D. 610.

the compromise, but keeps the money as part-payment, his position is in no way prejudiced if the money was sent by the debtor himself;[1] if the money was sent by a third party, it has been held in England that the creditor's conduct amounts, in spite of his refusal, to an acceptance of the compromise.[2]

Appropriation of Payments. When a debtor owes more than one debt, he is entitled to pay any debt which may suit him, and a creditor who has received a payment appropriated to a particular debt has no right to disregard the debtor's instructions and apply the payment to meet some other liability.[3] If there is only one debt, with arrears of interest, and the debtor, in making a remittance, ascribes it to part payment of the principal, this is not a proposal to which the creditor is bound to accede, but if he keeps the money he must apply it in accordance with the debtor's instructions.[4] This does not necessarily apply in the case of a trust-deed for creditors. There payments made are primarily to be ascribed to the principal debt; but where it turned out that the estate yielded a surplus, and the question was therefore with the debtor himself, it was held that the creditor was entitled to apply the payments he had received during a series of years to interest, although they had been remitted by the trustees in the trust-deed as payments of the capital debt, and the creditor had granted receipts on that footing.[5]

Unappropriated Payments. If a debtor makes a payment without any direction or any previous agreement as to the debt to which it is to be ascribed, he leaves it to the creditor to ascribe it as he pleases.[6] Thus he may ascribe it to an unsecured debt, leaving a debt for which he holds a security unpaid, in a question, not merely with the debtor himself, but with a cautioner,[7] or with the holders of secondary rights in the subjects conveyed in security.[8] He may ascribe it to interest, leaving the principal unpaid;[9] and it would appear that an accountant, to whom accounts are remitted, ought to deal with them on the assumption that all payments not ascribed by either debtor or creditor are to be considered as applicable to interest, on the ground that it is to the advantage of the creditor to wipe out arrears of interest, which do not themselves bear interest, rather than the principal debt.[10] Again, the creditor is entitled to ascribe indefinite payments to a debt which does not bear interest, rather than to a debt which does;[11]

[1] *Day* v. *M'Lea, supra*; *Thew* v. *Sinclair*, 1881, 8 R. 467; *Ackroyd* v. *Smithies*, 1885, 54 L.T. 130.

[2] *Punamchund* v. *Temple* [1911], 2 K.B. 330.

[3] Ersk. iii. 4. 1; Bell, *Prin.*, sec. 563; *Allan* v. *Allan*, 1831, 9 S. 519; *Mitchell* v. *Cullen*, 1852, 1 Macq. 190; *Semple* v. *Wilson*, 1889, 16 R. 790; *Brenes* v. *Downie*, 1914, S.C. 97; *Greenhalgh* v. *Union Bank of Manchester* [1924], 2 K.B. 153.

[4] *Wilson's Tr.* v. *Watson & Co.*, 1900, 2 F. 761, per Lord Moncreiff.

[5] *Wilson's Tr.* v. *Watson & Co.*, *supra*.

[6] Ersk. iii. iv. 2; *Forbes* v. *Innes*, 1739, M. 6813; *Jackson* v. *Nicoll*, 1870, 8 M. 408.

[7] *Cochrane* v. *Mathie*, 1821, 1 S. 80; *Buchanan* v. *Main*, 1900, 3 F. 215; *Anderson* v. *North of Scotland Bank*, 1909, 2 S.L.T. 262; *In re Sherry*, 1884, 25 Ch. D. 692. But this right may be excluded if it is contrary to the implied terms of the contract with the cautioner. Where *A.* was employed to collect the rents on two estates, and *B.* was cautioner for his intromissions on one of them, and *A.* made indefinite payments to his employer, it was held, on *A.'s* bankruptcy, that the employer was not entitled to ascribe these otherwise than rateably between the two estates, in a question with *B.* (*Duchess of Buccleuch* v. *Doul*, 1725, M. 6807).

[8] *Mackenzie* v. *Gordon*, 1837, 16 S. 311; affd. 1839, M'L. & R. 117.

[9] *Watt* v. *Burnett's Trs.*, 1839, 2 D. 132; *Scott* v. *Sandeman*, 1849, 11 D. 405; revd. 1851, 1 Macq. 293 (on the ground of an agreement to the contrary).

[10] *Wauchope* v. *North British Rly. Co.*, 1863 2 M. 326.

[11] *Bremner* v. *Mabon*, 1837, 16 S. 213.

probably also to a debt which, as prescribed, could not be proved except by the debtor's writ or oath.[1] Where *A.* was employed to collect a bill, it was held that there was no implied undertaking to ascribe indefinite payments made by the debtor to that bill; he was entitled to ascribe them to a debt in which he was himself the creditor.[2] But indefinite payments cannot be ascribed to a debt in which the party who made them is merely a cautioner;[3] to a debt which is known to be disputed, so as to prevent the debtor afterwards objecting to its validity;[4] to a debt of which the debtor (a trustee) was unaware;[5] to a debt which, under statutory provisions, cannot be enforced.[6] Nor can the creditor ascribe a payment contrary to "a general and mutual understanding that the same was applicable to a special account."[7]

The rule of the civil law[8] that a creditor, if he proposed to ascribe indefinite payments to a particular debt, must do so at once, has not been followed in Scotland.[9] The creditor may render his account without making any appropriation, without barring himself from appropriation afterwards.[10] But it is too late after a decree by consent has been obtained, fixing the amount of one of the debts to which appropriation was possible.[11] And it is conceived that if a creditor raises an action, or lodges a claim in the debtor's sequestration, on the basis that the indefinite payment in question has been ascribed by him to one debt, he is barred from afterwards ascribing it to another.[12]

Ascription in Questions with Cautioner.—It is stated by Erskine[13] that a creditor, to whom two debts are owing, one secured by a cautioner, the other not, cannot, after the bankruptcy of the debtor, ascribe indefinite payments received before the bankruptcy otherwise than rateably between the secured and the unsecured debt. But it may be doubted whether any case decides this, and as he may ascribe such payments wholly to the unsecured debt while the debtor is insolvent,[14] it is hard to see why declared bankruptcy should make any difference. In *Anderson* v. *North of Scotland Bank*,[15] *A.*, who was a cautioner for *B.* in a cash credit bond, assigned to the bank a policy of insurance. The assignation was *ex facie* absolute, qualified by a back letter stating it to be in security of any sums advanced or to be advanced to *B.*, and without prejudice to any other security the bank might hold. *B.* died in insolvent circumstances, indebted to the bank both under the cash credit and for an advance for which *A.* was not directly liable. It was held that the bank, in a question with *A.*, might ascribe the proceeds of the policy in the first place to the debt for which *B.* alone was liable, and it would appear that the same right could have been exercised though *B.* had been actually bankrupt. In *Dickson* v. *Moncrieff*[16] a

[1] *Good* v. *Smith*, 1779, M. 6816; but see *Couper* v. *Young*, 1849, 12 D. 190 (prescribed bill).
[2] *Macleod* v. *Mackenzie*, 1821, 1 S. 86.
[3] *Lady Semple* v. *Comistoun*, 1705, M. 6803. See *Dickson* v. *Moncrieff*, 1853, 16 D. 24.
[4] Bell, *Prin.*, sec. 563; *Dig.*, xlvi. 3, 1; *Dougall* v. *Lornie*, 1899, 1 F. 1187.
[5] *Couper* v. *Young*, 1849, 12 D. 190.
[6] *Johnston* v. *Law*, 1843, 5 D. 1372; *Maitland* v. *Rattray*, 1848, 11 D. 71 (Tippling Act, 1750, 24 Geo. II. c. 40); see *supra*, p. 553. But see *Seymour* v. *Pickett* [1905], 1 K.B. 715.
[7] *Bannatyne's Reprs.*, *infra*. Cp. *Scott* v. *Sandeman*, 1851, 1 Macq. 293.
[8] *Dig.*, xlvi. 3, 1. [9] Ersk. iii. 4, 2.
[10] *Hay & Co.* v. *Torbet*, 1908, S.C. 781, following *Cory Brothers* v. *Owners of the "Mecca"* [1897], A.C. 286.
[11] *Campbell* v. *Falconer*, 1828, 6 S. 830.
[12] *Jackson* v. *Nicoll*, 1870, 8 M. 408; *Scott's Trs.* v. *Alexander's Trs.*, 1884, 11 R. 407.
[13] Ersk. iii. 4, 2.
[14] *Cochrane* v. *Mathie*, 1821, 1 S. 80; *Bannatyne's Reprs.* v. *Brown's Trs.*, 1825, 3 S. 593.
[15] 1909, 2 S.L.T. 262. [16] 1853, 16 D. 24.

bankrupt was liable on two bills, both of which were held by a bank. On one bill *A.* was also liable, on the other *B.* Between themselves and the bankrupt *A.* was a cautioner, *B.* was a principal debtor for whom the bankrupt was cautioner. At the request of *B.* the bank allocated funds which they held belonging to the bankrupt rateably between the two bills. It was decided that this appropriation did not give *A.* any claim against *B.*, based on the footing that the whole funds should have been appropriated to the debt on which the bankrupt was principal debtor, but the question of the rights of the bank was not considered.

Rule in *Clayton's* Case. Where there is an account current on which payments are made without any appropriation, the general rule, at least in accounts between banker and customer, is usually known as the rule in *Clayton's* case,[1] and is that the payments on the credit side of the account are held to extinguish the items of the debit side of the account in the order of their date.[2] This rule has been applied even in cases where its application results in a gratuitous and unexpected advantage to one of several debtors at the expense of the creditor, or to one cautioner at the expense of another. Thus where a partner in a bank died when the bank was indebted to a customer, and the account was kept on, with the result that enough was drawn by the customer to extinguish his credit balance, if the principle of wiping out the earliest debit item by the earliest credit item were applied, it was held that the liability of the deceased partner's estate was thus extinguished, and that the customer, on the failure of the bank while there was still a balance due to him, could found no claim against that estate.[3] The converse case is illustrated by *Royal Bank* v. *Christie.*[4] There a partner in a firm had granted a bond and disposition in security to a bank to cover advances made to the firm. The partner died when the account shewed an adverse balance due to the bank. The account was continued without any overt change, and operated on by the firm, as carried on by the remaining partners. The balance remained continuously against the firm, but enough was paid in to wipe out the balance due at the date of the late partner's death. On the bankruptcy of the firm it was held that the bank could not apply the bond and disposition in security to meet the balance due, on the ground (1) that they could not use it to cover advances which were made after the granter's death, and (2) that the balance due at the granter's death was extinguished by the payments subsequently made. In *Cuthill* v. *Strachan* [5] the same rule was applied, with the result of depriving one cautioner of his right of relief against the other. *A.* and *B.* were cautioners in a cash credit account with a bank. *A.* was sequestrated, and no claim was made by the bank. The account was continued, and ultimately the debtor was sequestrated. *B.* paid the balance outstanding, and sued *A.*, who had been reinvested in his estates on a composition, for relief calculated on the amount that had been owing at the date of his sequestration. The Court, applying the rule of *Clayton's* case to the cash credit account, held that the amount due at the date of *A.'s* sequestration

[1] *Devaynes* v. *Noble* (*Clayton's* case), 1816, 1 Merivale, 529, 571 ; 3 Ross, *L.C.* (commercial), 643.

[2] *Royal Bank* v. *Christie*, 1839, 1 D. 745 ; 1841, 2 Rob. 118 ; *Lang* v. *Brown*, 1859, 22 D. 113 ; *Jackson* v. *Nicoll*, 1870, 8 M. 408 ; *M'Laren* v. *Bradly*, 1874, 2 R. 185 ; *Scott's Trs.* v. *Alexander's Trs.*, 1884, 11 R. 407 ; *Cuthill* v. *Strachan*, 1894, 21 R. 549 ; *Deeley* v. *Lloyd's Bank* [1912], A.C. 756.

[3] *Devaynes* v. *Noble* (*Clayton's* case), *supra.*

[4] 1839, 1 D. 745 ; affd. 1841, 2 Rob. 118.

[5] 1894, 21 R. 549.

had been extinguished, and therefore that, as *B.* was founding on a debt which was discharged, he had no claim to relief.

Trust Money.—The rule in *Clayton's* case does not apply where trust funds are lodged by a trustee in his own bank account. The inference then is that any cheques subsequently paid are paid from his own funds, and that any balance which may remain standing to his credit on his bankruptcy is earmarked as trust money. The beneficiary is entitled to it in a question with the trustee in the bankruptcy.[1] The inference does not hold if, when the trust money was lodged, the account was overdrawn to an amount exceeding it ;[2] or if, in the interval between lodging the trust funds and the trustee's bankruptcy, there was any time when the account was overdrawn.[3]

Limits of Rule in *Clayton's* Case. In other respects recent cases have tended to limit the application of the rule in *Clayton's* case. It does not apply where there are two separate accounts kept with a bank.[4] Nor does it apply to a tradesman's account, where partial payments have been made, but the element of advances made by the creditor is absent.[5] It is probably the law that it is limited to accounts between banker and customer, or to cases where *A.*, though not professionally a banker, has an account with *B.* which involves substantially the relationship of banker and customer between them.[6] Thus where the account was one between an auctioneer and a dairy-farmer, and consisted on the one side partly of charges by the auctioneer, partly of the price of cattle bought by the farmer, on the other side of cash items, and the price of cattle sold on the farmer's account, the Court was of opinion, in a question with a cautioner, that the rule did not apply.[7]

In *Cory Brothers* v. *Owners of the "Mecca,"* [8] Lord Macnaghten said : "Where the election is with the creditor it is always his intention, express or implied or presumed, and not any rigid rule of law, that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account, or anything else which indicates an intention one way or the other, and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction." The first part of this dictum was adopted as a guiding rule by Lord Ardwall in *Hay & Co.* v. *Torbet.*[9] There a farmer's account with an auctioneer was guaranteed by *T.* The auctioneer's business was converted into a limited company, but the account was continued, none of the parties then regarding this change as material. On *T.* ultimately withdrawing his guarantee, an account was rendered to him, consisting of credit and debit items, both before and after the constitution of the company. It was conceded that the alteration in the legal personality of the creditor, by the conversion of his business into a limited company, precluded any claim against the cautioner for liabilities subsequently incurred, and the action was limited to the

[1] *Macadam* v. *Martin's Tr.*, 1872, 11 M. 33 ; *Jopp* v. *Johnston's Tr.*, 1904, 6 F. 1028 ; *Knatchbull* v. *Hallett*, 1879, 13 Ch. D. 696.

[2] *Hofford* v. *Gowans*, 1909, 1 S.L.T. 153 (O.H., Lord Skerrington).

[3] *Roscoe Ltd.* v. *Winder* [1915], 1 Ch. 62.

[4] *Bradford Old Bank* v. *Sutcliffe* [1918], 2 K.B. 833.

[5] *Dougall* v. *Lornie*, 1899, 1 F. 1187 ; *Hay & Co.* v. *Torbet*, 1908, S.C. 781 ; *Cory Brothers* v. *Owners of the "Mecca"* [1897], A.C. 286.

[6] As in *Lang* v. *Brown*, 1859, 22 D. 113 ; *M'Laren* v. *Bradly*, 1874, 2 R. 185. And see cases relating to triennial prescription, *Mackinlay* v. *Wilson*, 1885, 13 R. 210 ; *Batchelor's Trs.* v. *Honeyman*, 1892, 19 R. 903.

[7] *Hay & Co.* v. *Torbet*, 1908, S.C. 781.

[8] [1897], A.C. 286.

[9] *Supra*, per Lord Ardwall, 1908, S.C., at p. 787.

balance due at that date. In defence, the cautioner maintained that there were sufficient credit items to wipe out that balance, on the principle that the earliest credit item wiped out the earliest debit item. The Court held that the question must be decided according to the presumed intention of the creditor, and the fact that the account had been rendered, with all the items of the account on each side summed up, was a sufficient indication of his presumed intention not to appropriate the payments so as to extinguish the earlier items. A subsequent decision of the House of Lords,[1] however, shews that the "presumed intention" of the creditor is to be gathered from his conduct in stating the account, not from the consideration that he can never have intended to deprive himself of the right for the enforcement of which he sues. The customer of a bank mortgaged property in security of his current account. He subsequently executed a second mortgage to *B.*, and *B.* gave notice to the bank. In such cases the usual banking practice is to close the customer's account and to open a new one. The bank manager, having forgotten the receipt of the notice from *B.*, omitted to do this, and the account was continued without alteration. Enough was paid in to wipe out the balance due at the date when the notice of the mortgage to *B.* was received, though at the same time advances were being made to the customer and an adverse balance remained against him. It was held that the rule in *Clayton's* case was applicable, and that the result was that the mortgage to *B.* had gained priority over the mortgage to the bank. After the receipt of notice the bank was not entitled, in a question with *B.*, to make advances in reliance on the security of the mortgaged subjects, on the ground that they had notice that these subjects no longer belonged to their debtor;[2] and the balance due to them when the notice was received, being extinguished by subsequent payments, could no longer be founded on. It was argued that the application of the credit items was a question of the bank manager's intention, but held that there was nothing to indicate that he did not intend that the earliest debit item should be extinguished by them, because, as he had forgotten the fact that he had received notice of *B.'s* mortgage, the risk that that mortgage might acquire priority could not have influenced his mind, and, regarding the case as a question with the debtor alone, it was quite immaterial whether the earlier or the later items were extinguished.

Proof of Payment. Where an attempt is made to prove the extinction of a debt without the production of a receipt or discharge, the rules of evidence are exceedingly vague and unsatisfactory. The general rule is stated to be that the extinction of a claim must be effected in the same way as it was constituted—*unumquodque eodem modo solvitur quo colligatur*[3]—but this rule is subject to so many exceptions as to be of little use as a practical guide. In attempting to state the leading rules, it may be best to separate cases depending on a document by which the debt sued for is constituted or proved, and cases where the debt, without being so constituted, is sued for as the result of a contract between the parties.

Documents of Debt. Where the creditor founds on a document of debt, such as a bond, bill, or I.O.U., and the defence is payment, it is a fixed rule of law that the proof is limited to the writ or oath of the creditor.[4] It is immaterial that the sum in question is less than £100 Scots.[5] And the law

[1] *Deeley* v. *Lloyd's Bank* [1912], S.C. 756.

[2] As to this, see *supra*, p. 641.

[3] Bell, *Prin.*, sec. 564.

[4] Dickson, *Evidence*, sec. 610; *Patrick* v. *Watt*, 1859, 21 D. 637; *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764; *Bishop* v. *Bryce*, 1910, S.C. 426.

[5] *Robertson* v. *Thomson*, 1900, 3 F. 5; *Macdonald* v. *M'Gregor*, 1803, Hume, 499.

is not altered by sec. 100 of the Bills of Exchange Act, 1882.[1] So where an I.O.U. was founded on, and the debtor admitted that he had granted it on receipt of a loan, but averred that he had paid it, it was held that parole evidence of this averment was incompetent, and the proof was limited to the writ or oath of the creditor.[2] But it would appear that averments of grounds for holding the debt to be extinguished, in other ways than by actual payment, will let in proof by parole evidence. It is recognised that "the defender may prove facts and circumstances which give rise to the inevitable inference that the debt has been satisfied or discharged in some way or other."[3] This inference is not to be drawn from mere delay in enforcing payment,[4] nor from the fact that in the interval other debts of a different character, due by the defender to the pursuer, have been duly settled.[5] "In general, it is necessary that there should be evidence of some transaction or settlement between the creditor and the debtor subsequently to the contraction of the debt, which necessarily leads to the conclusion that the debt was discharged."[6] Such transaction may take the form of a settlement of accounts, followed by a discharge in general terms;[7] of intromissions by the creditor with the debtor's effects;[8] of a sale of the subjects over which the debt was secured, with the creditor's concurrence, and followed by a payment to him;[9] or, in a case between two brothers, of the fact that there was a long course of dealing, and an account stated in the creditor's books with no mention of the particular debt.[10]

It would also seem open to the debtor to prove that the document of debt was granted for a particular purpose, that this purpose has been carried into effect, and that the document ought to have been given up. In *Bishop* v. *Bryce*,[11] *A.* granted an I.O.U. for £300 in favour of *B.*, on which *B.* sued for payment. *A.* averred in defence that the I.O.U. was granted for money lodged by *B.* in his hands for the purpose of obtaining shares in a company then being formed, that shares to the value of £300 had been duly allotted to *B.*, and that he had omitted *per incuriam* to have the I.O.U. given up. Proof had been allowed and taken in the Sheriff Court, and its competency was upheld on the ground, as put by the Lord President (Dunedin), that although proof by parole of payment of a debt constituted by writ was incompetent, "you can and may prove by parole that facts and circumstances have arisen which really shew that the party putting forward the I.O.U. has no proper right to have the document of debt with him."

Document in Possession of Debtor.—If the document of debt is in the hands of the debtor, although *ex facie* undischarged, a presumption of payment arises—*chirographum apud debitorem repertum praesumitur solutum*.[12] But it is open to the creditor to prove, by parole evidence, that the document

[1] *Robertson* v. *Thomson*, *supra*; and see *supra*, p. 384.
[2] *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764.
[3] Per Lord Skerrington in *Campbell* v. *Campbell's Exrs.*, 1910, 2 S.L.T. 240.
[4] *Supra*, p. 542. [5] *Patrick* v. *Watt*, 1859, 21 D. 637.
[6] Per Lord Moncreiff in *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764, at p. 780; approved and adopted in *Chrystal* v. *Chrystal*, 1900, 2 F. 373.
[7] *Neilson's Trs.* v. *Neilson's Trs.*, 1883, 11 R. 119.
[8] *Mitchell* v. *Berwick*, 1845, 7 D. 382; *Spence* v. *Paterson's Trs.*, 1873, 1 R. 46. As to proof that a heritable security has been extinguished by intromissions with the rents, see Dickson, *Evidence*, sec. 591.
[9] *Mackie* v. *Watson*, 1837, 16 S. 73.
[10] *Ryrie* v. *Ryrie*, 1840, 2 D. 1210. See also *Cameron* v. *Panton's Trs.*, 1891, 18 R. 728; *Mackintosh* v. *Mackintosh*, 1928, S.C. 83.
[11] 1910, S.C. 426. [12] Ersk. iii. 4, 5; Dickson, *Evidence*, sec. 173.

got into the hands of the debtor by mistake, or by some method which gives him no right to retain it, and that the debt has not in fact been paid.[1]

Lost or Cancelled Documents. The fact that a pursuer is unable to produce a document of debt on which he founds raises a presumption that the debt has been paid and the document in consequence destroyed. The pursuer may set up the missing document by an action of proving of the tenor, but very clear proof of the *casus amissionis* is required.[2] If a creditor has intentionally destroyed the document of debt the inference is that he has discharged or waived his claim, and neither he, nor anyone else interested, can set up the document by an action of proving of the tenor, which is competent only in cases of accidental or unintentional destruction.[3] If a bill of exchange or any signature thereon has been cancelled unintentionally, or under a mistake, or without the authority of the holder, the cancellation is inoperative, but the burden of proof rests on the party founding on the bill.[4]

Payment for Contractual Services. Where there is no document of debt, and the claim is for payment of a debt arising under a contract, it would appear that if the contract was in writing proof of the payment of money becoming due under it must be by the writ or oath of the creditor.[5] So payment of rent under a written lease must be proved by the writ or oath of the landlord,[6] unless it may be presumed, in exceptional circumstances, from intromissions by the landlord with the tenant's effects.[7] If the debt has arisen under a verbal contract, the method of proof of payment depends on the nature of the contract. Parole evidence is admissible to prove payment of a loan which is not vouched by any writing ;[8] of rent under a verbal lease, if each term's rent does not exceed £100 Scots :[9] and, probably under the same limitation as to amount, of wages due under a verbal contract of service.[10] As the contract of mandate may be proved by parole evidence it was held that the same proof was admissible of averments that money had been paid to the defender with instructions to invest it.[11] In the case of sale, the fact that goods sold for ready money have been paid for may be proved by witnesses, even although the payment may not have been made at the moment when the goods were delivered.[12] But if there has been a substantial interval between the delivery of the goods and the alleged payment, or if the sale was on credit, proof is limited to the writ or oath of the seller, even although the sale was purely verbal.[13] In *Young* v. *Thomson* [14] an account for milk supplied during a period of seven months by a dairyman to the keeper of a dairy was sued for. The defender admitted receipt of the milk,

[1] *Edwards* v. *Fyfe*, 1823, 2 S. 431 ; *Knox* v. *Crawford*, 1862, 24 D. 1088 ; *Henry* v. *Miller*, 1884, 11 R. 713 (proof that receipt given without payment).

[2] *Winchester* v. *Smith*, 1863, 1 M. 685, per consulted judges, at p. 689 ; *Walker* v. *Nisbet*, 1915, S.C. 639.

[3] *Mackinnon's Tr.* v. *Bank of Scotland*, 1915, S.C. 411.

[4] Bills of Exchange Act, 1882, sec. 63 (3) ; *Dominion Bank* v. *Anderson & Co.*, 1888, 15 R. 408.

[5] Stair, i. 43, 4 ; Erskine, iv. 2, 21 ; *Foggo* v. *Hill*, 1840, 2 D. 1322, per Lord Fullerton, at p. 1334.

[6] Dickson, *Evidence*, sec. 610 ; Rankine, *Leases*, 3rd ed., 319.

[7] *Mitchell* v. *Berwick*, 1845, 7 D. 382.

[8] Ersk. iv. 2, 13 ; *Newlands* v. *M'Kinlay*, 1885, 13 R. 353.

[9] *Earl of Lauderdale* v. *Tenants of Swinton*, 1662, M. 12362.

[10] *Brown* v. *Mason*, 1856, 19 D. 137.

[11] *Burt* v. *Laing*, 1925, S.C. 181.

[12] *M'Donald* v. *Callender*, 1786, M. 12366.

[13] *Tod* v. *Flockhart*, 1799, Hume, 498 ; *Shaw* v. *Wright*, 1877, 5 R. 245 ; *Kilpatrick* v. *Dunlop*, 1909, 2 S.L.T. 307 ; *Young* v. *Thomson*, 1909, S.C. 529.

[14] 1909, S.C. 529.

but averred that the supplies were regularly entered in a pass-book and settled at the end of each month, and that this pass-book had been lost in the hands of the pursuer. It was held that parole evidence of the existence of this pass-book, and of the discharges there recorded, was competent, and that satisfactory evidence of these facts amounted to proof of payment by the writ of the pursuer.

Presumption of Payment. Certain debts are presumed to have been paid. This has been held with regard to tavern bills, after the guest has left, but the only effect of the presumption is to lay on the innkeeper the onus of proof of non-payment, not to limit the mode of proof.[1] In the earlier part of the eighteenth century it was held that a physician had no action for his fees unless he could prove a special bargain, with the exception of fees for attendance on deathbed.[2] Later cases modified this rule to a presumption of payment, with the same exception as to attendance on deathbed ;[3] and allowed the presumption to be displaced by proof that by the custom of the particular locality the physician was not paid at the time of attendance.[4] In a modern case the provisions of sec. 6 of the Medical Act, 1886 (49 & 50 Vict. c. 48), would have to be considered, and appear to be inconsistent with any presumption of payment.[5] There is a presumption of law, not to be rebutted by evidence, that fees to counsel have been paid, and cannot be recovered by action against the client.[6] But this rule was held not to apply to the case of a "pension" granted to a member of the Bar by a town council ;[7] and does not preclude action by the advocate against the law agent, if the latter has actually received payment.[8]

Apocha trium annorum. It is an established rule—usually referred to by the term *apocha trium annorum*—that the production of receipts for three consecutive instalments of a termly payment, such as feu-duty, rent, interest, or an annuity, raises a presumption that all prior instalments have been paid.[9] If the receipts in question merely discharge the particular instalment, it has twice been held in the Outer House that the presumption may be redargued by parole evidence of non-payment ;[10] if they bear to discharge the whole balance due, it would appear that the only competent method of disproof is the writ or oath of the debtor.[11] As the presumption of payment "is mainly inferred from the reiteration of discharges, without reservation, which no prudent man is presumed to do,"[12] it does not arise from a single discharge for the amount due for several terms :[13] and discharges for rent by a singular successor in lands, or for interest by an assignee of a

[1] *Barnet* v. *Colvil*, 1840, 2 D. 337. As to charges for spirituous liquors, under the Tippling Act, see *supra*, p. 553.

[2] *Russell* v. *Dunbar*, 1717, M. 11419. Deathbed meant the last sixty days of life.

[3] *Hamilton* v. *Gibson*, 1781, M. 11422 ; *Sanders* v. *Hewat*, 1822, 1 S. 333.

[4] *Flint* v. *Alexander's Trs.*, 1795, M. 11422.

[5] "A registered medical practitioner shall . . . be entitled . . . to recover in due course of law . . . any fees to which he may be entitled, unless he is a fellow of a college of physicians, the fellows of which are prohibited by bye-law from recovering at law their expenses, charges, or fees. . . ."

[6] *Batchelor* v. *Pattison*, 1876, 3 R. 914, per Lord President Inglis, at p. 918.

[7] *M'Kenzie* v. *Town of Burntisland*, 1728, M. 11421.

[8] *Ogilvie* v. *Simpson*, 1837, 15 S. 746, at p. 748 ; *Cullen* v. *Buchanan*, 1862, 24 D. 1132.

[9] Stair, i. 18, 2 ; iv. 40, 35 ; Ersk. iii. 4, 10 ; Bell, *Prin.*, sec. 567 ; Dickson, *Evidence*, sec. 177.

[10] *Cameron* v. *Panton's Trs.*, 1891, 18 R. 728 ; *Stenhouse* v. *Stenhouse's Trs.*, 1899, 36 S.L.R. 637. See also *Duke of Buccleuch* v. *M'Turk*, 1845, 7 D. 927, opinion of Lord Medwyn, at p. 934.

[11] *Hunter* v. *Lord Kinnaird's Trs.*, 1829, 7 S. 548.

[12] Stair, i. 18, 2.

[13] Dickson, *Evidence*, sec. 177.

bond, do not raise any presumption that the terms due to the original landlord or creditor have been paid.[1] And if a bill for arrears of a termly payment has been granted,[2] or decree for such arrears has been obtained,[3] receipts for subsequent terms raise no presumption of the discharge of the bill or the sums due under the decree. In *Baird* v. *Mount*[4] it was decided that a landlord, who had granted discharges for rent for several terms without any reservation, could not claim penal or pactional rent for miscropping, but the decision was founded on personal bar rather than on any presumption of payment or discharge.

Proof by Creditor's Writ. Where a debtor proposes to prove payment by the writ of the creditor, it is conceived that it is never necessary that the writ produced should be probative. This is settled with regard to writings produced as evidence of payment of rent,[5] and was held with regard to a receipt for a legacy.[6] And it is probably safe to conclude, from the opinions given in *Paterson* v. *Paterson*,[7] that as a writ is produced in a question of payment as evidence of a fact, and not as the constitution of a right, the law as to authentication does not in any case apply. A cheque, granted by a debtor, and indorsed by a creditor, raises a presumption that it was given and taken in payment, which it rests with the creditor to displace.[8]

Effect of Receipt.—An acknowledgment of the receipt of money in a formal and probative deed, such as an acknowledgment of receipt of the price in a disposition of lands, cannot, in the absence of averments of fraud, be disproved except by the writ or oath of the party founding on it.[9] A receipted account, on the other hand, only lays the onus of proof of non-payment on the creditor. So where a pursuer averred that he had sent a receipt for rent with a letter requesting payment, and that he had not in fact been paid, it was held that he did not require to aver that the defender was fraudulently founding on the receipt in order to let in parole proof.[10] And if a creditor who has received a cheque has sent a receipt, and the cheque is dishonoured, it is conceived that he is entitled to prove the fact that the cheque was dishonoured, and consequently that the debt was not paid, although where action was brought after thirteen years, during which receipts for subsequent items of the same debt (rent) had been granted, it was held that proof of such averments was limited to the writ or oath of the debtor.[11] It would appear to be competent to prove that a receipt, though bearing to be in full discharge of a particular claim, was granted subject to a verbal reservation that a further claim might in a certain event be made.[12] A receipt for goods is not conclusive, but lays the burden of proof on the party who alleges that the goods were not received.[13]

[1] *Master of Corstorphine* v. *The Tenants*, 1636, M. 11396. The effect of discharges by an heir would seem doubtful (*Gray* v. *Reid*, 1699, M. 11399; and Ersk. iii. 4, 10).

[2] *Patrick* v. *Watt*, 1859, 21 D. 637.

[3] *Grant* v. *Maclean*, 1757, M. 11402.

[4] 1874, 2 R. 101.

[5] *Mitchell* v. *Berwick*, 145, 7 D. 382; Rankine, *Leases*, 3rd ed., 319.

[6] *M'Laren* v. *Howie*, 1869, 8 M. 106.

[7] 1897, 25 R. 144. See *supra*, p. 193.

[8] *Nicoll* v. *Reid*, 1878, 6 R. 216; *Robb* v. *Robb's Trs.*, 1884, 11 R. 881.

[9] *Gordon* v. *Trotter*, 1833, 11 S. 696; *Swan* v. *Baird*, 1836, 15 S. 251; *Grant's Trs.* v. *Morison*, 1875, 2 R. 377, per Lord President Inglis, at p. 380. As to the effect of an admission that the deed does not represent the true agreement between the parties, see *supra*, p. 377. As to averments of fraud, *Kirkwood* v. *Bryce*, 1871, 8 S.L.R. 435.

[10] *Henry* v. *Miller*, 1884, 11 R. 713.

[11] *Duke of Buccleuch* v. *M'Turk*, 1845, 7 D. 927; see opinion of Lord Medwyn.

[12] *Lee* v. *Lancashire and Yorkshire Rly. Co.*, 1871, L.R. 6 Ch. 527; *North British Rly. Co.* v. *Wood*, 1891, 18 R. (H.L.) 27.

[13] *Smith* v. *Bedouin Steam Navigation Co.*, 1895, 23 R. (H.L.) 1.

(2) *Performance*

Alternative Methods of Performance. Where an obligation is definitely alternative the general rule is that the choice of the method of performance lies with the debtor.[1] So an obligation to supply water to a tenant in one of two alternative methods leaves the landlord free to select either method ;[2] a loan, expressed to be for six or nine months, gave the debtor the right to select the longer period.[3] If one of the methods of performance becomes impossible the debtor is bound to perform the other.[4] In England it has been held that if the party who has the right to elect intimates the method he prefers he cannot afterwards revoke that election ;[5] in Scotland it has been laid down by Lord Bankton, founding on civil law, that "he that has the election may change his mind, any time before action is intended, but not thereafter."[6] In two early and somewhat special cases it was decided that part performance of one alternative is conclusive election.[7] These rules apply only to cases where the obligation is really alternative, not where there is one obligation fortified by a penalty in case of failure. Such a provision leaves it open to the creditor to insist on performance ; it does not entitle the debtor to tender the penalty instead.[8] It may often be a narrow question of construction in particular cases whether the obligation in question is truly alternative or an obligation fortified by a penalty,[9] but it may probably be regarded as a general rule, at least in leases, that if a party undertakes not to do a particular act the fact that the penal consequences of his doing it are expressly provided for does not make the obligation alternative so as to preclude interdict at the instance of the creditor.[10] Where a right to take a certain course is sanctioned by the contract without any provision as to which party is to exercise it, the inference is that it is open to both. So a break in a lease, if there is no provision on the subject, may be exercised either by landlord or tenant.[11]

Proof of Performance.—It is established that performance of an obligation *ad factum præstandum*, *e.g.*, to supply goods, to erect a building, to render services, may be proved *prout de jure*, whether the contract was verbal or in writing,[12] unless action has been so long delayed as to bring the case within the triennial or quinquennial prescription.[13] The onus of proof of performance depends on the nature of the question at issue. If that relates to one specific act, such as the delivery of goods, the performance of particular service, the

[1] *Dig.*, xiii. 4, 2 ; xlv. 1, 16 ; Stair, i. 17, 20 ; More, *Notes on Stair*, i. cxxi. ; Bankton, i. xxiii. 80, 83 ; Pothier, *Obligations*, sec. 245 *seq.* ; Savigny, *Obligationenrecht*, i. sec. 38. For English law see Leake, *Contracts*, 7th ed., p. 498 ; Chitty, *Contracts*, 17th ed., p. 814.

[2] *Christie* v. *Wilson*, 1915, S.C. 645.

[3] *Reed* v. *Kilburn Co-operative Society*, 1875, L.R. 10 Q.B. 264.

[4] *Dig.*, xlv. 1, 16 ; More, *Notes to Stair*, i. cxxi. ; *Anstruther* v. *Magistrates of Pittenweem*, 1742, Elchies, Notes, Alternative, No. 1. This assumes that the method which remains is one which was within the contemplation of the parties, as reasonable men. See *supra*, p. 356.

[5] *Brown* v. *Royal Insurance Co.*, 1859, 1 E. & E. 853.

[6] Bankton, i. xxiii. 83 ; *Dig.*, xlv. 138 ; Savigny, *Obligationenrecht*, i. sec. 38.

[7] *Collector of Taxation* v. *English*, 1675 ; Brown's *Supp.*, ii. 180 ; *Town of Edinburgh* v. *Gairden*, 1694 ; Brown's *Supp.*, iv. 157.

[8] *Supra*, p. 673.

[9] See note by Lord Elchies, in *Anstruther* v. *Magistrates of Pittenweem*, 1742, Elchies, Notes, Alternative, No. 1.

[10] *Craigie* v. *Mackenzie*, 18th June 1811, F.C. ; affd. 1815, 6 Paton, 117 ; *Weston* v. *Managers of Metropolitan Asylum District*, 1882, 9 Q.B.D. 404 ; *Gold* v. *Houldsworth*, 1870, 8 M. 1006 (feu) ; Rankine, *Leases*, 3rd ed., p. 461.

[11] *Grant* v. *Sinclair*, 1861, 23 D. 796.

[12] Stair, iv. 43, 4 ; Ersk. iv. 2, 20 ; Dickson, *Evidence*, sec. 611.

[13] *Infra*, pp. 741, 745.

rule is in accordance with the brocard, *ei incumbit probatio, qui dicit, non qui negat*,[1] and the onus of proof lies on the party who alleges and rests his case on performance. So where freight is to be paid by weight it lies on the carrier to prove that goods of the weight for which he charges were taken on board.[2] Similarly, if goods are carried without a bill of lading or other receipt it lies on the carrier to prove that he has delivered all he received.[3] As the obligation of a party who has received an article on loan, pledge, or deposit is to return it, the onus of proof that he has done so lies upon him.[4] Again, if a party admits that he has not performed an obligation, but avers facts which would constitute an excuse, the onus of proof of these facts will generally rest upon him.[5] A party who has the temporary possession of another's property (carrier, hirer, pledgee, depositary) is bound to restore it in as good condition as he received it, but may have as a defence that its loss or injury was due to a cause for which, either by implication of law or by express bargain, he was not responsible. The onus of proof then rests upon him. If his obligation was merely to take reasonable care, he must prove that care affirmatively ;[6] if nothing short of the loss or injury being attributable to a particular event will save him, he must prove that such an event occurred, and might reasonably be supposed to have caused the injury.[7] Having proved so much, he is not bound to prove affirmatively the cause of the loss or injury. So where goods were injured during a voyage, and the shipowner proved that a storm sufficient to cause the injury had been encountered, he had discharged the onus which lay upon him, it rested then on the shipper to prove that the injury had not arisen from the storm but from some other cause for which the shipowner was responsible.[8] If, however, the question be whether the performance was in accordance with the conditions of the particular contract, it has been laid down that when contract work has been completed or where goods have been sold and delivered, there is a presumption in favour of the person who has completed the work or delivered the goods, with the result that the onus of proving that the work or goods is not according to contract or is of bad quality rests with the building-owner or purchaser, although to ensure relevancy it may be necessary for the pursuer, claiming payment, to aver that he has duly performed his contract.[9] The onus may often be easily discharged by proof that the work or article is imperfect. But where *A.* contracted for the building and plastering work on a house, another party being engaged for the joiner work, a refusal to pay *A.*'s account was not justified by proof that the walls had bulged and cracked, and an appeal to the principle *res ipsa loquitur*. It lay on the owner of the house to prove breach of contract

[1] *Dig.*, xxii. 3, 1.

[2] "*Chassie Maersk*" (*Owners of*) v. *Love & Stuart*, 1916, S.C. (H.L.) 187.

[3] *Langlands & Sons* v. *M'Master & Co.*, 1907, S.C. 1090. As to the effect of statements in a bill of lading, as affected by the Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. V. c. 22), a subject too special to be dealt with here, see Scrutton, *Charter-parties*, 12th ed., p. 171 and App. iv.

[4] *Taylor* v. *Nisbet*, 1901, 4 F. 79. See also *Tosh* v. *Ogilvy*, 1873, 1 R. 254.

[5] *Dig.*, xxii. 3, 19.

[6] *M'Lean* v. *Warnock*, 1883, 10 R. 1052 ; *Pyper* v. *Thomson*, 1843, 5 D. 498 ; *Pullars* v. *Walker*, 1858, 20 D. 1238 ; *Sutherland* v. *Hutton*, 1896, 23 R. 718, which seems to lay the onus of proof of fault on the owner of the article, is questioned by Lord Justice-Clerk Scott-Dickson in *Mustard* v. *Paterson*, 1923, S.C. 142, at p. 149, and described as decided on the form of the pleadings.

[7] *Jones* v. *Ross*, 1830, 8 S. 495 ; *Wilson* v. *Orr*, 1879, 7 R. 266 ; *Bain* v. *Strang*, 1888, 16 R. 186 ; *Mustard* v. *Paterson*, 1923, S.C. 142.

[8] *Williams* v. *Dobbie*, 1884, 11 R. 982 ; *Carruthers* v. *Macgregor*, 1927, S.C. 816.

[9] Lord Murray in *Carruthers* v. *Macgregor*, 1927, S.C. 816, 822.

on *A.*'s part, and the onus was not discharged by pointing to a result which might be due to such breach of contract, but might equally well be due to fault of the other contractor, or to some other cause, such as subsidence of the ground, for which *A.* would not be responsible.[1] If, however, a building in the course of erection is accidentally destroyed, the builder, in cases where he has any claim for payment, must discharge the onus of proof that he had observed the contractual conditions.[2]

(3) *Acceptilation and Discharge*

Acceptilation.—Acceptilation is the term employed in Scots law to denote the release of an obligant or debtor without performance of his obligation or payment of his debt.[3] If the obligation arose from a verbal contract its acceptilation may be proved by parole evidence;[4] if it arose from a written contract the authorities are to the effect that, except in the case where obligatory documents are destroyed or given up, proof is limited to the writ or oath of the creditor.[5] But it may be assumed that actings, such as would suffice to validate a verbal agreement for the alteration of a written contract, would also suffice in the case of a verbal agreement for its renunciation or acceptilation.[6] Parole evidence has been admitted to prove that an I.O.U. was destroyed by or with the authority of the creditor, and with the intention to release the debtor,[7] but the terms of sec. 62 (1) of the Bills of Exchange Act, 1882, seem to preclude such proof in the case of a bill or promissory note.[8]

The renunciation of a written contract which is still pending may be inferred, without any express discharge, where the parties have concluded a new contract in relation to the same matter.[9] So where an heir of entail granted a new lease to parties whose existing lease had still two years to run the arrangement was not open to the objection that, if construed as an extension of the old lease, it would have amounted to a contravention of the fetters of the entail. The old lease, without any express renunciation or discharge, was extinguished when the new lease was granted.[10]

Construction of General Discharge. A general discharge on a composition with creditors will include all debts of which the creditors were then aware, including debts on which the bankrupt was merely cautioner, unless any particular debt was expressly reserved.[11] In other circumstances a discharge of all claims, following an enumeration of particular debts discharged, is construed on the principle that general words following an enumeration of particulars are applicable only to things *ejusdem generis* to the particulars enumerated.[12] So a discharge of all claims, following a recital of personal

[1] *Carruthers* v. *Macgregor, supra.*
[2] *M'Intyre* v. *Clow*, 1875, 2 R. 278.
[3] Stair, i. 18, 5; Ersk. iii. 4, 8. As to Roman law, see *Inst.*, iii. 29, 2; *Dig.*, 46, 4.
[4] Ersk. iii. 4, 8; Nicolson's note, impugning Erskine's statement, is not supported by the case he cites.
[5] Ersk. iii. 4, 8; Tait, *Evidence*, 335, 341; Dickson, *Evidence*, sec. 627. And see *supra*, p. 717.
[6] *Supra*, p. 392.
[7] *Anderson's Trs.* v. *Webster*, 1883, 11 R. 35.
[8] "When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor." See *Edwards* v. *Walters* [1896], 2 Ch. 157, where it was held that the section had altered the law of England.
[9] Ersk. ii. 6, 44; *Campbeltown Coal Co.* v. *Duke of Argyll*, 1926, S.C. 126; *Edinburgh Entertainments Co.* v. *Stevenson*, 1926, S.C. 363, opinion of Lord Justice-Clerk Alness, at p. 378.
[10] *Campbeltown Coal Co., supra.*
[11] *British Linen Co.* v. *Esplin*, 1849, 11 D. 1104.
[12] Bell, *Prin.*, sec. 583; *Marquis of Tweeddale* v. *Hume*, 1848, 10 D. 1053.

debts, does not involve a discharge of debts of a different character, such as a bond and disposition in security,[1] or a claim of relief arising under a cautionary obligation.[2] A discharge granted by a daughter in her marriage contract was declared to be "in full satisfaction of her patrimony," and discharged all her claims against her father's estate "in name of legitim, portion natural, bairn's part of gear, executry, or any other manner of way whatever." As all the claims expressly mentioned were claims in succession, the general words were held not to be applicable to a claim which the daughter had under her father's marriage contract.[3] It was averred that she was unaware of the existence of this right, but the truth of this averment was not admitted, and the case was decided as a question of construction. It has been laid down as a general rule that the meaning of a discharge must be arrived at by a consideration of its terms, and that parole evidence of the intention of the party who granted it is incompetent.[4] But it is probably competent to prove that the party was unaware of the claim which he is alleged to have discharged.[5] And where *A.* granted a receipt for money received from *B.*, expressed to be in full settlement of all claims against *B.* or his firm of *X. & Co.*, and *A.* averred that he had a separate claim against *B.* as an individual, which he had not intended to discharge, parole proof of *A.'s* averments was allowed, on the ground that the terms of the receipt were ambiguous.[6] It has already been noticed that a general discharge is not binding, if granted on a specific payment when both parties were unaware that any further claim was maintainable.[7]

Fitted Accounts. Fitted accounts, *i.e.*, accounts between parties who have had business transactions, rendered by one party and docqueted as correct by the other, without any express discharge, do not imply a discharge of all claims arising to either party under the transactions in question, but they raise a presumption that all claims are settled, which the party who avers an outstanding account must overcome.[8] So where house factors, who had rendered annual accounts, in which they deducted their disbursements from the rents received, and paid the balance, had received from their employers discharges of all claims in respect of the rents, it was held that this course of dealing did not preclude a subsequent claim for a disbursement alleged to have been omitted, but laid the burden of proof of non-payment on the pursuers.[9] A bank pass-book, made up and initialled by the officers of the bank as correct, does not preclude parole evidence that a particular entry has been made by mistake.[10] Fitted accounts do not preclude a demand for taxation of the account of a law agent.[11] It has been decided in England that action is competent on an "account stated," although the contract to which the account related was one which, under the provisions

[1] *Mitchell* v. *Sinclair*, 1716, M. 5031.

[2] *Wood* v. *Gordon*, 1695, M. 5035; *M'Taggart* v. *Jeffrey*, 1830, 4 W. & S. 361.

[3] *Greenock Banking Co.* v. *Smith*, 1844, 6 D. 1340.

[4] *M'Taggart* v. *Jeffrey*, 1830, 4 W. & S. 361, per Lord Wynford, at p. 367.

[5] *Lyall* v. *Edwards*, 1861, 6 H. & N. 337. And see opinion of Lord Moncreiff in *Greenock Banking Co.* v. *Smith*, 1844, 6 D. 1340.

[6] *M'Adam* v. *Scott*, 1912, 50 S.L.R. 264; 1913, 1 S.L.T. 12.

[7] *Supra*, p. 454.

[8] *Struthers* v. *Smith*, 1913, S.C. 1116; *Laing* v. *Laing*, 1862, 24 D. 1362; *Glasgow Royal Infirmary* v. *Caldwell*, 1857, 20 D. 1; *Robb* v. *Gow*, 1905, 8 F. 90, per Lord President Dunedin, at p. 105; *M'Laren* v. *Liddell's Trs.*, 1862, 24 D. 577.

[9] *Struthers* v. *Smith*, *supra*.

[10] *Commercial Bank of Scotland* v. *Rhind*, 1857, 19 D. 519; revd. 1860, 3 Macq. 643; *Couper's Trs.* v. *National Bank*, 1889, 16 R. 412.

[11] *Cockburn* v. *Clark*, 1885, 12 R. 707; *M'Farlane* v. *M'Farlane's Trs.*, 1897, 24 R. 574.

of the Trade Union Act, 1871, could not be directly enforced, but that no such action is maintainable if the contract in question was actually void.[1]

Agreement not to Sue.—An agreement not to sue (*pactum de non petendo*), if conceived in absolute terms, and concluded with a party who was a sole debtor, would amount to a discharge of the debt.[2] Where there are several debtors jointly and severally liable, a discharge in favour of one, reserving the creditor's claim against the others, may be construed as amounting merely to an agreement not to sue, and if so does not preclude a claim of relief by the other debtors.[3] Where a creditor, contracting with a party who proposed to advance money to the debtor, undertook that for a period of seven years he would not take legal steps against the debtor, or sell or foreclose mortgages held for the debt, it was decided that he was free to accept payment from the debtor within the seven years, and to use any form of pressing the debtor for payment from which he had not expressly bound himself to abstain.[4]

(4) *Novation*

Novation and Delegation.—A debt, though not expressly discharged, may be extinguished by novation when a new obligation by the same debtor is substituted for it, or by delegation when the obligation of a new party is substituted for that of the original debtor. Cases of delegation have been already considered.[5] Where no new obligant intervenes, but the original debtor renews his obligation in some other form, it is probably competent to prove by parole evidence that the arrangement was that the original debt, with all claims depending on it, was given up.[6] But in the absence of proof of such an arrangement the general presumption is that if there is no discharge, but a new obligation is undertaken, the original obligation is not extinguished, and the new one is to be regarded as a security for it, or as the addition of a more convenient way of enforcing payment.[7]

Presumption against Novation. When a document of an obligatory character is given for a debt resting upon open account, the presumption is strongly against novation. Thus, as already noticed, a bill or cheque, unless paid at maturity, does not extinguish the debt for which it is taken.[8] Where several parties are liable for a debt, the creditor, by taking a bill from one of them, does not preclude recourse against the others in the event of non-payment of the bill.[9] Where a party who is the creditor in a debt for which he is entitled to a lien takes a bill from the debtor, he does not operate novation of the debt so as to preclude assertion of the lien, though waiver of the lien may be inferred if the currency of the bill is of exceptional duration.[10]

Substitution of New Document. Where one document of debt is given in place of another, as where a bill is renewed, or a new promissory note is given for one in danger of prescribing, but the original document is not

[1] *Evans* v. *Heathcote* [1918], 1 K.B. 418.
[2] Stair, iv. 40, 31.
[3] *Supra*, p. 204.
[4] *Thin & Sinclair* v. *Arrol & Sons*, 1896, 24 R. 198.
[5] *Supra*, p. 258.
[6] *Hope Johnstone* v. *Cornwall*, 1895, 22 R. 314, per Lord Justice-Clerk and Lord Trayner.
[7] Stair, i. 18, 8; Ersk. iii. 4, 22; Bell, *Prin.*, sec. 577; *Fraser* v. *M'Lennan*, 1849, 12 D. 208; *Anderson* v. *M'Dowal*, 1865, 3 M. 727.
[8] *Supra*, p. 709.
[9] *Wilson & Corse* v. *Gardner*, 1807, Hume, 247.
[10] Bell, *Com.*, ii. 109; *Stevenson* v. *Paterson*, 1823, 2 S. 354; *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565; *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718; *Palmer* v. *Lee*, 1880, 7 R. 651.

given up or cancelled, the presumption is that any rights depending on it are still preserved. So where several parties are liable on a bill, and a new bill for the same debt is granted by one or more of them, but the old bill is retained by the creditor, those who are parties to the old bill may be made liable on it in the event of the new bill not being met,[1] and are liable in relief to the granters of the new bill if they have paid it.[2] But if the creditor gives up the bill, it will be inferred that he has elected to trust to the new security, and that on its failure he has no right to recover the bill and found upon it.[3] But even where a bill or note is given up, on a new one being granted, it has been held that this does not raise any presumption that a claim for interest arising *ex lege* on the original document is abandoned.[4] So where the debtor in a promissory note which was about to prescribe granted a new note for the same sum, and the old note was handed to him, the creditor was entitled to decree in an action for interest on the old note, in the absence of averments by the defender that such interest had been paid, or that it was part of the arrangement that the claim for interest should be held as discharged.[5] But if a debt for which a new debt is substituted is regularly discharged, it would appear that no further claim can be founded upon it, in the absence of any grounds for impeaching the validity of the discharge. So where *A.*, *B.*, and *C.* were liable upon a cash credit bond, and the debt was discharged in consideration of a new bond by the same parties, it was held that as *C.* was a married woman, she was not liable either on her obligation in the new bond or on her original liability.[6] Where creditors in bonds heritably secured discharged them, and, under a misconception, took bonds which were mere personal obligations in exchange, it was decided that they had lost their rights over the heritable subjects, in a question with a postponed bondholder.[7]

(5) *Confusio*

Discharge *confusione*.—The theory of the extinction of a debt where the rights of debtor and creditor become vested in the same person, known as the law of *confusio*,[8] which has raised many difficult questions, is stated by Erskine as follows: "Obligations are dissolved *confusione* where the same person becomes both debtor and creditor in them, and so is not only vested *activè* with the right of the debt, but *passivè* subjected to the payment of it; for no person can be creditor or debtor to himself."[9] "Where anyone is *pleno jure* the ultimate debtor and creditor in the same debt without relief, that situation in general amounts to confusion, and extinguishes the debt."[10] The fusion of the interests of debtor and creditor may arise from succession, where the debtor succeeds to his creditor, or *vice versa*, or from contract, where the right of a creditor in a debt is assigned to the debtor, or the creditor undertakes liability on the debt.

Cases on Succession. If a creditor succeeds as the sole representative of his debtor, or a debtor as sole representative of his creditor, and no

[1] *Crow* v. *Weir*, 1803, Hume, 247. [2] *Stevenson* v. *Campbell*, 1806, Hume, 247.
[3] *Black* v. *Cuthbertson*, 15th December 1814, F.C.
[4] *Hope Johnstone* v. *Cornwall*, 1895, 22 R. 314.
[5] *Hope Johnstone*, *supra*. [6] *Jackson* v. *M'Diarmid*, 1892, 19 R. 528.
[7] *Duke of Norfolk* v. *Annuitants of York Buildings Co.*, 1752, M. 7062.
[8] Stair, i. 18, 9; Ersk. iii. 4, 23; Bell, *Prin.*, sec. 580; More, *Notes to Stair*, i. cxxxvi. The English term is "merger."
[9] Ersk. iii. 4, 23.
[10] Per Lord Neaves, *Love* v. *Storie*, 1863, 2 M. 22, at p. 31.

interests of other creditors are involved, the debt is extinguished.[1] Where there are other creditors the law is not definitely settled. In *Elder* v. *Watson*[2] *A.* was a debtor of his sister. On her death intestate he was her sole next-of-kin. He confirmed as her executor, but the confirmation, being only partial, was held to be of no effect. Two years after her death the estate of the sister was sequestrated, and *A.* was sued by the trustee in sequestration for payment of the debt due by him to the bankrupt estate. It was held that the right to exact the debt had vested in him without confirmation as his sister's sole next-of-kin, that, accordingly, as he was both debtor and creditor, the debt was extinguished *confusione* at the expiry of six months after her death. It was not necessary to decide whether *confusio* took place at once, but the opinions were that as all creditors doing diligence within six months of the death of the deceased are entitled to share equally in the estate, any such diligence would operate as an impediment to the extinction of the debt by *confusio*.

Right of Relief. A debt is not extinguished by *confusio* merely because the right of the creditor comes to be vested in a party who is liable to pay it, if he is not the primary obligant, but is merely a cautioner, or has a right of relief. "Whenever the person who comes to be both debtor and creditor in an obligation has a claim of relief against another, I hold it to be quite fixed that *confusio* does not necessarily take place."[3] Thus if a creditor in a moveable debt succeeds to his debtor, not universally, but merely as heir in heritage, then, though in a question with third parties he would be liable for all debts of the deceased to the value of the heritage, still he is not the primary debtor, and is entitled to exact payment of his debt from the moveable estate.[4] Conversely, should an executor acquire a debt secured on the deceased's heritable estate, he is entitled to exact payment from the heir in the estate over which the debt is secured. As executor he is liable for all the debts of the deceased, but in a question with the heir he is only in the position of a cautioner with regard to debts secured on heritage.[5] And if a cautioner succeeds to, or acquires, the debt for which he is cautioner, it is not extinguished *confusione*, and may be enforced against the principal debtor.[6] And the principle that *confusio* does not apply where there is a right of relief would cover the case of a creditor, in a debt for which he held a cautioner bound, succeeding to the estate of the principal debtor; the cautioner would still be liable in so far as the estate of the principal debtor was insufficient to meet the debt.

Principle of *confusio*. Where a right from which a debt would arise is vested, temporarily or permanently, in the party who would be the debtor, the principle is that the debt never comes into existence. In a case of this kind (and it is conceived that the statement must be limited to cases of this kind) Lord Kinnear said:[7] "Confusion does not operate either payment or discharge. It prevents the possibility of a debt arising. It extinguishes the *jus crediti*. From the moment that the inconsistent characters of debtor and creditor are combined in the same person, both debtor and creditor cease to exist; there is no longer any debt or any relation of debtor and creditor at all." So where the lessee in a long lease, where the rent was much below

[1] Ersk. iii. 4, 23.
[2] 1859, 21 D. 1122.
[3] *Fleming* v. *Imrie*, 1868, 6 M. 363; narrated *infra*, p. 729; per Lord Benholme, at p. 368. See Stair, i. 18, 9; iii. 4, 24.
[4] *Johnston* v. *Ireland*, 1610, M. 3035.
[5] Stair, i. 18, 9.
[6] Stair, *ut supra*; Ersk. iii. 4, 24.
[7] *Motherwell* v. *Manwell*, 1903, 5 F. 619, at p. 631.

the value of the subjects, acquired the property of which he was lessee, it was held, in a question as to the amount of the composition for which he was liable to the superior, that whether the lease was to be regarded as extinguished or not, there were no rents while the position of landlord and tenant was united in the same person, and therefore that the composition could not be fixed at the rent payable under the lease, but must be paid on the actual annual value of the subjects.[1] And where the owner of the *dominium utile* acquires the *dominium directum*, though they exist as two separate estates in his person (*unless* consolidated), and may subsequently be separated, no feu-duties become due so long as the two estates are vested in one person, and therefore, on a future separation of interest, the party acquiring the *dominium directum* could not maintain a claim for arrears of feu-duty.[2]

Separate Rights to Same Subject.—Where a party has two rights to a particular subject, one wider or more extensive than the other, as where a feuar acquires and consolidates the right of the superior, where a tenant acquires the subjects let, or where a liferenter acquires the fee, it would seem doubtful whether the principle of *confusio*, or any extension of it, excludes him from founding on the lower or less extensive right, should that right have incidents appertaining to it which the higher right does not possess. An answer in the affirmative seems involved in the decision in *Campbell* v. *M'Kinnon*.[3] There lessees, under an exceptional form of tenure, had a right of pasturage on other property belonging to the landlord. Some of these lessees accepted a feu of the subjects held in lease, and the feu-right contained no reference to the right of pasturage. The Court, founding on some very general expressions in the institutional writers,[4] held that the leases were entirely extinguished, and therefore that those tenants who had become feuars had lost their right of pasturage even for the years for which the leases would have been still current. But it may be doubted whether this result can be reconciled, on any intelligible principle, with the decision in *Earl of Zetland* v. *Glover Incorporation*.[5] There *A.*, having under a feu-right to lands a right of salmon fishing, on which he had had prescriptive possession, acquired the superiority, and consolidated the two rights by resignation in favour of himself *ad remanentiam*. The superiority right contained no grant of salmon fishing. The Court refused to accept the argument that as the feu-right had been consolidated with the right of superiority it could no longer be founded on as a title to the salmon fishing.

Creditor in Security Acquiring Right to Subject.—Where the holder of a right in security acquires the right to the subjects covered by the security, or where the owner of subjects acquires a bond by which the subjects are affected, some difficult questions arise, and it is not clear whether the guiding principle is the intention of the parties, or the legal results deducible from the principle of *confusio*. But it has been observed that the principle is one which "ought not to be extended in application out of mere deference to legal logic."[6] And so it was held that the cases, in which a bond and

[1] *Lord Blantyre* v. *Dunn*, 1858, 20 D. 1188.

[2] *Motherwell* v. *Manwell*, 1903, 5 F. 619, per Lords Adam and Kinnear.

[3] 1867, 5 M. 636. In House of Lords, where this point was not raised, *Campbell* v. *M'Lean*, 1870, 8 M. (H.L.) 40.

[4] Craig, *Jus Feudale*, ii. 10, 7; Stair, ii. 9, 36; Ersk. ii. 6, 44.

[5] *Earl of Zetland* v. *Glover Incorporation*, 1868, 6 M. 292; affd. 1870, 8 M. (H.L.) 144. The point was not raised in the Court of Session.

[6] *Healy & Young's Tr.* v. *Mair's Trs.*, 1914, S.C. 893, per Lord Johnston.

disposition in security has been held to be extinguished if the creditor acquired the subjects conveyed, were not authoritative in a question of the effect of the fusion of the right of creditor in a ground-annual and owner of the subjects out of which it was payable.[1]

Assignation of Debt on Payment. If a party pays a debt in which he is the sole debtor, without any present or ultimate right of relief, and there is no indication of his intention in the matter beyond the fact that he did not take a discharge, and if he had no apparent interest to maintain the debt as a subsisting charge, it will be held that the debt, with any security by which it may be fortified, is extinguished *confusione*.[2] And it would seem that even if the party who paid the debt intended to keep it alive, that intention is not one to which the law will give effect if no steps are taken to separate the interests of debtor and creditor by the intervention of a trustee. It is not to be presumed that he intended to keep up an unnecessary and apparently useless charge. So where *A.* left by will a certain property to *B.*, "under burden of any heritable securities that may affect the same," and *A.* in her lifetime paid a bond affecting the subjects and took an assignation to it, it was held that the bond was extinguished *confusione*, and that *B.* was entitled to the subjects unburdened.[2] In *Codrington* v. *Johnstone's Trs.*[3] *B.* succeeded his brother *A.* in an estate held on a simple destination to heirs-male. He intromitted with the estate so as to render himself liable for *A.'s* debts. These debts, which were all personal, he paid, taking assignations in favour of himself, his heirs, and assignees. He took no steps to make them burdens on the estate, nor did he alter the destination. On his death the estate passed to his nephew as heir-male, the rest of his property passed to his daughter, who was also his executrix. She brought an action against the nephew, on the ground that he, as heir of *A.*, was liable in *A.'s* debts, and that these were still subsisting claims. It was held that as *B.* before he paid them had rendered himself liable for them, they were extinguished *confusione*, on the ground that it was not clear that he intended to keep them alive, and that, if he did, his mere intention was not sufficient to effect that result. In *Forbes, Hunter & Co.* v. *Duncan*[4] the creditor in an entailer's debt succeeded to the entailed estate and also as the sole representative of the entailer in his unentailed estate. He assigned the debt. The Court, holding that he was both creditor and debtor without relief, decided that the debt was extinguished *confusione*, and that his intention to preserve it as a separate right, evinced by his assignation, was not sufficient to preserve it as a charge against the entailed estate. On these authorities it was held in the Outer House that where the proprietor of subjects covered by a bond, in which he was the sole debtor, paid it, and took an assignation to it, it was extinguished *confusione*, so that it could not be afterwards assigned as a charge upon the estate. In the case referred to (*Balfour-Melville's Trs.* v. *Gowans*[5]), *A.*, who was personally liable in a debt secured over certain subjects, had, on being pressed for payment, paid a portion of the debt and taken an assignation to it, with the avowed intention of transferring it as a security if he could find a new lender prepared to advance the money. This *B.* advanced, and received an assignation of the bond. In *A.'s* bankruptcy it was held by

[1] *Healy & Young's Tr.* v. *Mair's Trs.*, 1914, S.C. 893, per Lord Johnston.
[2] *Murray* v. *Parlane's Tr.*, 1890, 18 R. 287. See opinion of Lord Kinnear (Ordinary).
[3] 1824, 2 Sh. App. 118.
[4] 1802, M. App. v. Tailzie, No. 10.
[5] 1896, 4 S.L.T. 111.

Lord Pearson that the debt was extinguished *confusione*, and that *B.* could not claim to rank as a secured creditor, on the ground that where a debt was paid by the sole debtor it ceased to exist, even if his intention was clear that it should still be kept alive.

Bondholder Purchasing Subjects.—Where the creditor in a bond purchases the subjects, paying only the balance of the price after deduction of the bond, the mere fact that the bond is not discharged does not keep it in existence as a charge on the subjects, and therefore the creditor's heir cannot make it effectual against a party who has obtained a gratuitous conveyance of the subjects.[1] If a prior bondholder purchases the subjects, it would seem not to be determined whether he can still hold the bond as a preferable right in a question with a postponed bondholder, but Lord Ardwall – it is submitted, correctly – has expressed the opinion that he may competently do so.[2] And it is decided that a conveyance of the security subjects to a prior creditor, if that conveyance, though in terms absolute, is in reality a further security, does not give an intermediate bondholder any right to claim priority.[3] In such a case there is no real fusion of the position of debtor and creditor, for the prior bondholder, even though he may be regarded as owner of the subjects, is not the debtor in the intermediate bond which covers them.

Owner of Lands Paying Bonds.—Where the owner of lands subject to bonds pays off a prior bond, it would appear that he cannot keep it up as a prior charge in his own favour by taking an assignation instead of a discharge, so as either to assert it as a prior right in questions with postponed bondholders of whose existence he is aware, or to guard himself from the possibility that the estate may prove to be affected with intermediate rights of which he had no notice.[4] But this has never been definitely decided. And if the substance of the transaction is that a prior bond is to be transferred to a new lender, the priority of the bond is not affected by the fact that instead of a direct assignation by the original bondholder to the new lender the transaction is carried out by an assignation to the debtor, followed by a subsequent assignation by him to the new lender. Such a form of conveyance makes the debtor for the time being both debtor and creditor, but a postponed bondholder is not entitled to take advantage of that accidental circumstance, and maintain that the prior bond is extinguished *confusione*, and that his bond has therefore acquired a preference.[5] In a very exceptional case trustees were the owners of a subject, but were under an obligation to convey it to *A.*, subject to a certain bond. Before the condition under which *A.*'s right emerged was purified the trustees, in order to avoid a sale of the subjects, paid the bond, and obtained an assignation to it. *A.* maintained that the bond was extinguished *confusione*.[6] It was held that there was a sufficient separation of the interests

[1] *Hogg* v. *Brack*, 1822, 11 S. 198. [2] *King* v. *Johnston*, 1908, S.C. 684, at p. 689.

[3] *King* v. *Johnston*, *supra*; *Crichton's Trs.* v. *Clarke*, 1909, 1 S.L.T. 467.

[4] See opinion of Lord Chancellor Cottenham in *Mackenzie* v. *Gordon*, M'L. & Rob., at p. 123; of Lord Kinnear (Ordinary) in *Murray* v. *Parlane's Trs.*, 1890, 18 R. 287. If the owner of subjects pays a debt affecting them for which he is not personally liable, there would seem no reason to hold that he is not entitled to keep up the debt as a right preferable to postponed bonds. See opinion of Lord Macnaghten in *Thorne* v. *Cann* [1895], A.C. 11, at p. 18. In *Balfour-Melville's Trs.* v. *Gowans*, 1896, 4 S.L.T. 111, the owner who paid the bond was also the sole debtor.

[5] *Mackenzie* v. *Gordon*, 1837, 16 S. 311; affd. 1839, M'L. & Rob. 117; *Whiteley* v. *Delaney* [1914], A.C. 132.

[6] *Fleming* v. *Imrie*, 1868, 6 M. 363.

of the trustees as owners of the property and debtors in the bond, and their interests as creditors in the bond, to exclude the operation of *confusio*. According to Lord Cowan, "wherever there is an interest to keep up the debt, the party who takes an assignation is entitled to keep it as a separate right in his person."

Fiar and Liferenter : Entail. —In such cases, however, *confusio* does not operate if the party who pays the debt is not in every respect the full debtor.[1] If a debt affecting an estate held by liferenter and fiar is acquired by the fiar, there is sufficient separation of interest to prevent any *confusio* during the subsistence of the liferent.[2] So if an heir of entail in possession pays entailer's debts which form a burden on the entailed estate, and takes an assignation to them, they are not discharged, though for the time being the same person is both debtor and creditor. He is debtor as heir of entail, creditor in his individual capacity. So he may assign the bonds to a third party, *inter vivos* or *mortis causa*,[3] and at his death they will pass to his heir, who may not be the next heir of entail.[4] In either case they will exist as burdens on the entailed estate. And it makes no difference that the heir of entail could, if he had chosen, have broken the fetters of the entail, and acquired the estate in fee-simple, so long as he has not done so.[5] But the bonds which he acquires subsist by virtue of his presumed intention to keep them as subsisting debts, and therefore if instead of an assignation he simply takes a discharge, it will be held, in the absence of any proof to the contrary, that his intention was to bring them to an end for the benefit of succeeding heirs of entail, and this intention is to be deduced from what was done at the time of taking the discharge, and not from the fact that the party subsequently dealt with the security as a subsisting right. So where an heir of entail discharged a wadset affecting the entailed estate, and there was no indication at the time that he intended to preserve it as an independent right, it was held that a subsequent disposition of his unentailed property, including the lands covered by the wadset, was ineffectual in a question with succeeding heirs of entail.[6] If a succeeding heir of entail is creditor in an entailer's debt, and is also the sole representative of the entailer, the authorities leave it doubtful whether the debt can survive.[7]

(6) *Extinction of Obligations by Lapse of Time*

Notice of Termination. A contract may or may not contain an express provision as to its endurance. In either case there may be a question whether notice of termination is necessary.

No Fixed Term of Endurance. Where there is no express provision as to endurance, and no interests of third parties are involved, the normal

[1] Stair, i. 18, 9; Ersk. iii. 4, 27, quoted and approved by Lord President Dunedin in *Colvile's Trs.* v. *Marindin*, 1908, S.C. 911, 920; *Healy & Young's Tr.* v. *Mair's Trs.*, 1914, S.C. 893.

[2] *Fraser* v. *Carruthers*, 1875, 2 R. 595; *Crichton's Trs.* v. *Clarke*, 1909, 1 S.L.T. 467. Cp. *Lore* v. *Storie*, 1863, 2 M. 22.

[3] *Welsh* v. *Barstow*, 1837, 15 S. 537; *Macalister* v. *Macalister*, 1865, 4 M. 245; *Colvile's Trs.* v. *Marindin*, 1908, S.C. 911; Ersk. iii. 4, 27; Bell, *Prin.*, sec. 580.

[4] *Gordon* v. *Maitland*, 1757, M. 3045, 11161.

[5] *Colvile's Trs.* v. *Marindin*, 1908, S.C. 911.

[6] *Duke of Roxburgh* v. *Wauchope*, 1825, 1 W. & S. 41. A discharge of the debt, and an assignation of the bond, in favour of the heir of entail in possession, keeps the bond alive (*Ker* v. *Turnbull*, 1758, M. 15551).

[7] *Forbes, Hunter & Co.* v. *Duncan*, 1802, M. App. v. Tailzie, No. 10; *Macalister* v. *Macalister*, 1865, 4 M. 245.

construction is that either party may at pleasure put an end to the contractual relationship.[1] It does not follow that he can do so without giving notice. So far as any general rule can be stated, it would be that notice is necessary if from the nature of the contract termination without notice by either party would involve the other in exceptional difficulty or hardship.[2] Instant termination is competent in a partnership at will,[3] in contracts of agency where no employment for a definite term is involved,[4] and probably in all contracts of employment where the services to be rendered do not take up the whole time of the party employed.[5] So the appointment of a law agent on a trust may be revoked at any time.[6] On the other hand, a party who has undertaken a cautionary obligation is probably bound to give reasonable notice to the party guaranteed before revoking it.[7] A banker who has allowed his customer to overdraw his account is entitled at any time to refuse further accommodation.[8] And in contracts of employment, where the whole time of the party engaged is devoted to his duties, it is a general rule that, even although no definite period of employment is specified, neither party is entitled to terminate the relationship without reasonable notice. This rule has been applied in the case of a private tutor,[9] of a teacher in a school, in spite of a statutory provision that his engagement should be at the pleasure of the school board;[10] of the manager of a colliery;[11] of the captain of a ship;[12] of the editor of a newspaper;[13] probably also of the manager of a bank or of an insurance company.[14] An obligation to give notice may, in any case, be inferred from the usage of the particular employment.[15] Dismissal without notice is not properly a breach of contract on the part of the employer, but brings into operation an implied condition of the contract that payment in lieu of notice is due.[16] But desertion by the servant is treated as a breach of contract.[17] The obligation to give notice is in all cases reciprocal.[18]

Period of Endurance Specified. Where the period of endurance is specified in the contract there is no doubt, as a general rule, that notice of the intention to terminate it at the expiry of that period is unnecessary. There are, however, certain cases which are exceptions to this. These exceptions have been stated to rest on custom;[19] and might possibly be held to apply

[1] *Supra*, p. 301.

[2] *Morrison* v. *Abernethy School Board*, 1876, 3 R. 945, opinions of Lords Deas and Gifford; *Stevenson* v. *North British Rly.*, 1905, 7 F. 1106.

[3] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 32.

[4] *London, Leith, etc., Shipping Co.* v. *Ferguson*, 1850, 13 D. 51.

[5] *Brenan* v. *Campbell's Trs.*, 1898, 25 R. 423.

[6] *Cormack* v. *Keith & Murray*, 1893, 20 R. 977.

[7] *Doig* v. *Laurie*, 1903, 5 F. 295.

[8] *Ritchie* v. *Clydesdale Bank*, 1886, 13 R. 866.

[9] *Moffat* v. *Shedden*, 1839, 1 D. 468.

[10] *Morrison* v. *Abernethy School Board*, 1876, 3 R. 945; *Hinds* v. *Dunbar School Board*, 1883, 10 R. 930; *Robson* v. *Orerend*, 1878, 6 R. 213. It has been held in England that a power to dismiss a teacher "at pleasure" involved a power to dismiss him without notice (*Wright* v. *Marquis of Zetland* [1908], 1 K.B. 63).

[11] *Forsyth* v. *Heathery Knowe Coal Co.*, 1880, 7 R. 887.

[12] *Creen* v. *Wright*, 1876, 1 C.P.D. 591.

[13] *Campbell* v. *Fyfe*, 1851, 13 D. 1041.

[14] *Commercial Bank* v. *Pollock's Trs.*, 1829, 3 W. & S. 430; *Mitchell* v. *Smith*, 1836, 14 S. 358, as explained in *Morrison* v. *Abernethy School Board*, 1876, 3 R. 945.

[15] *Forsyth* v. *Heathery Knowe Coal Co.*, 1880, 7 R. 887; *Hamilton* v. *Outram*, 1855, 17 D. 798.

[16] *Cooper* v. *Henderson*, 1825, 3 S. 619; *Morrison* v. *Abernethy School Board*, *supra*, opinion of Lord Deas.

[17] *Hamilton* v. *Outram*, 1855, 17 D. 798.

[18] *Hamilton* v. *Outram* and *Morrison* v. *Abernethy School Board*, *supra*; *Creen* v. *Wright*, 1876, 1 C.P.D. 591.

[19] *Lennox* v. *Allan & Son*, 1880, 8 R. 38. See opinion of Lord Justice-Clerk, quoted *infra*, p. 733.

to such a contract as the hiring of moveables, on proof that notice was usual in the particular case. But there is no authority for their extension beyond the contracts of service and lease.

Contracts of Service. In certain contracts of service for a period not exceeding a year, and usual in the particular class of employment, it is an established rule that notice is required on either side of the intention to terminate the contract at the close of that period, and that, in the absence of notice, the contract is renewed for a similar period by tacit relocation.[1] Proof of a local custom to the contrary, if "uniform and notorious," will dispense with notice.[2] In contracts not covered by prior decisions, and not shewn to be usual, while there may be an obligation to give notice, its only effect is to render a payment in lieu of it due, not to renew the contract for another period. So where a shoemaker's labourer was engaged for a year—a step admittedly unusual, and taken in order to secure labour during a strike—it was held that, whether he was entitled to notice of dismissal or not, he was not entitled to maintain that in the absence of notice he was re-engaged for another year.[3]

In exceptional engagements, for some particular purpose, and for a definite time, no notice is required. So a school teacher, engaged to fill a vacancy for three months, was held to have no right to notice on the expiry of that time.[4] And probably where the contract is for a definite period exceeding a year, or does not form the whole means of livelihood of the party employed, notice is unnecessary. In *Brenan* v. *Campbell's Trs.*[5] a surveyor was engaged as factor on an estate for four and a half years. In addition to his duties he carried on a private practice. It was held that his employment terminated, without notice, on the expiry of its period.

Notice Required in Leases.—The general principle that notice of intention to terminate the contractual relations is necessary in leases, although the lease bears to be for a definite period, has been long recognised in the law of Scotland.[6] The obligation is in every case reciprocal, *i.e.*, the same obligation of notice lies upon the tenant who proposes to leave as upon the landlord who proposes to resume possession.[7] It is not an absolute rule that all leases require to be terminated by notice. Statutory provisions[8] seem now to impose it in all leases for a year or more of a heritable subject, no matter what that subject may be. It was held, in 1805,[9] that there was no necessity for notice in the case of grass parks let from year to year, but such a lease would now fall under the Agricultural Holdings (Scotland) Act, 1923, and six months' notice would be required. But the reason for the decision—universal understanding—would apply to grass parks let for the

[1] Bell, *Prin.*, sec. 187; Fraser, *Master and Servant*, 3rd ed., 58; *Baird* v. *Don*, 1779, M. 9182 (domestic servant); *Morrison* v. *Allardyce*, 1823, 2 S. 434 (cook); *M'Lean* v. *Fyfe*, 4th February 1813, F.C. (gardener); *Cameron* v. *Scott*, 1870, 9 M. 233 (cattleman); *Campbell* v. *Fyfe*, 1851, 13 D. 1041 (editor of newspaper); *Stevenson* v. *North British Rly. Co.*, 1905, 7 F. 1106 (commission agent on yearly engagement). See review of prior cases in *Morrison* v. *Abernethy School Board*, 1876, 3 R. 945. The period of notice is that reasonable in the circumstances. See *Stevenson* v. *North British Rly. Co.*, *cit.*, and cases collected in Umpherston, *Master and Servant*, 86.

[2] *Morrison* v. *Allardyce*, 1823, 2 S. 434.

[3] *Lennox* v. *Allan & Son*, 1880, 8 R. 38. See also *Stanley Ltd.* v. *Hanway*, 1911, 2 S.L.T. 2; 48 S.L.R. 757.

[4] *Robson* v. *Hawick School Board*, 1900, 2 F. 411.

[5] 1898, 25 R. 423.

[6] Stair, ii. 9, 38; Ersk. ii. 6, 35, 44; Bell, *Prin.*, sec. 1265.

[7] *M'Intyre* v. *M'Nab's Trs.*, 1829, 8 S. 237; affd. 1831, 5 W. & S. 299.

[8] Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51, sec. 34-38); Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10), sec. 26.

[9] *Macharg, Petr.*, 1805, M. App. *voce* Removing, No. 4.

summer season, but for less than a year. The same reason, and the absence of any statutory provision, would lead to the conclusion that notice is not required in leases of furnished houses or lodgings for a definite period less than a year, nor in leases of fishings or shootings merely for the season. And a party who occupies a house merely as a servant, and whose contract of service has come to an end, is not entitled to maintain that notice to quit the house is necessary.[1] Notice to quit part of the subjects let is inoperative.[2] It is an unsettled point whether in cases of joint tenancy or of joint ownership notice by one tenant or one owner is sufficient.[3] A tenant who has received an inadequate notice without remonstrance and has allowed the landlord to act upon the assumption of its sufficiency (*e.g.*, by reletting) may be barred from founding on the inadequacy.[4] For the various statutory rules as to the period of notice reference may be made to the exposition in Rankine on *Leases*.[5]

Tacit Relocation. In cases where notice to terminate a contract is required, and is not given, or where, no notice being requisite, the parties continue in contractual relations without any new arrangement, some new contract must be implied. That may or may not be a renewal of the old contract on the principle of tacit relocation. The legal effect of tacit relocation has been judicially declared to be that "all the conditions and stipulations remain in force, in so far as these are not inconsistent with any implied term of the new contract."[6] This is the rule in leases,[7] and in partnership.[8] It is also the rule in certain ordinary contracts of service.[9] There is some authority for holding that in other cases the principle of tacit relocation is not applicable, and that if relations under a contract are in fact continued after the term fixed for its expiry the parties must be held to be acting on the terms which the law would imply in the contract in question, irrespective of the terms which had actually ruled in the particular case. To that effect the law was laid down by Lord Justice-Clerk Moncreiff,[10] with the subsequent approval of Lord President Dunedin,[11] in a case where a shoemaker unsuccessfully contended that a contract under which he was guaranteed constant work for a year was continued by tacit relocation after the year had expired. "The foundation of the pursuer's argument fails entirely, as he is without the basis on which alone it can be supported. The law of tacit relocation, on which he relies, has reference only to specific classes of servants

[1] *Young, Ross, Richardson & Co.* v. *Paton*, 1808, Hume, 582; *Dunbar's Trs.* v. *Bruce*, 1900, 3 F. 137 (distinction between tenancy and service); *M'Arthur* v. *M'Master*, 1894, 2 S.L.T. 137; *Sinclair* v. *Tod*, 1907, S.C. 1038.

[2] *Gates* v. *Blair*, 1923, S.C. 430.

[3] *Graham* v. *Stirling*, 1922, S.C. 90.

[4] *Gordon* v. *Bryden*, 1803, M. 13854; *Dunlop* v. *Meiklen*, 1876, 4 R. 11; *Fenner* v. *Blake* [1900], 1 Q.B. 426.

[5] 3rd ed., p. 564 *seq.* Sec. 18 of the Agricultural Holdings Act, 1908, there referred to, has, with the rest of the Act, been repealed by the Agricultural Holdings (Scotland) Act, 1923, and is, with certain alterations, reproduced by sec. 26 of the latter Act.

[6] Per Lord Watson, *Neilson* v. *Mossend Iron Co.*, 1886, 13 R. (H.L.) 50, at p. 54.

[7] *Infra*, p. 734.

[8] Partnership Act, 1890 (53 & 54 Vict. c. 39), sec. 27: "Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will." See *Neilson* v. *Mossend Iron Co.*, 1884, 12 R. 499; revd. 1886, 13 R. (H.L.) 50 (provision for partner retiring held applicable only to original contract); *Wallace* v. *Wallace's Trs.*, 1906, 8 F. 558; *M'Gown* v. *Henderson*, 1914, S.C. 839 (clause of pre-emption).

[9] *Earl of Mansfield* v. *Scott*, 1831, 9 S. 780; affd. 1833, 6 W. & S. 277; *Brenan* v. *Campbell's Trs.*, 1898, 25 R. 423. Cases in following notes.

[10] *Lennox* v. *Allan & Son*, 1880, 8 R. 38, 40.

[11] *Stanley Ltd.* v. *Hanway*, 1911, 2 S.L.T. 2; 48 S.L.R. 757.

—agricultural, domestic, and the like. The pursuer does not dispute that the rule as regards them depends upon custom, yet he seeks to import it into a case of master and workman, where there is no such custom at all. The reason why there is no such custom as exists in the case of servants of the kind I have referred to is that an engagement of the kind we have here is very unusual. The rule is an artificial one, and is created and grows out of the ordinary understanding among the people to whom it applies. If extended to other forms of employment, it might easily become excessively inconvenient." It must, however, be observed that Lord Low has decided that tacit relocation, involving the continuance of exceptional terms, applied in the case of a sketch-maker in the employment of a calico printer ;[1] and, in *Stevenson* v. *North British Rly.*,[2] the term was applied to the continuance of a very exceptional contract, under which a coal merchant was employed to direct the import of coal to particular ports. In view of these cases it may be permissible to doubt whether, as the opinion of Lord Justice-Clerk Moncreiff would seem to suggest, tacit relocation is a closed chapter in the law. In such a case as the supply of books from a circulating library it is submitted that most people would suppose, if the contract was in fact continued after the term agreed upon had expired, that the books were supplied upon the terms originally fixed. Tacit relocation, it may be suggested, does not rest upon custom but upon the presumable intention of the parties to the contract.

Whether tacit relocation is founded on custom or on presumable intention, it is rested on the tacit consent of the parties. So where a business was transferred, and the new employer was not aware of the exceptional terms on which one of the workmen had previously worked, it was held that his claim to continue these terms on the principle of tacit relocation was excluded on the ground that the employer's tacit consent could not be implied to terms of which he was unaware.[3]

Leases.—In leases a verbal agreement for a new lease, either for a year or a period of years, will exclude tacit relocation on the lease which has expired,[4] at least in cases to which the Agricultural Holdings (Scotland) Act, 1923, is not applicable. Where the Act applies its provisions might be considered as importing a statutory tenancy, not alterable by agreement.[5]

The provisions of sec. 26 of the Agricultural Holdings (Scotland) Act, 1923, and a similar provision in sec. 34 of the Sheriff Courts (Scotland) Act, 1907, applicable to lands exceeding two acres in extent held under a probative lease specifying a term of endurance, provide, with regard to leases for a year or more, that in default of notice the lease shall be renewed by tacit relocation for a year and thereafter from year to year. In leases which do not fall under either statute there is no statutory rule that the expiry of the term of endurance without notice by either party results in the renewal of

[1] *Houston* v. *Calico Printers' Association*, 1903, 10 S.L.T. 532.

[2] 1905, 7 F. 1106 ; Lord President Dunedin, in *Stanley Ltd.* v. *Hanway*, *supra*, explains this decision on the ground that the term "tacit relocation" was there used loosely and incorrectly, a supposition somewhat difficult in the case of a judge so careful as Lord Stormonth Darling.

[3] *Houston* v. *Calico Printers' Association*, 1903, 10 S.L.T. 532. The principle that tacit relocation involves tacit consent by both parties seems to have been lost sight of in *Gates* v. *Blair*, 1923, S.C. 430.

[4] *Blain* v. *Ferguson*, 1840, 2 D. 546 ; *Morrison* v. *Campbell*, 1842, 4 D. 1426 ; *Sutherland's Tr.* v. *Miller's Tr.*, 1888, 16 R. 10 ; *M'Farlane* v. *Mitchell*, 1900, 2 F. 901 ; *Buchanan* v. *Harris & Sheldon*, 1900, 2 F. 935.

[5] Sec. 26 (2). In leases falling under the Act the parties are not entitled to alter the statutory period of notice (*Duguid* v. *Muirhead*, 1926, S.C. 1078 (O.H., Lord Constable)).

the lease by tacit relocation. But in the case of a lease for a year or longer, it is well settled that if neither party gives notice, a new lease, on the same terms as the old, but for a period of one year, is inferred by law,[1] whether the tenant in fact stays on [2] or proposes to quit.[3] The effect of the expiry of a lease for less than a year, without notice by either party, is less definitely established, but it is probable that the result is to infer a new lease by tacit relocation, on the same terms and for the same period as the lease which has expired.[4] A cautionary obligation for rent expires with the lease, though the tenant may remain on tacit relocation.[5]

Tacit Relocation with Heir of Tenant. Where a tenant died before the expiry of the lease, and without warning to remove, it was held that the right to possess on tacit relocation passed to his heir.[6] But where a tenant died more than twelve months before the expiry of the lease, and the heir made no claim to possession, it was held that his younger brothers, who had in fact remained in possession, could not maintain any right to possess after the expiry of the lease, on the plea that it had been continued by tacit relocation with the heir, and that they were managers for him.[7]

Tenant Remaining after Giving Notice. When notice to terminate the tenancy has been duly given by landlord or tenant, but the tenant stays on after its expiry, it is stated by Erskine that if the landlord takes no immediate action, the inference is that the parties have agreed to depart from the notice, and that a new lease by tacit relocation will arise.[8] And in *Taylor* v. *Earl of Moray*[9] opinions were given that even when the landlord had obtained a decree of removing, but failed to put it in force within a reasonable time, a new lease by tacit relocation might be inferred. In *Tod* v. *Fraser*,[10] however, a different view was adopted. The tenant of a house from year to year had duly given notice of his intention to leave at Whitsunday. The intimation was acknowledged. Owing to illness he did not leave until August. On 31st May the landlord raised an action for the rent for the ensuing year. The tenant lodged defences, offering payment for the period during which he had remained in occupation. The landlord restricted his claim to a half-year's rent. For this the Lord Ordinary gave decree, intimating an opinion that the lease had been renewed for another year. The Court, while affirming the Lord Ordinary's interlocutor, held that tacit relocation was excluded by the fact of notice; that the tenant was in the position of an intruder without a title; and was, in the strict view of the landlord's rights, liable for violent profits.

[1] Ersk. ii. 6, 35; Bell, *Prin.*, sec. 1265.
[2] *Robertson & Co.* v. *Drysdale*, 1834, 12 S. 477.
[3] *M'Intyre* v. *M'Nab's Trs.*, 1829, 8 S. 237; affd. 1831, 5 W. & S. 299.
[4] See Rankine, *Leases*, 3rd ed., 602.
[5] *Forbes* v. *Saltoun's Exrs.*, 1735, Elchies, Cautioner, No. 4.
[6] *Hume* v. *M'Leod's Repre.*, 1808, Hume, 583.
[7] *Wilson* v. *Stewart*, 1853, 16 D. 106.
[8] Ersk. ii. 6, 35.
[9] 1892, 19 R. 399.
[10] 1889, 17 R. 226.

CHAPTER XL

PRESCRIPTION

Scope of Chapter.—The law of prescription is here considered only in outline and with reference to its application to contractual obligations. For its wider application to rights of property, works specially devoted to the subject must be consulted.[1]

Negative Prescription.—Under the Acts 1469, c. 28, 1474, c. 54, and 1617, c. 12, obligations prescribe, or cease to be enforceable, after the expiry of forty years—a rule referred to as the negative prescription. By sect. 17 of the Conveyancing (Scotland) Act, 1924, the period is reduced to twenty years, with the provisoes that the provisions of the section shall not be pleadable to any effect in any action in dependence at the commencement of the Act (1st January 1925), or in any action commenced prior to 1st January 1930, or with regard to any period of twenty years completed prior to the latter date.[2] Subject to the same provisoes, no deduction is to be made for the years of minority of those against whom the prescription is used and objected, or of any period during which any person against whom the prescription was used and objected was under legal disability. The effect of the statutes, when they are applicable, is not to raise a presumption of payment or to alter the onus or method of proof, but to extinguish the obligation.[3] So it was held that it was incompetent to refer a prescribed debt to the defender's oath, and observed that he might admit that he had incurred a debt and not paid it, and plead that under the negative prescription he was not liable.[4]

Rights which Prescribe.—The negative prescription applies generally to all contractual or *quasi*-contractual rights and obligations, which do not amount to a real right of property in lands.[5] So it excludes the enforcement of a right contracted for ;[6] of the obligation to restore moveable property lent,[7] or given in security ;[8] of the right to recover money lodged on deposit

[1] Napier, *Prescription* ; Millar, *Prescription*.

[2] Sec. 17 provides that "the period of twenty years shall be substituted for the period of forty years" in the relative passage of the Act 1617, c. 12. The Act of 1617 is entitled "Anent Prescription of Heritable Rights," and its terms admit of being read as limited to bonds, or other obligations relating to heritage, obligations relating to moveables being already subject to prescription under the earlier Acts. On this reading it would follow that the change in the law effected by the Conveyancing Act is confined to obligations relating to heritage. But there is the authority of Lord Bankton (*Inst.*, ii. 12, 2) that the Act of 1617 is general in its application; if so, the Conveyancing Act will fall to be construed in the same way.

[3] Stair, ii. 12, 10 ; Ersk. iii. 7, 7 ; Bell, *Prin.*, sec. 607 ; *Kermack* v. *Kermack*, 1874, 2 R. 156.

[4] *Napier* v. *Campbell*, 1703, M. 10656.

[5] As to real rights, see *Paterson* v. *Wilson*, 1859, 21 D. 322 ; Millar, *Prescription*, 80, *et seq.* As to breach of trust, see Menzies, *Trustees*, 2nd ed., sec. 1112.

[6] *Lauder* v. *Colmslie*, 1630, M. 10655.

[7] Ersk. iii. 7, 7 ; *Minister of Aberscherder* v. *Minister of Gemrie*, 1633, M. 10972 (church bell lent by one parish to another).

[8] *Paterson* v. *Wilson*, 1859, 21 D. 322.

receipt with a bank ;[1] of an obligation to execute an entail,[2] or to make a personal undertaking a real burden on lands.[3] On a sale it was held that an obligation to consign the price, a bond given for it, and the underlying obligation to pay, alike prescribed.[4] The lapse of forty years is a bar to the reduction of a contract on the ground of fraud or any other extrinsic ground,[5] and precludes the revocation of a donation by one spouse to another.[6] It cuts off the right of relief of one co-obligant who has paid more than his share of the debt,[7] the claim of repetition of money paid by mistake ;[8] the right of the creditors of an ancestor to a preference over the creditors as heir.[9]

Null Deeds.— On the other hand, the negative prescription does not bar a challenge of a right which can only be defended by founding on a nullity, such as a forged deed,[10] a deed entirely unauthenticated,[11] possession traceable to theft,[12] or of property which is *extra commercium* and could not have been lawfully acquired.[13] It does not preclude the reduction of a decree pronounced in a matter in which the Court had no jurisdiction.[14] And it would seem that a body acting under statute cannot lose, by negative prescription, the right to perform a statutory duty.[15]

Annuities and Bonds. —In the case of debts a distinction is taken between pensions or annuities, where there is no direct right of action for the capital sum, and an ordinary bond, where the interest is an accessary of the principal debt. In the former case the negative prescription applies only to the claim for each term's payment ; in the latter it extinguishes the principal debt, and, with it, any further claim for interest.[16]

Trust.—When a question of trust is involved it is settled that prescription does not apply to the claim of a beneficiary to recover a specific subject impressed with a trust if it, or money which can be identified as derived from its realisation, is extant in the hands of a trustee, or of a person taking from him by gratuitous title. In such cases, as the trustee is held to possess for the beneficiary, there is no adverse possession.[17] But any personal claim against the trustee, other than a demand to make the trust property forth-

[1] *Bertram, Gardner & Co.'s Trs.* v. *King's Remembrancer*, 1920, S.C. 555. See also *Joachimson* v. *Swiss Bank Corporation* [1921], 3 K.B. 110.

[2] *Porterfield* v. *Porterfield*, 1771, M. 10698.

[3] *Pearson* v. *Malachi*, 1892, 20 R. 167.

[4] *Allan* v. *Brander*, 1839, 1 D. 678 ; affd. 1842, 1 Bell, App. 167 ; *M'Innes* v. *Brander*, 1844, 6 D. 512.

[5] Bankton, ii. 12, 49 ; *Home* v. *Ker*, 1733, M. 10736 ; *Cubbison* v. *Hyslop*, 1837, 16 S. 112, per Lord Corehouse, at p. 119 ; *Hume* v. *Duncan*, 1831, 5 W. & S. 43, turned, it is conceived, on a point of procedure, as did the case there followed—*Sinclair* v. *Sinclair*, 1781, M. 6725.

[6] *Turnbull* v. *Turnbull*, 1697, M. 10726.

[7] *Campbell's Trs.* v. *Sinclair*, 1878, 5 R. (H.L.) 119, per Lord Blackburn, at p. 131.

[8] *Magistrates of Edinburgh* v. *Heriot's Trust*, 1900, 7 S.L.T. 371.

[9] *Traill's Trs.* v. *Free Church*, 1915, S.C. 655.

[10] Ersk. iii. 7, 12 ; *Graham* v. *Watt*, 1843, 5 D. 1368 ; affd. 1846, 5 Bell's App. 172, where this was treated as unquestionable. See 5 D. 1369.

[11] *Kinloch* v. *Bell*, 1867, 5 M. 360. See a special case, *Cooper Scott* v. *Gill Scott*, 1924, S.C. 309.

[12] Stair, ii. 12, 10.

[13] *Edinburgh Presbytery* v. *Edinburgh University*, 1890, 28 S.L.R. 567 ; *Magistrates of Dumbarton* v. *Edinburgh University*, 1909, 1 S.L.T. 51.

[14] *Earl of Lauderdale* v. *Wedderburn*, 1908, S.C. 1237 ; revd. 1910, S.C. (H.L.) 35.

[15] *Ellice's Trs.* v. *Caledonian Canal Commissioners*, 1904, 6 F. 325.

[16] *Burt* v. *Burt*, 1858, 20 D. 402, following Ersk. iii. 7, 13, and Bell, *Prin.*, sec. 609.

[17] *University of Aberdeen* v. *Irvine*, 1866, 4 M. 392 ; revd. 1868, 6 M. (H.L.) 29 ; per Lord Kinloch, L.O., approved by Lord Chancellor Cairns, at p. 37 ; *Magistrates of Aberdeen* v. *University of Aberdeen*, 1876, 3 R. 1087 ; affd. 1877, 4 R. (H.L.) 48 ; *Bertram, Gardner & Co.'s Tr.* v. *King's Remembrancer*, 1920, S.C. 555 ; *Cooper Scott* v. *Gill Scott*, 1924, S.C. 309, opinion of Lord Skerrington.

coming, will be cut off by the negative prescription.[1] This has been applied to a claim of damages for wrongful disposal of the trust estate to persons not entitled to it, and to a claim for loss incurred by an investment *ultra vires*.[2] On the very narrow and doubtful ground that an executor is not a trustee it was held that a claim for a legacy, directed against a party who had confirmed as executrix and universal legatee, was excluded by prescription.[3] Where a claim was made on the representative of a trustee, founded on the ground that the trustee had died in possession of trust property, it was treated as an ordinary claim for debt, subject to the negative prescription.[4]

Res meræ facultatis. -In certain cases the negative prescription is excluded on the ground that the right against which it is pleaded is one *res meræ facultatis*, a right which the creditor may exact or not at pleasure. In one sense this is obviously true of every right, and it is difficult to frame any general canon of distinction. According to Pothier the principle of *res meræ facultatis* applies where the right in question is one implied by law, *e.g.*, the right to increase the height of a building ; or where it is *inter naturalia* of a contract, *e.g.*, the right, in pledge, to recover the article ; not where it is an accidental right arising from contract, *e.g.*, a right of repurchase in a contract of sale.[5] The right of a superior to exact feu-duties or casualties is *res meræ facultatis* ; each claim prescribes from the time it becomes payable, but the right to exact future claims is not lost *non utendo*.[6] The same principle was applied to the right of a superior to a declarator of non-entry.[7] The power to exercise the ordinary rights of property, *e.g.*, to build, though with the result of blocking a neighbour's window, is not lost *non utendo*,[8] nor is a contractual right, such as a right to alter a common stair.[9] And a right to redeem a burden is not affected by prescription.[10]

Period.—The computation of the prescriptive period starts from the day when it first became possible for the creditor to take action to enforce his claim.[11] It is expressly provided by the Act 1617, c. 12, that an obligation of warrandice prescribes, not from the date when it was undertaken, but from the date when eviction opened a claim. Where the claim against which prescription was pleaded was one of damages against a law agent for a mistake in carrying out diligence, it was held that the term of forty years did not begin until the mistake was discovered ; [12] and the same rule would probably be applied in the case of a reduction on the ground of fraud. A bond prescribes from the date of payment, not from the date of granting.[13]

Minority.—Under the express terms of the earlier statutes the years during which the creditor is in minority are to be deducted. But this applies only to the minority of the party who for the time being has the right to

[1] *Pollock* v. *Porterfield*, 1778, M. 10702 ; affd. 1779, 2 Paton 495.
[2] *Barns* v. *Barns' Trs.*, 1857, 19 D. 626.
[3] *Jamieson* v. *Clark*, 1872, 10 M. 399.
[4] *Murray* v. *Mackenzie*, 1897, 34 S.L.R. 571 (O.H., Lord Kyllachy).
[5] Pothier, *Vente*, sec. 391.
[6] *Duke of Buccleuch* v. *Officers of State*, 1770, M. 10751.
[7] *Governors of Cauvin's Hospital* v. *Falconer*, 1863, 1 M. 1164.
[8] *Inglis* v. *Clark*, 1901, 4 F. 288.
[9] *Gellatly* v. *Arrol*, 1863, 1 M. 592 ; *Smith* v. *Stewart*, 1884, 11 R. 921.
[10] *Reid's Trs.* v. *Duchess of Sutherland*, 1881, 8 R. 509.
[11] It runs to "the day of the month of the last year which is of the same numerical denomination as the day of the month of the year in which the computation commenced" (*Simpson* v. *Marshall*, 1900, 2 F. 447, per Lord Stormonth Darling (Ordinary), at p. 450).
[12] *Cooke* v. *Falconer's Reprs.*, 1850, 13 D. 157.
[13] *Butter* v. *Gray*, 1665, M. 11183 ; Ersk. iii. 7, 36.

enforce the claim, not to the minority of a party entitled in reversion, and who ultimately sues. When the right to sue is vested in trustees, the fact that the beneficiary was in minority is irrelevant.[1] And the minority of one of a body of creditors has no effect.[2] As already noticed, the Conveyancing (Scotland) Act, 1924, sec. 17, precludes the objection of minority, in cases arising after 1st January 1930.[3]

Non valens agere.— The years during which the creditor is unable to assert his right - *non valens agere cum effectu*— must also be deducted. But this rule seems to apply only in cases where for the time being the rights of debtor and creditor are vested in the same party,[4] or there is a legal impediment to action by the creditor,[5] not to cases where it is in fact impossible for the creditor to take action. It means "not a physical but a legal incapacity to sue."[6] So the creditor's ignorance of his rights is not enough,[7] nor the fact that he was imprisoned,[8] or pressed for the Navy.[9] The plea was not given effect to where a body of creditors, having under a statutory provision the right to sue only through a common agent, had not taken steps, on the common agent's death, to appoint a new one.[10] The plea is not, like minority, founded on an express provision of the statutes establishing the negative prescription, but is equitable, and may be repelled when the creditor's incapacity to sue is due to his own act.[11] It is stated in Bell's *Principles* that the plea of *non valens agere* applies to the years of the creditor's insanity,[12] and to the years when the creditor is married and under the curatory of her husband.[13] By sec. 17 of the Conveyancing (Scotland) Act, 1924, the objection that the creditor was *non valens agere* is abrogated in actions raised after 1st January 1930.[14]

Interruption. The plea of prescription may be met by an averment that its course has been validly interrupted. It may be interrupted at any time before the full period of forty years has actually expired.[15]

Extrajudicial Acts.—A written acknowledgment by the debtor of the existence of the claim, which need not be probative, is sufficient to interrupt the running of prescription.[16] By a narrow majority it was held that a correspondence between the parties, in which the debtor asked for time, was

[1] *Buchanan* v. *Bogle*, 1847, 9 D. 686. See *Black* v. *Mason*, 1881, 8 R. 497 (minority in action of right-of-way).

[2] *Allan* v. *Brander*, 1839, 1 D. 678; affd. 1842, 1 Bell's App. 167; *M'Innes* v. *Brander*, 1844, 6 D. 512.

[3] *Supra*, p. 736.

[4] *Durham* v. *Durham*, 1802, M. 11220; *Lawrie* v. *Donald*, 1830, 9 S. 147. See *Duke of Argyll* v. *Campbell*, 1912, S.C. 458, opinion of Lord President Dunedin, at p. 477.

[5] Bell, *Prin.*, sec. 627; *Graham* v. *Watt*, 1843, 5 D. 1368; affd. 1846, 5 Bell's App. 172; *Harvie* v. *Robertson*, *infra*. As to the plea of *non valens agere* in claims for overpayment of stipend, see *Earl of Fife* v. *Duff*, 1887, 15 R. 238, and cases there cited.

[6] Per Lord President Kinross, *Harvie* v. *Robertson*, 1903, 5 F. 338, 343.

[7] *Graham* v. *Watt*, *infra*, per Lord Medwyn; *Buchanan* v. *Bogle*, 1847, 9 D. 686.

[8] *O'Neal* v. *Magistrates of Dumfries*, 1803, M. 11201.

[9] *Graham* v. *Watt*, 1843, 5 D. 1368; affd. 1846, 5 Bell's App. 172.

[10] *Allan* v. *Brander*, 1839, 1 D. 678; affd. 1842, 1 Bell's App. 167.

[11] *Earl of Fife* v. *Duff*, 1887, 15 R. 238; *Harvie* v. *Robertson*, 1903, 5 F. 338 (neighbouring proprietor not *non valens* to object to a nuisance during years while he was himself committing a nuisance). And see, as to objection to nuisance, in questions of prescription, Rankine, *Landownership*, 4th ed., 60.

[12] *Prin.*, sec. 627.

[13] Bell, *Prin.*, sec. 627. But it may be doubted whether this would hold except in the case where the claim was against the husband, as in *Mackie* v. *Stewart*, 1665, M. 11204.

[14] *Supra*, p. 736.

[15] *Simpson* v. *Marshall*, 1900, 2 F. 447.

[16] *Briggs* v. *Swan's Exrs.*, 1854, 16 D. 385. In *Bertram, Gardner & Co.'s Tr.* v. *King's Remembrancer*, 1920, S.C. 555, the Lord Ordinary (Blackburn), held that the admission must be made to the creditor, not to a third party. The point was not considered in the Inner House.

not sufficient.[1] A submission of the particular debt, or an arrangement amounting to a compromise,[2] is enough.[3] Payment of part of the principal sum,[4] or of interest,[5] during the currency of the forty years, is sufficient interruption, but in each case the fact of payment and its application to the particular debt must be proved by the writ or oath of the debtor.[6] From the opinions in the case last cited it seems clear that no verbal admission of the debt would amount to interruption.

Judicial Interruption.—Interruption may be judicial, by citation, action, diligence, or a claim in sequestration.

Citation.—Citation in an action founded on the claim interrupts prescription. But the citation, if not renewed every seven years (unless the creditor is a minor) itself prescribes, and cannot be founded on as an interruption.[7] So it was held that where the debtor was cited in an action for payment just before the forty years had expired, this citation could not be founded on as an interruption in an action brought more than seven years after its date.[8]

By Action.—An action called in Court (unless resulting in a decree of absolvitor[9]) interrupts the running of prescription for forty years.[10] The same effect is given to a claim in a multiplepoinding,[11] or a statement in defence to an action for another debt.[12] In a case referring to the sexennial prescription of bills of exchange, it was held that where a summons was framed without mention of the bill, and was therefore incompetent, yet, as the incompetency could be cured by amendment, it operated as an interruption of prescription.[13]

By Diligence.—Diligence is sufficient to interrupt prescription, provided that it is regular.[14]

By Proceedings in Sequestration.—The Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), enacts (sec. 105)[15]: "The presenting of or concurring in a petition for sequestration, or the lodging a claim in the hands of the trustee, or the Sheriff, or *preses* at any meeting of creditors, shall interrupt prescription of the debt of the creditor so petitioning, concurring, or claiming, and in regard to such debt shall bar the effect of any Statute of Limitations in England or Ireland, or other His Majesty's dominions, and although this sequestration shall be recalled, such interruption or bar shall, notwithstanding, be effectual."

Short Prescription.—The other statutory rules of prescription which seem to demand notice in a work on the general principles of Contract are the triennial, the quinquennial, the sexennial, and the vicennial.[16]

General Effect.—Unlike the negative prescription, these shorter prescrip-

[1] *Pitmedden* v. *Monro*, 1705, M. 11261.
[2] *Simpson* v. *Marshall*, 1900, 2 F. 447.
[3] *Vans* v. *Murray*, 14th June 1816, F.C. Not a general submission of all debts (*Garden* v. *Rigg*, *infra*).
[4] *Garden* v. *Rigg*, 1743, M. 11274.
[5] *Kermack* v. *Kermack*, 1874, 2 R. 156.
[6] *Kermack* v. *Kermack*, *supra*.
[7] Act 1669, c. 10.
[8] *Cameron* v. *Macdonald*, 1761, M. 11331.
[9] *Montgomery* v. *Fowler*, 1795, Bell's *Folio Cases*, 203.
[10] Bell, *Prin.*, sec. 615. If the action is allowed to fall asleep, and not wakened for forty years, the claim is prescribed (*Pillans* v. *Sibbald*, 1897, 5 S.L.T. 186).
[11] *National Bank* v. *Hope*, 1837, 16 S. 177 (bill).
[12] *Sloan* v. *Birtwhistle*, 1827, 5 S. 742 (triennial prescription).
[13] *Bank of Scotland* v. *Fergusson*, 1898, 1 F. 96.
[14] Bell, *Prin.*, sec. 621.
[15] Re-enacting sec. 109 of the Bankruptcy (Scotland) Act, 1856.
[16] As to the septennial limitation of cautionary obligations, see Millar, *Prescription*, 178; Gloag and Irvine, *Rights in Security*, 935.

tions do not extinguish the debt, but only alter the onus and method of proof. The general rule in their construction is that they "introduce no presumption, but enact certain specific and imperative rules on the subject of probation." [1]

Triennial Prescription.—The Act 1579, c. 83, enacts: "All actiones of debt for house-mailles, mennis ordinars, servand's fees, merchant's comptes, and uther the like debts, that are not founded upon written obligationes, be persewed within three zeires, utherwise the creditour sall have na action, except be outher preife, be writ, or be aith of his partie." [2]

Debts Founded on Written Obligation.—The scope of the general exception of debts founded on written obligations is not settled. It is not necessary that a writing should be producible which contains or proves the entire obligation: a contract for work concluded in writing by both parties allows parole evidence that the work has been done.[3] A written offer to supply goods, or perform services, accepted verbally, does not take the case out of the statute, since, though the obligation to supply the goods or perform the services may then be said to depend on writing, the obligation to pay for them does not.[4] But where, in a contract of hiring, the party taking on hire signed a printed form, supplied by the hirer, which contained the conditions of hiring, and asked that the articles should be supplied to the bearer, it was held that this amounted to a contract in writing by both parties, and excluded prescription.[5] It is probably to be taken as settled law that an account for goods supplied may prescribe though the goods were supplied in accordance with a written order.[6] But this rule is not extended to analogous cases. Where services are rendered in response to a written order, request, or appointment, the more recent cases shew that they are to be regarded as rendered under a written obligation to pay for them, and therefore that the triennial prescription is not applicable. The majority of the Court were of this opinion in *Blackadder* v. *Milne*,[7] where an engineer sued for his fees as a professional witness, and produced a letter asking him to act and stating the terms. And the statute has been held to be inapplicable to a law agent's account preceded by a letter asking him to act,[8] or by a minute of trustees appointing him as law agent to the trust.[9] Where mercantile agency was undertaken on a letter by the merchant offering the employment, the Lord Ordinary (Kyllachy) held that the agent's claim for commission was founded on a written obligation. The Division, holding that prescription was excluded by the nature of the employment, found it unnecessary to decide the question.[10]

House-Mailles. Where there is no question of a written obligation the

[1] Per Lord Fullerton in *Darnley* v. *Kirkwood*, 1845, 7 D. 595, at p. 600. And see opinion of Lord Justice-Clerk Hope in *Alcock* v. *Easson*, 1842, 5 D. 356.

[2] See Stair, ii. 12, 30; Mackenzie, *Observations*, 195; Ersk. iii. 7, 17; Bell, *Prin.*, sec. 628; *Com.*, i. 348; Dickson, *Evidence*, sec. 484; Napier, *Prescription*, 714; Millar, *Prescription*, 115.

[3] *Watson* v. *Lord Prestonhall*, 1711, M. 11095; *Broatch* v. *Jackson*, 1900, 2 F. 968, per Lord Kinnear, at p. 979.

[4] *North British Rly. Co.* v. *Smith-Sligo*, 1873, 1 R. 309; *Chalmers* v. *Walker*, 1878, 6 R. 199; *Gordon* v. *Ford*, 1902, 39 S.L.R. 706; 10 S.L.T. 120.

[5] *Chisholm* v. *Robertson*, 1883, 10 R. 760.

[6] Bell, *Com.*, i. 349; *Douglas* v. *Grierson*, 1794, M. 11116. See review of the earlier authorities in opinion of the Lord President in *Broatch* v. *Jackson*, 1900, 2 F. 968.

[7] 1851, 13 D. 820.

[8] *Broatch* v. *Jackson*, *supra*.

[9] *Millar, Walker & Millar* v. *Brodie's Trs.*, 1902, 4 F. 846. In *Neilson* v. *Magistrates of Falkirk* (1899, 2 F. 118) prescription was held to apply to the salary of a burgh official, but on the ground that there was no relevant averment that he was appointed under a written minute of the town council.

[10] *Brown* v. *Brown*, 1891, 18 R. 889.

Act, under the term "house-mailles," applies to the rent of a house,[1] not to the rent of a farm.[2] "Mennis ordinars" includes accounts for board and lodging,[3] and for aliment, if supplied under a contractual obligation.[4]

Servand's Fees. The phrase "servands fees," taken with the general addition "other the like debts," has been widely interpreted. It covers the accounts of a law agent,[5] of an architect,[6] of an engineer,[7] of a stockbroker,[8] of a clerk to a submission,[9] of an advocate's clerk,[10] and of a surgeon.[11] It applies to the salary of a burgh official,[12] but it does not cover cases of mercantile agency,[13] or a claim for advances made on a contract of mandate,[14] or the account of insurance brokers for disbursements in respect of policies.[15] And it probably does not apply to an exceptional piece of work, out of the usual line of the person employed, such as the fee of a professional witness.[16]

Merchant's Comptes. The word "merchants," as used in the Act, means, it has been explained,[17] shopkeepers, or other persons engaged in trade analogous to that of a shopkeeper, such as builders or contractors,[18] or, it would appear, the proprietors of a newspaper.[19] The Act does not apply generally to mercantile transactions. While no exact line can be drawn, the general principle is that it applies to accounts between trader and consumer, not to accounts between the manufacturer or producer and the retailer, or between a merchant and his correspondent.[20] It was held not to be applicable to employment remunerated by salary and a share of profits.[21] There is some doubt as to the supply of a single article.[22]

[1] *Cumming's Trs.* v. *Simpson*, 1825, 3 S. 545.

[2] *Ross* v. *Fleming*, 1627, M. 12735; Dickson, *Evidence*, sec. 487.

[3] *Thomson* v. *Lord Duncan*, 1808, Hume, 466.

[4] *Taylor* v. *Allardyce*, 1858, 20 D. 401. The contract need not be in express terms (*Longmuir* v. *Longmuir*, 1893, 1 S.L.T. 143; *Wilson* v. *Scott*, 1908, 15 S.L.T. 948). But the statute does not apply to arrears of aliment due *ex debito naturali* (*Thomson* v. *Westwood*, 1842, 4 D. 833).

[5] Bell, *Prin.*, sec. 629; detailed law in Begg, *Law Agents*, 2nd ed., 175. Prescription applies to an account for all ordinary work falling within a law agent's employment, including disbursements, such as fees of Court, witnesses, or counsel (*Richardson* v. *Merry*, 1863, 1 M. 940). It is co-extensive with the law agent's lien for his account (*Richardson*, *supra*, per Lord Curriehill). So it does not apply to cash advances by a law agent to his client (*Moncrieff* v. *Lady Durham*, 1836, 14 S. 830; *Mitchell* v. *Moultry*, 1882, 10 R. 378, per Lord Craighill).

[6] *Fairlie* v. *Earl of Breadalbane*, 1894, 1 S.L.T. 601.

[7] *Blackadder* v. *Milne*, 1851, 13 D. 820. [8] *White* v. *Caledonian Rly. Co.*, 1868, 6 M. 415.

[9] *Farquharson* v. *Lord Advocate*, 1755, M. 11108.

[10] *Fortune's Exrs.* v. *Smith*, 1864, 2 M. 1005. [11] *M'Dowall* v. *Loudon*, 1849, 12 D. 170.

[12] *Neilson* v. *Magistrates of Falkirk*, 1899, 2 F. 118. The opinions indicate that prescription would not apply to a Crown appointment, or where the tenure was *ad vitam aut culpam*.

[13] *M'Kinlay* v. *M'Kinlay*, 1851, 14 D. 162; *Brown* v. *Brown*, 1891, 18 R. 889.

[14] *Grant* v. *Fleming*, 1881, 9 R. 257 (charges paid in connection with landing a cargo).

[15] *Lamont, Nisbett & Co.* v. *Hamilton*, 1904, 12 S.L.T. 624.

[16] *Blackadder* v. *Milne*, 1851, 13 D. 820; *Barr* v. *Edinburgh and Glasgow Rly. Co.*, 1864, 2 M. 1250; *Brown* v. *Brown*, 1891, 18 R. 889 (law agent employed as a mercantile agent).

[17] See opinions in *Laing & Irvine* v. *Anderson*, 1871, 10 M. 74.

[18] *M'Kay* v. *Carmichael*, 1851, 14 D. 207; *Ross* v. *Cowie's Exrs.*, 1888, 16 R. 224; *Gordon* v. *Ford*, 1902, 39 S.L.R. 706; 10 S.L.T. 120; *Drysdale* v. *Birrell*, 1904, 12 S.L.T. 120.

[19] *Robertson* v. *National Monument Association*, 1840, 2 D. 1343 (account for advertising held prescribed).

[20] So it does not apply to accounts between a merchant and his correspondent (*Anderson & Child* v. *Wood*, 1809, Hume, 467), or commission agent (*M'Kinlay* v. *M'Kinlay*, 1851, 14 D. 162); or accounts between a manufacturer and merchant (*Laing & Irvine* v. *Anderson*, 1871, 10 M. 74), or to accounts, with cross-entries on the credit and debit side, between two horse dealers (*M'Kinlay* v. *Wilson*, 1885, 13 R. 210). And see opinion of Lord M'Laren in *Brown* v. *Brown*, 1891, 18 R. 889. But it was held to apply to an account between a cattle dealer and a farmer (*Batchelor's Trs.* v. *Honeyman*, 1892, 19 R. 903).

[21] *Allison* v. *Allison's Tr.*, 1904, 6 F. 496.

[22] See Dickson, *Evidence*, sec. 493; Millar, *Prescription*, 128; *Gobbi* v. *Lazaroni*, 1859, 21 D. 801, opinion of Lord Kinloch (Ordinary).

Accountings.—It is a general principle that the triennial prescription is not applicable to actions of accounting between two parties who have had business dealings with each other.[1] But a builder's account for work done under a verbal contract is not saved from prescription merely by the fact that deductions are admitted for work done by the employer at the request of the builder.[2]

Period. Where the payments should have been made termly, each separate term runs a separate course of prescription.[3] In other cases prescription runs only from the close of the account between the parties.[4] In order that the principle of termly prescription may be applicable there must have been an agreement to pay at a definite term, and therefore when a pursuer sues for aliment, and does not aver that there was an obligation to pay at any specified terms, the debt is not prescribed until three years after the obligation to aliment has ceased.[5]

Last Item of Account. If prescription starts only from the close of an account it is calculated from the date of the last item, provided that item be an enforceable debt. So items specially paid for,[6] or unenforceable under the Tippling Act, 1750 (24 Geo. II. c. 40),[7] are disregarded. A law agent cannot evade the prescription of his account by inserting a charge for rendering it.[8] Proof of an averment that the last entries in an account were fictitious will be allowed before the plea of prescription is disposed of.[9] It has been held by Lord Pearson that a pursuer, on a plea of prescription being taken, is entitled to restate his account by adding items incurred within the last three years.[10]

Continuity of Account. An account may be continuous, though its items vary in character. So where a joiner's account began and ended with charges for small repairs, and intermediately there was a relatively large sum for work done on certain new buildings, it was held that prescription was excluded by the last items being within the *triennium*, and the argument that the account for the buildings prescribed separately was repelled.[11] The same principle was applied in the case of a hotel bill for a series of visits.[12]

When Account Closed. An account, definitely closed or altered, begins to prescribe, though a new one be opened between the same parties.[13] The death of the customer or employer closes the account, though furnishings of the same kind have been supplied to the order of his representatives.[14] The effect of a change in the creditor's firm has been before the Courts, with indecisive results.[15]

[1] Dickson, *Evidence*, sec. 510; *M'Kinlay* v. *Wilson*, 1885, 13 R. 210.

[2] *Gordon* v. *Ford*, 1902, 39 S.L.R. 706; 10 S.L.T. 120; *Drysdale* v. *Birrell*, 1904, 12 S.L.T. 120.

[3] *Douglas* v. *Duke of Argyll*, 1756, M. 11102 (servant's wages); *Cumming's Trs.* v. *Simpson*, 1825, 3 S. 545 (rent).

[4] Bell, *Prin.*, sec. 631; Dickson, *Evidence*, sec. 498.

[5] *Bracken* v. *Blasquez*, 1891, 18 R. 819; *Whyte* v. *Crighton's Trs.*, 1896, 3 S.L.T. 235.

[6] *Beck* v. *Learmonth*, 1831, 10 S. 81.

[7] *Macpherson* v. *Jamieson*, 1901, 4 F. 218.

[8] *Tait & Johnston* v. *Hope's Factor*, 1904, 42 S.L.R. 17; 12 S.L.T. 44.

[9] *Ross* v. *Cowie's Exrx.*, 1888, 16 R. 224.

[10] *Tait & Johnston* v. *Hope's Factor*, 1904, 42 S.L.R. 17; 12 S.L.T. 44. See also *Wotherspoon* v. *Henderson's Trs.*, 1868, 6 M. 1052.

[11] *Ross* v. *Cowie's Exrx.*, 1888, 16 R. 224. See *Hotson* v. *Threshie*, 1833, 11 S. 482.

[12] *Lees* v. *Jackson*, 1925, S.L.T. 190 (O.H., Lord Ashmore).

[13] *Christison* v. *Knowles*, 1901, 3 F. 480.

[14] Bell, *Com.*, i. 349; Dickson, *Evidence*, sec. 500.

[15] *Barker* v. *Kippen*, 1841, 3 D. 965; *Stewart* v. *Scott*, 1844, 6 D. 889, opinion of Lord Medwyn; *Wotherspoon* v. *Henderson's Trs.*, 1868, 6 M. 1052.

Effect of Prescription.—The effect of the triennial prescription is not to extinguish the debt, but to alter the onus and limit the mode of proof. Within three years the creditor is indeed bound to prove that the debt was incurred, but he is not limited as to the mode of proof by which that fact may be established. Once it is established, it lies on the debtor to prove payment. When prescription has run, the creditor must prove not only that the debt was incurred, but that, three years afterwards, it was still resting-owing, and he is limited to proof by the writ or oath of the debtor. It has, however, been held that resting-owing might be proved by a writ dated within the three years.[1] Constitution and resting-owing being established, the burden of proof of subsequent payment reverts to the debtor.

Payment not Averred.—It is established that it is not necessary for a defender, in pleading prescription, to aver payment, and that the limitation of proof is not affected by the absence of such an averment. Whether prescription is applicable or not is to be determined from the case set forth by the pursuer.[2] So it is competent for a defender to maintain that the relationship averred is not of such a character as to involve any debt on his part, and also to insist that the pursuer must prove resting-owing, although the contention that no debt has been incurred necessarily implies that no debt has been paid.[3]

Interruption.—The principle of interruption is not properly applicable to cases of triennial prescription. The debt either prescribes in three years from the time when it became payable (or from the last item in an account), or the statute is not applicable. So the years of the creditor's minority are not deducted,[4] nor is the running of the prescriptive term affected by citation.[5] It is, however, like other prescriptions, interrupted by proceedings in bankruptcy.[6] And certain actings or events within the three years may exclude the operation of the Act to debts to which it would otherwise apply.

Personal Bar.—The plea of prescription may be barred if the conduct of the debtor has precluded the ascertainment of the debt during the prescriptive period. It is probably not enough that the debtor, by removing and leaving no address, has placed difficulties in the way of timeous action.[7] But the plea of bar was sustained in a case where a railway undertook to carry, without charge, sacks which had been used for goods carried on their line, and brought an action based on the allegation that they had discovered that sacks which did not fulfil the condition had been sent.[8] Where a domestic servant brought an action claiming wages for the last thirty-three years, and

[1] *Johnston* v. *Tillie, Whyte & Co.*, 1917, S.C. 211, Lord Johnston dissenting. *Deans and Moore* v. *Melvin*, 1897, 4 S.L.T. 292, when Lord Pearson held that the writ must be beyond the triennium, was not cited. It is submitted that this decision, which proceeded to some extent on a concession by senior counsel, should be reconsidered. The object of the triennial prescription was to afford a protection against a demand for stale debts (see authorities cited by Lord Johnston, at p. 219), and this object the decision in *Johnston* v. *Tillie, Whyte & Co.* will defeat. *A.* writes a letter during the *triennium* acknowledging liability. Afterwards, still within the *triennium*, he pays, and takes a receipt. After the triennium he destroys the receipt. Is he left without defence against a claim for payment during the years of the negative prescription ?

[2] *Alcock* v. *Easson*, 1842, 5 D. 356.

[3] *Alcock* v. *Easson*, *supra* ; *Cullen* v. *Smeal*, 1853, 15 D. 868 ; *Miller* v. *Miller*, 1898, 25 R. 995, per Lord Kincairney (Ordinary) ; *Allison* v. *Allison's Tr.*, 1904, 6 F. 496, per Lord Stormonth Darling (Ordinary).

[4] *Brown* v. *Brodie*, 1709, M. 11150.

[5] *Campbell* v. *M'Neill*, 1799, M. 11120.

[6] *Supra*, p. 740.

[7] *Wilson* v. *Scott*, 1908, 15 S.L.T. 948. See also *Butchart* v. *Ireland*, 1839, 1 D. 1128.

[8] *Caledonian Rly. Co.* v. *Chisholm*, 1886, 13 R. 773.

averred an agreement under which her employer had undertaken to place each term's wages, as they accrued, to her credit at a savings bank, the plea of triennial prescription was repelled, and proof *habili modo* was allowed.[1]

Pursuit within Three Years. By the terms of the Act of 1579 its provisions are applicable only to debts which have not been pursued within three years. It has been decided that this excludes prescription where the debt has been asserted in a legal process, though other than that in which the plea of prescription is taken.[2]

Prescription though Debt Secured. An account may prescribe although the debtor holds a security for it. So the prescription of a law agent's account is not affected by the fact that he holds papers over which he has a lien.[3] But where the action was by the client, and for the recovery of the papers, it was held that the agent was not limited to the client's writ or oath in the proof of his account.[4]

Writ of Debtor. When the statute applies, and proof is attempted by writ of the debtor, it has been decided that the writ need not be probative,[5] or addressed to the creditor;[6] and that while a letter containing a general admission of debt is not sufficient,[7] it is sufficient if it can be ascribed to the particular debt by production of the letter to which it is an answer,[8] or if, while expressly denying any liability, it states a relationship from which the law infers a debt, and its terms negative payment.[9] A letter by the debtor, which merely acknowledges receipt of a demand for payment, or, without any reference to the debt, proposes a personal interview, does not prove resting-owing.[10] An entry in the debtor's books, if amounting to an explicit statement of the debt, is proof by his writ,[11] but the statutory conditions as to proof are not fulfilled by the inference to be drawn from the fact that the debtor's books contain no record of payment.[12] In a case relating to the sexennial prescription of bills of exchange it was held that receipts for interest granted by the creditor, and found in the debtor's repositories after his death, might be regarded as constructively his writ.[13] If the constitution of the debt be admitted or sufficiently proved, a letter by the defender, denying liability on some other ground than payment, is proof of resting-owing.[14]

Proof of Amount. Where the constitution and resting-owing have been duly proved, the amount of the debt may be established by parole evidence.[15]

[1] *Inglis* v. *Smith*, 1916, S.C. 581.

[2] *Sloan* v. *Birtwhistle*, 1827, 5 S. 742 (plea of compensation); *Dunn* v. *Lamb*, 1854, 16 D. 944 (submission, and death of arbiter); *Eddie* v. *Monklands Rly. Co.*, 1855, 17 D. 1041 (not enough that claim reserved in defences to prior action); *Stock Journal Co.* v. *Clydesdale Horse Co.*, 1898, 25 R. 1016 (decree in foreign Court).

[3] *Foggo's Exrs.* v. *M'Adam*, 1780, M. 6252; *Adam & Winchester* v. *White's Tr.*, 1884, 11 R. 863.

[4] *Mitchell* v. *M'Adam*, 1712, M. 11096.

[5] Dickson, *Evidence*, sec. 512.

[6] *Wilson* v. *Scott*, 1908, 15 S.L.T. 948.

[7] *Mitchell* v. *Moultry*, 1882, 10 R. 378 (a decision very favourable to the debtor). See *Fiske* v. *Walpole*, 1860, 22 D. 1488; *Blair* v. *Horn*, 1859, 21 D. 1004.

[8] *Stevenson* v. *Kyle*, 1849, 11 D. 1086; *Rennie* v. *Urquhart*, 1880, 7 R. 1030.

[9] *Wilson* v. *Scott*, 1908, 15 S.L.T. 948.

[10] *MacBain's Exr.* v. *MacBain's Exr.*, 1929, S.L.T. 173.

[11] *Storey* v. *Paxton*, 1878, 6 R. 293; *Drummond* v. *Lees*, 1880, 7 R. 452; *Campbell's Trs.* v. *Hudson's Exrs.*, 1895, 22 R. 943; *Neilson* v. *Magistrates of Falkirk*, 1899, 2 F. 118.

[12] *Ellis* v. *White*, 1849, 11 D. 1347; Dickson, *Evidence*, sec. 519.

[13] *Campbell's Trs.* v. *Hudson's Exrs.*, 1895, 22 R. 943.

[14] *Macandrew* v. *Hunter*, 1851, 13 D. 1111. "I do not hold myself liable, and decline to recognise any claim by you against me."

[15] *Stevenson* v. *Kyle*, 1850, 12 D. 673; *Fife* v. *Innes*, 1860, 23 D. 30.

Quinquennial Prescription. The Act 1669, *c.* 9,[1] introduced a quinquennial prescription of, *inter alia*, rents after the tenant has left, and bargains concerning moveables provable by witnesses. In each case the result is that after the lapse of five years the creditor must prove the constitution of his debt and the fact that it is still resting-owing by the writ or oath of the debtor.[2] In each case, too, the Act provides that the years during which the creditor is in minority are to be deducted.

Rents. The prescription of rents five years after the tenant has left applies to urban and rural subjects, and to verbal or written leases.[3] The Act applies only to the case where the tenant has removed; and therefore where a tenant purchased the subjects, and remained in possession, it was held that the claim for rents for the years during which he was tenant did not prescribe.[4] The prescription is excluded by action or diligence within the five years,[5] but not by sequestration in security before the term of payment.[6] It is not excluded by partial payments.[7] It may be pleaded by a cautioner for the rent.[8]

Bargains Concerning Moveables.—The bargains concerning moveables which fall under the Act do not include debts or claims arising under a written obligation, such as a claim for the price on a sale carried out by letters.[9] The Act is said by Erskine to cover "all sales, locations, and other consensual contracts concerning moveables, to the constitution of which writing is not necessary."[10] It applies to the sale of a single article, to which the application of the triennial prescription is doubtful.[11] It has also been applied to a verbal bargain to take the stocking of a farm at valuation.[12] But it does not affect the mode of proof in an action of accounting between principal and agent.[13] It would seem doubtful whether it applies to an action for the recovery of articles pledged.[14] It was held not to be applicable to the proof that a bundle of bank notes had been deposited to be returned *in forma specifica*, nor (in the opinion of Lord Trayner) to any contract of deposit.[15] It would appear that it does not apply to a bargain alleged by a defender who is in possession of moveable property; and hence where *A.*, who was in possession of a stallion which had admittedly at one time been the joint property of himself and *B.*, averred, in defence to an action for a share of the profits arising from the stallion, that he had purchased *B.'s* share, the plea of quinquennial prescription was repelled.[16]

[1] "That . . . mails and duties of tenants not being pursued within five years after the tenant shall remove from the lands for which the mails and duties are craved, shall prescribe in all time coming, except the saids . . . mails and duties shall be offered to be proven to be due and resting-owing by the defenders their oaths, or by a special writ under their hands, acknowledging what is resting-owing . . . that all bargains concerning moveables or sums of money, provable by witnesses, shall only be provable by writ or oath of party if the same be not pursued within five years after the making of the bargain." See Bell, *Prin.*, sec. 634; Dickson, *Evidence*, sec. 472; Mackenzie, *Observations*, 429; Napier, *Prescription*, 813; Millar, *Prescription*, 155.

[2] *Campbell* v. *Grierson*, 1848, 10 D. 361; *Kennard* v. *Wright*, 1865, 3 M. 946 (see opinion of Lord Ordinary).

[3] *Boyes* v. *Henderson*, 1823, 2 S. 190.

[4] *Johnston's Exrs.* v. *Johnston*, 1897, 24 R. 611.

[5] *Hogg* v. *Low*, 1826, 4 S. 702; *Macdonald* v. *Jackson*, 1826, 5 S. 28.

[6] *Cochran* v. *Fergusson*, 1830, 8 S. 324.

[7] *Nisbet* v. *Baikie*, 1729, M. 11059.

[8] *Duff* v. *Innes*, 1771, M. 11059.

[9] *Hunter* v. *Thomson*, 1843, 5 D. 1285.

[10] Ersk. iii. 7, 20.

[11] *Noble* v. *Armstrong*, 11th June 1813, F.C.; *Kennard* v. *Wright*, 1864, 2 M. 677; 1865, 3 M. 946.

[12] *Lawson* v. *Milne*, 1839, 1 D. 603; but see *Wilson* v. *Swan*, 1804, Hume, 817.

[13] *Mackinlay* v. *Mackinlay*, 1851, 14 D. 162.

[14] *Macfarlane* v. *Brown*, 1827, 5 S. 205.

[15] *Taylor* v. *Nisbet*, 1901, 4 F. 79.

[16] *Kilpatrick* v. *Dunlop*, 1909, 2 S.L.T. 307.

Proof by Writ. Where proof by writ was attempted, it was decided that a letter by the defender, stating that the writer had paid for the article to the person who ordered it for him, did not amount to proof by writ of the constitution of any bargain with the pursuer.[1]

Sexennial Prescription. By 12 Geo. III. c. 72, sec. 37,[2] it is provided that "no bill of exchange, or inland bill, or promissory note executed after 15th day of May 1772 shall be of force or effectual to produce any diligence or action in that part of Great Britain called Scotland, unless such diligence shall be raised and executed, or action commenced thereon within the space of six years from and after the terms at which the sums in the said bills or notes became exigible." Sec. 39 excludes bank notes, and also renders it competent "to prove the debts contained in the said bills and promissory notes, and that the same are resting and owing by the oaths or writs of the debtor." Sec. 40 enacts "the years of the minority of the creditors in such notes or bills shall not be computed in the said six years." [3]

Period. The prescriptive period of six years runs from the last day of grace in a bill payable at a fixed date,[4] from the date of the bill if payable on demand or at sight,[5] from the last day of the period of notice if payable on the expiry of a period of notice after demand.[6]

Effect of Expiry of Six Years. The effect of the expiry of the sexennium is to exclude diligence, action, or direct claim on the bill or note. It ceases to exist as an enforceable document of debt.[7] The indorsation of a prescribed bill does not convey to the assignee any right against the parties liable on the bill.[8] But the claim of relief by a party who has paid against others primarily liable is not affected by the fact that the bill has prescribed.[9]

Proof of Independent Debt.—The statutory rule that a bill or note prescribes in six years, with the result that the constitution of the debt for which it was given, and the fact that that debt was resting-owing at the end of the six years, must be proved by the writ or oath of the debtor, does not imply that a party, by taking a bill or note from his debtor for a debt already sufficiently vouched, necessarily places himself within the statutory restrictions if he allows the bill or note to prescribe. He is entitled to maintain that he is suing for the debt and not on the bill, and therefore that the competency of his proof of constitution must depend on the law applicable to the proof of that particular debt, and that when the constitution is duly proved it rests on the debtor to prove payment. Thus where the action was for the price of a horse for which a promissory note had been given, and the quinquennial prescription was excluded by the fact that the sale had been carried out by letters and not verbally, it was held that the method of proof, and the onus lying on each party, were not affected by the fact that the note had prescribed.[10] So where property was assigned in

[1] *Kennard* v. *Wright*, 1865, 3 M. 946.

[2] See Bell, *Prin.*, sec. 594; *Com.*, i. 416; Napier, *Prescription*, 822; Millar, *Prescription*, 161; Hamilton, *Bills of Exchange*, 222. The Act has been held to apply to a cheque (*M'Craw* v. *M'Craw's Trs.*, 1906, 13 S.L.T. 757.

[3] *Patrick* v. *Watt*, 1859, 21 D. 637.

[4] *Douglas, Heron & Co.* v. *Grant's Trs.*, 1793, M. 4602.

[5] *Stephenson* v. *Stephenson's Trs.*, 1807, M. App. *voce* Bill, 20.

[6] *Broddelius* v. *Grischotti*, 1887, 14 R. 536.

[7] *Armstrong* v. *Johnstone*, 16th May 1804, F.C.; *Stirling* v. *Lang*, 1830, 8 S. 638; *Lockhart* v. *Mitchell*, 1849, 11 D. 1341.

[8] *Kerr's Trs.* v. *Ker*, 1883, 11 R. 108.

[9] *Jolly* v. *M'Neill*, 1829, 7 S. 666.

[10] *Hunter* v. *Thomson*, 1843, 5 D. 1285.

security of a loan, and a promissory note was given, it was found that the right to enforce the security, being a security for the loan and not for the promissory note, was not affected by the sexennial prescription.[1] It was pointed out that the validity of the assignation could be affected only by the extinction of the debt for which it was given, and that the statutory provisions did not make the prescription of the note equivalent to payment. On the same principles, where a bill was sent with a letter acknowledging the receipt of a loan, it was held that, as the letter was sufficient proof of the loan, the creditor might found his action on the loan, and was not compelled to prove resting-owing merely because the bill had prescribed.[2]

Reference to Bill in Summons.—It is conceived that a creditor suing for a debt for which he holds a prescribed bill or note may refer to the bill or note in his summons, in compliance with the provisions of the Court of Session Act, 1850 (13 & 14 Vict. c. 36, Sched. A.), and yet maintain that his action is founded merely on the debt, and is therefore not affected by the sexennial prescription.[3]

Proof after Sexennium.—Where there was no obligation on the defender before he signed the bill or note, the creditor in it, after the expiry of the sexennium, is bound to prove by the debtor's writ or oath that the bill, as between him and the debtor, was given for value, and that it is still resting-owing. So if the bill was granted for the accommodation of the party who is suing upon it,[4] or under a mistake,[5] or under the condition that on a certain achieved event liability should cease,[6] there is no debt apart from the bill which can be enforced. But if the creditor can prove by the debtor's writ or oath that, on the debtor's signature, he gave value to a third party, he has done enough so far as proof of the constitution of a debt apart from the bill is concerned; it is not necessary to prove that the debtor personally obtained value for his obligation on the bill.[7]

Proof by Writ.—When proof by writ of resting-owing is attempted the general rules as to the character of the writ required are the same as those applicable in cases under the triennial prescription.[8] The writ must be dated after the six years, but an acknowledgment just before the expiry of that period has been held to be sufficient.[9] A writ which merely contains a general acknowledgment of indebtedness, without referring to any particular debt applicable to the bill, is not sufficient.[10]

Payments of Interest.—Payments of interest after the six years have expired would seem to be sufficient proof of resting-owing, though it is hard to see how they prove the subsistence of any other obligation than that embodied in the bill. The payments must be proved by the writ or oath

[1] *Blake* v. *Turner*, 1860, 23 D. 15.

[2] *Nisbet* v. *Neil's Tr.*, 1869, 7 M. 1097; *Fullarton's Tr.* v. *Macdowall*, 1898, 5 S.L.T. 248. It would seem to follow from these cases that if a creditor had taken a promissory note for a loan without any writing by which the loan could be proved, and allowed the note to prescribe, he would sufficiently prove his case by obtaining an admission, on a reference to the debtor's oath, of the receipt of the money as a loan, without being under any obligation to prove resting-owing. He could found his claim on the loan, proved as fully by admission on oath as by writ, and not on the promissory note.

[3] *Clarkson's Trs.* v. *Gibson*, 8th June 1820, F.C.; *Hunter* v. *Thomson*, 1843, 5 D. 1285; *Milne's Trs.* v. *Ormiston's Trs.*, 1893, 20 R. 523.

[4] Dickson, *Evidence*, sec. 452.

[5] *Agnew* v. *M'Rae*, 1782, M. 13219; *Fraser* v. *Fraser*, 27th June 1809, F.C.

[6] *Galloway* v. *Moffat*, 1845, 7 D. 1088; *Drummond* v. *Crichton*, 1848, 10 D. 340.

[7] *Christie* v. *Henderson*, 1833, 11 S. 744; *Laidlaw* v. *Hamilton*, 1826, 4 S. 636.

[8] *Supra*, p. 745.

[9] Dickson, *Evidence*, sec. 455; *Lindsay* v. *Moffat*, 1797, M. 11137.

[10] *Blair* v. *Horn*, 1859, 21 D. 1004.

of the debtor.[1] Markings on the bill in the debtor's handwriting have been held to be sufficient ;[2] and even receipts by the creditor, if found in the debtor's possession, have been considered to be constructively his writ.[3] A partial payment by the representative of the debtor was held sufficient proof of the debt, but no proof that the balance was still resting-owing, as it did not in any way prove that the balance had not been paid by the original debtor.[4]

A writing within the six years may amount to a reconstitution of the debt on a different basis, which will render the statute inapplicable, and proof of resting owing therefore unnecessary. This was held where the bill was expressly referred to among the debts for which a trust deed was granted, to which the creditor on the bill, among others, had acceded, and under which the acceding creditors bound themselves not to do diligence on their debts.[5] The judgments proceeded on the ground that the debtor in the bill was barred from pleading the sexennial prescription, but it has subsequently been described as a case of reconstitution of the debt.[6]

Bill as Evidence. The bill itself, when prescribed, has been said to prove nothing.[7] It is not sufficient to prove resting-owing,[8] and clearly does not prove that it was granted for value. It has been said to be admissible as "an adminicle of evidence,"[9] but if it proves neither the constitution of a debt nor the fact that a debt is resting-owing, it is hard to see what it can be supposed to prove. It has been remarked that "the production of the note by the creditor shews that it was never retired, and removes the slightest suspicion of the debt having been paid," but this was in a case where it was held that the sexennial prescription did not apply because the action was founded on a letter acknowledging a loan.[10] In *MacBain's Exr.* v. *MacBain's Exr.*, the proof tendered consisted of the bill and a correspondence in which, though the pursuer's letters expressly referred to the bill, the defender's letters contained no reference to it. It was held that the proof failed. It was suggested by Lord Sands that if there was a general admission of debt the bill might be evidence of the debt referred to.

Proof against Co-Obligant. The writ (or oath) of one co-obligant does not prove the debt or resting-owing against another.[11]

Proof after Sexennium Establishes Debt. It would appear to be definitely settled that the effect of competent proof that a debt under the bill is resting-owing is not to set up the bill as a bill to run a second course of prescription, but to establish the debt, which will then be a ground of action until it is

[1] *Storey* v. *Paxton*, 1878, 6 R. 293.

[2] More, *Lectures*, i. 432 ; *Ferguson* v. *Bethune*, 7th March 1811, F.C. ; *Drummond* v. *Lees*, 1880, 7 R. 452 ; *Storey* v. *Paxton*, 1878, 6 R. 293.

[3] *Campbell's Trs.* v. *Hudson's Exrs.*, 1895, 22 R. 943.

[4] *Darnley* v. *Kirkwood*, 1845, 7 D. 595.

[5] *Ettles* v. *Robertson*, 1833, 11 S. 397.

[6] *Blair* v. *Horn*, 1859, 21 D. 45, 1004. It was held that a trust deed without any mention of the bill did not amount to a reconstitution of the debt, and therefore did not elide prescription.

[7] *M'Neill* v. *Blair*, 1825, 3 S. 459, per Lord Glenlee ; *Kerr's Trs.* v. *Ker*, 1883, 11 R. 108, per Lord President Inglis. "Of course we must throw the bill itself out of account, for that is prescribed, and proves nothing."

[8] *Storey* v. *Paxton*, 1878, 6 R. 293.

[9] *Christie* v. *Henderson*, 1833, 11 S. 744, per Lord Justice-Clerk Boyle ; *MacBain's Exr.* v. *MacBain's Exr.*, 1929, S.L.T. 173.

[10] *Nisbet* v. *Neil's Tr.*, 1869, 7 M. 1097, per Lord President Inglis. See also *Campbell's Trs.* v. *Hudson's Exr.*, 1895, 22 R. 943.

[11] *Allan* v. *Ormiston*, 1817, Hume, 477 ; *M'Neill* v. *Blair*, 1823, 2 S. 174.

cut off by the negative prescription.[1] Summary diligence on the bill, however, is no longer competent.[2]

Action or Diligence. Action or diligence within the six years elides prescription, and the bill or note may be sued upon as a substantive document of debt after the six years have expired.[3] A claim in sequestration has the same result.[4] Diligence against one co-obligant preserves recourse against all.[5] Where action was raised on a bill just before the expiry of the six years, on a summons which did not refer to the bill and was in consequence held to be incompetent, it was sufficient to obviate the plea of prescription.[6] But the course of the sexennial prescription is not interrupted or elided by a registered protest of the bill, if not followed by a charge for payment.[7] Averments that demands for payment have been made by the creditor,[8] or that the debtor has verbally acknowledged his liability,[9] are irrelevant.

Vicennial Prescription.—The vicennial prescription depends on the Act 1669, c. 9,[10] and extends to holograph missive letters, holograph bonds, and subscriptions in compt books without witnesses. It has been extended by decision to all holograph writings on which an obligation can be founded,[11] except, probably, bills and notes.[12] It lays upon the creditor, after the expiry of twenty years, the obligation to establish the genuineness of the writing, not merely of the signature,[13] by the debtor's oath.[14] The years during which the creditor is in minority are, it is expressly provided, to be deducted. There is no obligation on the creditor to prove that a debt arising under a holograph writ which he has proved to be genuine is still resting-owing.[15]

The Act excepts holograph obligations which have been "pursued for" within the twenty years. Pursuit may be by action or diligence.[16] It has been held by Lord Skerrington in the Outer House, and acquiesced in, that no other exception to the operation of the Act is admissible, and therefore that it is not excluded by payments of interest within the twenty years.[17] It would seem to follow that payments of interest after the twenty years

[1] *Drummond* v. *Lees*, 1880, 7 R. 452, which seems to overrule dicta in *Storey* v. *Paxton*, 1878, 6 R. 293.

[2] *Armstrong* v. *Johnstone*, 16th May 1804, F.C.; More, *Lectures*, i. 435.

[3] *Fraser* v. *Urquhart*, 1831, 9 S. 723; *National Bank of Scotland* v. *Hope*, 1837, 16 S. 177 (claim in multiplepoinding); *Milne's Trs.* v. *Ormiston's Trs.*, 1893, 20 R. 523, where Lord Rutherfurd Clark intimated doubts as to whether this rule was justified by the terms of the statute.

[4] Bankruptcy (Scotland) Act, 1913, 3 & 4 Geo. V. c. 20, sec. 105, quoted supra, p. 740.

[5] *Paxton* v. *Forster*, 1842, 4 D. 1515; *Milne's Trs.* v. *Ormiston's Trs.*, *supra*.

[6] *Bank of Scotland* v. *Fergusson*, 1898, 1 F. 96.

[7] *Scott* v. *Brown*, 1828, 7 S. 192.

[8] *Ewing* v. *Cumine*, 1835, 14 S. 1.

[9] *Easton* v. *Henshaw*, 1873, 1 R. 23.

[10] "That holograph missive letters and holograph bonds and subscriptions in compt books without witnesses not being pursued for within twenty years shall prescribe in all time thereafter, except the pursuer offer to prove by the defender's oath the verity of the said holograph bonds and letter, and subscriptions in the compt books." See Stair, ii. 12, 35; Ersk. iii. 7, 26; Bell, *Prin.*, sec. 590; Dickson, *Evidence*, sec. 421; Napier, *Prescription*, 857; Millar, *Prescription*, 193.

[11] *Mowat* v. *Banks*, 1856, 18 D. 1093 (letter acknowledging receipt of money); *Macadam* v. *Findlay*, 1911, S.C. 1366 (I.O.U.). In *Wyse* v. *Wyse* (1847, 9 D. 1405) it was held that the defender could not plead the Act after a proof *prout de jure* had been allowed as to authenticity. It is doubtful whether it applies to an I.O.U. (*Craig* v. *Monteith's Exrx.*, 1926, S.C. 123).

[12] See *Drummond* v. *Lees*, 1880, 7 R. 452; *Garden* v. *Rigg*, 1748, 1 Paton, 409.

[13] Bell, *Prin.*, sec. 592; Dickson, *Evidence*, sec. 429.

[14] Or by the oath of his heir (*Dalziel* v. *Lord Lindores*, 1784, M. 10994).

[15] *Muir* v. *Cunningham*, 1695, 4 Brown's Supp. 269.

[16] Bell, *Prin.*, sec. 590; Dickson, *Evidence*, sec. 425.

[17] *Macadam* v. *Findlay*, 1911, S.C. 1366.

would fall under the same rule. Parole evidence that the executor of the granter of the obligation had acknowledged that it was genuine was not admitted, the only proper evidence being his writ or oath.[1]

Reference to Oath. On a reference to oath under any of the shorter prescriptions the defender is bound to answer all relevant questions, and is not entitled to take refuge in a general denial of liability.[2] The construction of the oath is for the Court, and therefore an admission of relations from which the law infers a contract to pay, though coupled with a statement that the deponent did not consider himself under any liability, amounts to an admission of the constitution of the debt.[3]

Deposition of Payment.—Where the question referred is resting-owing, the cases do not afford any very definite rules of construction. Probably a pursuer cannot maintain that the defender's oath that he paid the debt amounts to an admission of resting-owing merely because the defender is unable to condescend on time or place of payment.[4] And where the reference was to the representative of a party to a bill, his deposition that he knew nothing of the bill, and did not know whether his ancestor had paid it or not, was held to be negative of the reference.[5] It is probably sufficient to negative resting-owing where the defender depones that he gave money to his factor or agent to pay the debt, and believed that it had been paid.[6] But a merely general statement of belief that some one else has paid the bill has been construed as an admission of resting-owing.[7] So where one co-obligant deponed that he understood that the other had paid he was held to have admitted liability.[8] Where resting-owing was referred to the oath of two out of four co-acceptors of a bill (one of the others being bankrupt, and the fourth, and principal obligant, dead), and they deponed that they had not paid, and did not know whether either of the others had paid, the oath was held to be affirmative.[9] If a defender avers payment, and refers to books or documents as the ground of his statement, these may be examined as part of the deposition, and if the proper inference from them is non-payment, resting-owing is established.[10] An oath of payment to a party believed to be a representative of the creditor does not negative resting-owing, in the absence of any proof of that party's authority.[11]

Intrinsic and Extrinsic Qualifications.—The distinction between intrinsic and extrinsic qualifications of an oath on reference has been already noticed.[12] To what has been said it may be added that in cases under the triennial prescription the qualification that the goods supplied or work done was not according to contract,[13] or that the account is overcharged,[14] is regarded as

[1] *Turnbull's Exrx.* v. *Turnbull's Exr.*, 1903, 11 S.L.T. 120.

[2] Dickson, *Evidence*, sec. 461.

[3] *Grant* v. *Wishart*, 1845, 7 D. 274; *Neill* v. *Hopkirk*, 1850, 12 D. 618; *Macandrew* v. *Hunter*, 1851, 13 D. 1111.

[4] *Fyfe* v. *Carfrae*, 1841, 4 D. 152; *Houston* v. *Yuill*, 1825, 4 S. 24.

[5] *Stirling* v. *Henderson*, 11th March 1817, F.C.

[6] *Mackay* v. *Ure*, 1849, 11 D. 982; but see *Crichton* v. *Campbell*, 1857, 19 D. 661.

[7] *Paul* v. *Allison*, 1841, 3 D. 874.

[8] *Black* v. *Black*, 1838, 16 S. 1220.

[9] *Christie* v. *Henderson*, 1833, 11 S. 744. This case is criticised in Dickson, *Evidence*, sec. 468, on the ground, which is also applicable to the last cases cited, that the decision ignores the fact that the prescription statutes lay on the creditor the onus of proof of resting-owing. And see opinion of Lord Fullerton in *Darnley* v. *Kirkwood*, 1845, 7 D. 595.

[10] *Cooper* v. *Hamilton*, 1824, 2 S. 728; affd. 1826, 2 W. & S. 59. See also *Hunter* v. *Geddes*, 1835, 13 S. 369.

[11] *Smith* v. *Ivory*, 1807, Hume, 462.

[12] *Supra*, p. 194.

[13] *Robertson* v. *Clarkson*, 1784, M. 13244; *Turnbull* v. *Borthwick*, 1830, 8 S. 735.

[14] *Napier* v. *Smith*, 1838, 1 D. 245; *Fife* v. *Innes*, 1860, 23 D. 30.

extrinsic, and the oath amounts to an admission of the debt, leaving the defender to prove *aliunde* his objections to it. The same rule applies to an admission of the debt, with an explanation amounting to a plea of compensation.[1] But where a tradesman admitted the receipt of goods, and added that they had been received under a system of barter, under which he had supplied goods of equivalent value, it was held that his deposition, amounting to an averment of payment by a *modus solutionis* other than money, was negative of the reference.[2] In a case under the sexennial prescription, where the question referred is the existence of a debt apart from the bill, the oath is negative of the reference if the defender merely admits having signed the bill, and adds that he signed it for the accommodation of the pursuer,[3] or because he mistook it for another document,[4] or signed it for the purpose of retiring another bill, which has not been retired ;[5] or that he signed as cautioner, on the condition that his liability should cease on the occurrence of a certain event, which has in fact occurred.[6] An admission of original liability on the bill, qualified by a statement that the creditor had said that he did not want payment, is negative of the reference.[7]

[1] *Miller* v. *Baird*, 1819, Hume, 480.
[2] *Thomson's Exr.* v. *Thomson*, 1921, S.C. 109.
[3] Dickson, *Evidence*, sec. 452.
[4] *Agnew* v. *M'Rae*, 1782, M. 13219 ; *Fraser* v. *Fraser*, 27th June 1809, F.C.
[5] *Drummond* v. *Crichton*, 1848, 10 D. 340.
[6] *Galloway* v. *Moffat*, 1845, 7 D. 1088.
[7] *Balfour* v. *Simpson*, 1873, 11 M. 604.

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